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Temporary Labour Migration in the Global Era

The Regulatory Challenges

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I. INTRODUCTION

IN THE GLOBAL era, controversies abound over temporary labour migration, either undertaken through programmes designed specifically for that purpose or as an adjunct to migration for non-labour purposes. However, remarkably, there has been little scholarly attention paid to the ways in which these controversies converge around the issues of temporariness and regulation. Temporary labour migration in the global era has not previously been subjected to a sustained socio-legal analysis on a comparative basis, critiquing the underpinning concepts conventionally accepted as fundamental in this area. This collection of essays aims to fill that void.

A basic question to ask might be whether this ‘new’ global phenomenon is really new at all. In many ways, temporary labour migration today echoes colonial indentured labour and older forms of guest work, for example, Chinese labour in Malaya and the Dutch East Indies, and Indian ‘coolies’ in the West Indies.¹ As Europe industrialised, demand for labour increased exponentially, and a number of countries such as Germany, France and Switzerland designed temporary worker programmes between 1870 and 1914 to prevent workers from settling permanently. The period after the two world wars led to a new flourishing of temporary worker programmes as countries sought to rebuild.² For example, Britain’s ‘European Worker Scheme’ aimed to recruit 90,000 temporary workers, largely from the ranks of refugees.³

¹ See, eg John Connell, ‘From Blackbirds to Guestworkers in the South Pacific: Plus ça change ... ?’ (2010) 20 *Economic and Labour Relations Review* 111.

² OECD, *International Migration Outlook: Sopemi 2011* (Paris, OECD Publishing, 2011).

³ Stephen Castles, ‘The Guest-Worker in Western Europe: An Obituary’ (1986) 20 *International Migration Review* 761.

Not dissimilarly, although on a much larger scale, North America's 'Bracero Program' oversaw the annual entry of over 100,000 Mexican seasonal workers into the United States between 1942 and 1965.⁴ Although decreed 'dead' over two decades ago after a faltering in the nascent new global economy led to falling demand for migrant labour,⁵ temporary worker programmes are once again 'de jour' amongst policy-makers, characterised as producing a 'triple win' for all involved.⁶

Despite its long pedigree, national governments and supranational institutions continue to grapple with the complex regulatory challenges arising from temporary labour migration. The objective of this collection is to understand why this is so, and to explore the extent to which temporary labour migration programmes can be ethical, equitable and efficacious and so deliver decent work for these workers. Whilst the tendency for migration law to divide labour law's worker-protective mission has been observed before,⁷ the authors of the chapters comprising this collection seek not only to interrogate why and how this is so, but to go further in examining the implications and effects of a wide range of regulatory mechanisms on temporary labour migration.

In this collection, we explore the tendency of regulation in the global era to privilege the interests of capital. To a large extent the role and purpose of temporary labour migration has become one of unlocking and maximising the entrepreneurial potential and profit-maximising capabilities of capital. This has been made possible through the process of global economic integration which has transformed temporary labour migration so that it can occur en masse, not only through targeted programmes like those with which we are historically familiar, but also, and especially, through economic zones permitting the free movement of people, and typified through the approach to regulating the global trade in services. The deference to the needs of Global Inc (to borrow a term deployed by Cathryn Costello and Mark Freedland in their chapter),⁸ which is inherent in the design of most contemporary temporary labour migration programmes in receiving states, is derivative of a seemingly unquestioned economic

⁴ Massimo Livi-Bacci, *A Short History of Migration* (Cambridge, Polity, 2012) 114.

⁵ Castles, 'The Guest-Worker in Western Europe' (n 3).

⁶ Stephen Castles and Derya Ozkul, 'Circular Migration: Triple Win, or a New Label for Temporary Migration?' in Graziano Battistella (ed), *Global and Asian Perspectives on International Migration* (New York, Springer, 2014).

⁷ Cathryn Costello and Mark Freedland, 'Migrants at Work and the Division of Labour Law' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford, Oxford University Press, 2014).

⁸ Cathryn Costello and Mark Freedland, 'Seasonal Workers and Intra-corporate Transferees in EU Law: Capital's Handmaidens?', ch 2 in this volume.

philosophy that temporary labour migration programmes need to be less regulated by government and driven instead by the needs of business, with market responsiveness, timeliness and flexibility as the key indicators of success.

Acknowledging capital as a primary beneficiary of temporary labour migration is not to deny its transformative potential for migrant workers. Temporary labour migration is now, even more than it ever was, deeply aspirational, as migrant workers seek to take advantage of increased remuneration and job opportunities available abroad. However, the desire of many to improve their life chances through temporary labour migration has encouraged the increasing commercialisation of migration, which has opened up new global possibilities for capital, via its myriad entrepreneurial endeavours, to exploit. Contemporary labour migration, with its emblematic features of worker precarity and temporality, has proven the perfect fodder for capital's interests, and the law regulating work has struggled to respond. Whilst international law has tended to focus on the principle of equal treatment to address the problems arising from migrant workers' precarious status in the labour market, this collection raises fresh concerns about the realisation of this principle in practice. A recurring theme, borne out in several of the ensuing chapters, is not only the failure to deliver to temporary migrant workers the same wages and conditions as that of their counterparts in the local workforce, but also the use of migrant labour sometimes to the exclusion of local labour in the poorest paid and least well regulated sectors of the labour market. Viewed in this light, implicit in a number of contributions to this volume is the idea that 'dignity at work' might provide a stronger normative framework and ordering principle in regulating temporary labour migration.⁹

In developing regulatory responses to the myriad challenges arising from temporary labour migration, this collection is situated at the interface of migration law, labour law, trade law, human rights, refugee and asylum law, criminal law and national security law. Complex interactions between these disparate regulatory regimes produce both unintended consequences as well as challenges and possibilities. On one level, a regulatory response to

⁹ Elsewhere Tonia Novitz and Colin Fenwick have advanced a human rights discourse to defend workers' interests as a result of globalisation: Tonia Novitz and Colin Fenwick, 'The Application of Human Rights Discourse to Labour Relations: Translation of Theory into Practice' in Tonia Novitz and Colin Fenwick (eds), *Human Rights At Work* (Oxford, Hart, 2010); see also Simon Deakin, 'Social Rights in a Globalised Economy' in Philip Alston (ed), *Labour Rights as Human Rights* (Oxford, Oxford University Press, 2005); Bob Hepple, *Labour Laws and Global Trade* (Oxford, Hart, 2005) ch 10; Judy Fudge, 'The New Discourse of Labour Rights: From Social to Fundamental Rights?' (2007) 29 *Comparative Labor Law and Policy Journal* 29.

the problems arising from excessive reliance on employer demand and the capital-driven nature of temporary labour migration programmes produces a case for tempering capital, and in particular employer requests to access temporary migrant labour, through the use of quotas, caps, occupational shortage lists and other similar but distinct regulatory mechanisms. On another level, a different set of responses reframes the regulatory responsibility in terms of national governments and supranational institutions to realise the dignity of migrant workers without constraining employer demand. Two contributors favour this macro-level approach. Martin Ruhs argues for a structural redesign of temporary migrant worker programmes so that a trade-off is allowed between some rights in return for access, and Alexander Reilly develops a normative case for giving migrant workers the possibility of transforming their temporary status into citizenship.¹⁰ By way of contrast, a third set of responses is to develop new and innovative regulatory methods to address the challenges posed by temporary labour migration. Some of the methods explored in this collection involve regulating the supply chain for migrant labour, through developing worker-driven codes of conduct and restricting recruitment costs, as well as strategic innovations by labour inspectorates in enforcing the rights of temporary migrant workers. Such regulatory responses, although not without merit and indeed often effective in their own right, tend to operate at a more micro level.

This collection explores these themes using a socio-legal approach, conscious that the legal regulation of temporary labour migration does not evolve separately from the political, economic and social contexts in which it is embedded. Nor can temporary labour migration be understood without an interdisciplinary approach; not only are disparate law disciplines required, but also the contributions of economics, political science and sociology. Because the receiving state is predominantly responsible for regulating temporary labour migration, the essays in this collection analyse the regulatory practices of countries that host migrant workers: Australia, Austria, Canada, Italy, Spain, Sweden, the United Kingdom and the United States. It also examines how supranational organisations, such as the International Labour Organization (ILO) and the World Trade Organization (WTO), regional governance structures such as the European Union (EU), and multilateral and bilateral free trade agreements have sought to develop and disseminate new legal norms around temporary labour migration.

¹⁰ Martin Ruhs, 'Protecting the Rights of Temporary Migrant Workers: Ideals Versus Reality', ch 14 in this volume; Alexander Reilly, 'The Membership of Migrant Workers and the Ethical Limits of Exclusion', ch 13 in this volume.

A. Defining Temporary Labour Migration

Defining ‘temporary labour migration’ is no straightforward matter.¹¹ One approach to the definition of temporary labour migration today is to limit consideration to those who migrate on a temporary basis primarily for the purpose of work.¹² These are the migrant workers who are participating generally in state-sponsored temporary labour migration programmes, such as ‘skilled temporary labour’, ‘seasonal worker’ or ‘circular labour’ migration schemes. While there may be particular policy and regulatory issues relevant to these groups, some other scholars have argued that such an approach elevates ‘form over substance’, and risks ignoring the reality of the vast numbers of people who may have migrated on a temporary basis for other purposes, but who participate in the labour market during the (temporary) period of their stay in either a transit or destination country.¹³ Indeed a socio-legal approach invites an examination of the distinction between temporary labour migration conventionally understood and, for example, other migrants who also work on a temporary basis (eg students, holiday makers, trafficked workers or the providers of international services).¹⁴ As several contributors to this volume remind us, the potential for exploitation of these workers is compounded by either their lack of a visa or their use of a visa for a non-work purpose.¹⁵ Tham, Campbell and Boese’s chapter, for example, charts the precarious labour market status of international students working in the Australian hospitality industry. Moreover, the politics of temporary labour migration in developed countries often leads to governments tacitly accepting these visa holders to meet low-skill labour shortages.¹⁶ Excluding these workers from analysis ignores their

¹¹ For a summary of the quite different approaches EU Member States have adopted, see European Migration Network, *Temporary and Circular Migration: Empirical Evidence, Current Policy Practice and Future Options in EU Member States* (Brussels, European Migration Network, 2011) 12–29.

¹² See, eg Martin Ruhs, *The Price of Rights: Regulating International Labour Migration* (Princeton, NJ, Princeton University Press, 2013).

¹³ See Alexander Reilly, ‘Review: The Price of Rights’ (2014) 35 *Adelaide Law Review* 189.

¹⁴ These groups are often not considered in debates concerning temporary labour migration. See Joanna Howe and Alexander Reilly, ‘Meeting Australia’s Labour Needs: The Case for a Low Skill Work Visa’ (2015) 43(2) *Federal Law Review* 259. See also the inquiry commissioned in 2015 by the Australian Senate recognising all forms of temporary migrant work entitled ‘The impact of Australia’s temporary work visa programs on the Australian labour market and on the temporary work visa holders’, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa.

¹⁵ See, eg Joo-Cheong Tham, Iain Campbell and Martina Boese, ‘Why is Labour Protection for Temporary Migrant Workers so Fraught? An Australian Perspective’, ch 8 in this volume; Julia López López, ‘The Regulation of Temporary Immigration as Part of New Forms of the Supply Chain: Segmenting Labour Rights for Workers’, ch 11 in this volume; Veronica Papa, ‘Regulating Temporariness in Italian Migration Law’, ch 12 in this volume.

¹⁶ For more on the politics of temporary labour migration, see Joanna Howe, ‘Does Australia Need an Expert Commission to Assist with Managing its Labour Migration Program?’

contribution as workers and fails to draw attention to this growing underclass of workers invisible to the law, thus perpetuating and indeed exacerbating their exploitation. Further, because many temporary migrant workers ultimately remain long term in their destination country, with or without permission to do so, the boundary between temporariness and permanency must also be interrogated. Discourses about other groups of migrant workers, whether permanent, temporary for non-labour market purposes or undocumented, may also influence understandings of temporary migrant labour, raising in turn questions about the nature of membership, allegiance, belonging and identity in the global era—a subject that Alexander Reilly explores in his chapter on the ethical limits of exclusion.¹⁷

In this collection, the terminology of ‘receiving country’ and ‘sending country’ is used to connote a state’s policy position with respect to temporary labour migration. The working assumption behind this is that states have a particular set of objectives to realise with respect to immigration and adopt policies accordingly, which tend to render them countries that predominantly ‘receive’ or ‘send’ migrant workers on a temporary basis. Generally, receiving countries adopt this policy as a means of addressing skills or labour shortages in the domestic economy. By way of comparison, sending countries generally rely on exporting temporary migrant labour as a means of raising national income through remittances and increasing job opportunities for their citizens. Nonetheless, at other times, in recognition of the limitations of any descriptive term, other terminology is used that is relevant to the particular context, for instance ‘country of origin’ and ‘country of destination’ reflecting a migrant worker’s individual trajectory.

II. GLOBAL ECONOMIC INTEGRATION AND THE REGULATION OF TEMPORARY LABOUR MIGRATION

The dominant regulatory approach of receiving states has been to facilitate temporary labour flows according to an economic rationale. As the chapter by Biffel and Skrivaneck in this collection shows, this policy choice in the structuring of the labour market also has distinct social as well as economic implications, not least for the nature and structure of unemployment, and the responses needed to address it.¹⁸ However, the economic rationale serves

(2014) 27(3) *Australian Journal of Labour Law* 233. See also the special issue of the journal *Migration Letters* dedicated to this topic: ‘Expert Commissions and Migration Policy Making’ (2014) 11(1) *Migration Letters*.

¹⁷ Reilly, ‘The Membership of Migrant Workers’, ch 13 in this volume.

¹⁸ Gudrun Biffel and Isabella Skrivaneck, ‘The Distinction Between Temporary Labour Migration and Posted Work in Austria: Labour Law Versus Trade Law’, ch 4 in this volume.

the interests of global business particularly well, because it creates a larger and more flexible labour market from which to select workers. Temporary labour migration generally means the entry into the local labour market of workers from countries with less protective or developed regulation. In competing with local workers, these migrant workers are usually willing to accept lower wages and worse conditions because their frame of reference is their country of origin.¹⁹ Furthermore, they usually form a more compliant workforce because of their twin desire to recoup the costs of their investment in the migratory process and to send remittances home. They are especially motivated to be compliant when there is the possibility of securing permanent residency. In short, temporary labour migration increases labour supply and provides capital with a workforce that may be more motivated and certainly less likely to voice concerns to a union or other third party about their wages, conditions of employment or workplace safety.

Although it is conventionally thought that the 'migrant worker' is the subject of the law regulating temporary labour migration,²⁰ in this collection, a number of contributors identify a common strand in the regulatory approach of receiving countries, namely developing policies and laws around temporary labour migration with global capital as their subject. Temporary labour migration programmes have been designed according to a brief that privileges the freedom of employing organisations and their ability to access temporary migrant labour. This is not to say that these programmes do not incorporate some worker-protective elements, or that there have not been attempts to re-regulate these programmes to reduce the potential for exploitation. In the main, however, we can identify a common regulatory approach amongst receiving countries to regulate temporary labour migration from the standpoint of migration law, which tends to focus on the efficacy of the visa process and the reduction of regulatory burdens on business, rather than the traditionally worker-protective focus of the law of work. In this collection, Cathryn Costello and Mark Freedland build upon their previous work²¹ by examining the distinctive role of capital in using migration in the global era as a tool to maximise profits.²² Their chapter contrasts the EU's approach to regulating intra-corporate transferees and seasonal workers, drawing upon the evocative image of the phenomenon of temporary labour migration as 'capital's handmaiden', to shed light on the relations between labour and capital under conditions of contemporary globalisation.

¹⁹ For more on temporary migrant workers' 'dual frame of reference', see Michael J Piore, *Birds of Passage: Migrant Labor and Industrial Societies* (Cambridge, Cambridge University Press, 1979).

²⁰ See, eg Costello and Freedland, 'Migrants at Work' (n 7) 4.

²¹ *Ibid.*

²² Costello and Freedland, 'Seasonal Workers and Intra-corporate Transferees', ch 2 in this volume.

A. Globalisation and the Changing Nature of Migration

Globalisation has provided the perfect vehicle to accelerate and facilitate temporary labour migration. Although the complex set of phenomena widely referred to as ‘globalisation’ defies precise definition,²³ it is commonly understood as the intensification of international economic integration.²⁴ Facilitated by computer and technological developments and the associated information and communications revolutions, globalisation has gained momentum by the progressive opening up of national economies (especially through trade liberalisation), the ease with which capital and corporations have adapted to (and thereby in turn promoted) a new world without borders, the increased international flows of capital, and the consequent growth of international business.

The extraordinary growth in the migratory movements of people around the world has also been a key aspect of globalisation. There is scarcely a nation-state that is not now touched by migration—either as an origin, transit or destination country for migrants. It is estimated there are more than 232 million migrants around the world.²⁵ Moreover, migration in the global era is an increasingly complex phenomenon, not least in the range of factors driving it. Migration is no longer (if it ever was) undertaken primarily in response to ‘push’ factors such as political, social, religious and cultural oppression or flight in the face of climatic, environmental or other disasters, or the ‘pull’ of associated or consequential family reunions.

The flows and patterns of migration are constantly changing: movements of people are occurring not only from developing to more developed economies but also between countries within those broadly framed categories, and are being driven not only by states but also by market factors. The concentration of global capital has led to demand for both highly skilled workers and for low-skilled agriculture, industrial and service workers. Temporary migrant workers feature prominently in jobs that local workers do not want and in sectors where exploitation is more likely to be prevalent

²³ See Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge, Cambridge University Press, 2008) 29: ‘the term globalization has grown out of control. There is no longer much to be gained in pinning down a definition for this shape shifter. Rather it makes sense to use it with full consciousness of the fluidity, and its inevitable incorporation by reference of layers of meaning from the popular to the erudite.’

²⁴ Judy Fudge and Rosemary Owens, ‘Precarious Work, Women and the New Economy: The Challenge to Legal Norms’ in Judy Fudge and Rosemary Owens (eds), *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Oxford, Hart, 2006) 4.

²⁵ ILO, *Labour Migration Facts and Figures*, ILO Fact Sheet (2014), http://www.ilo.org/global/about-the-ilo/media-centre/issue-briefs/WCMS_239651/lang--en/index.htm. See also ILO, *Global Estimates on Migrant Workers: Results and Methodology*, (Geneva, ILO, 2015). For an overview of labour migration in the EC/OECD countries see Maria Vincenza Desiderio, *Free Movement of Workers and Labour Market Adjustment* (Paris, OECD, 2012).

because of cost pressures in highly competitive businesses, poor workplace health and safety standards and a low level of unionisation.²⁶ However, the advent of highly skilled migrant worker programmes aimed at addressing a skills deficit in receiving countries where technical and vocational training often lags behind rapid changes in technology and organisation of work, means that temporary migrant labour cannot be characterised exclusively as work that is low-paid, dirty, dangerous, physically difficult, repetitious or seasonal. This is not to say, however, that temporary migrant work, even of the high-skilled variety, is not precarious. The notion of dividing temporary migrant labour according to ‘skill level’ is somewhat arbitrary, because it is, at least in part, a social construction, rather than an objective measure. As Rosemary Hunter has observed in the pay equity context, the traditional factors often used to identify the skill and value of work—qualifications, training, attributes, responsibility, physical work conditions, work quality, flexibility of skills, knowledge, supervision, and place and importance to the operation—can all be identified and constituted in ways that are, for instance, deeply gendered.²⁷ Likewise, different political, social and cultural contexts reflect and produce different deeply held assumptions and biases which affect how we identify and value skills, and which impact, in turn, upon the design of temporary worker programmes.²⁸

As the boundaries around national economies have been dismantled, so too the prospects for the greater integration of labour markets have increased. Intermediary agencies, working with both state and non-state actors, have proved particularly adept at promoting temporariness as a talisman for success in the new economy and deploying migrant labour around the globe.²⁹ Labour migration has increased significantly in recent years, comprising an estimated 90 per cent of all migratory movements.³⁰ Of course many of those who migrate for other reasons are also participants in labour markets. The International Labour Organization estimated that in 2013 there were 150.3 million migrant workers.³¹ Migration is thus a labour issue and

²⁶ These were some of the factors identified by the UN Special Rapporteur on the human rights of migrants in his report to the UN Human Rights Council, ‘Labour Exploitation of Migrants’, A/HRC/26/35 (April 2014), <http://www.ohchr.org/Documents/Issues/SRMigrants/A.HRC.26.35.pdf>. See Tham, Campbell and Boese, ‘Why is Labour Protection for Temporary Migrant Workers so Fraught?: A Perspective from Australia’, ch 8 in this volume.

²⁷ Rosemary Hunter, *The Beauty Therapist, the Mechanic, the Geoscientist and the Librarian: Addressing Undervaluation of Women’s Work* (Broadway, NSW, ATN WEXDEV, 2000).

²⁸ Martin Ruhs and Bridget Anderson (eds), *Who Needs Migrant Workers: Labour Shortages, Immigration and Public Policy* (Oxford, Oxford University Press, 2010).

²⁹ On the role of such intermediaries generally, see Judy Fudge and Kendra Strauss (eds), *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work* (New York, Routledge, 2014).

³⁰ ILO, *Labour Migration Facts and Figures*.

³¹ ILO, *Global Estimates on Migrant Workers 5*.

labour mobility has become a key feature of the global economy, with the World Bank estimating that remittance flows from migrant workers will reach US\$479 billion in 2016.³²

Geographers have also observed dramatic shifts in patterns of labour migration in recent decades, especially as the labour market characteristics of migrants have become more diverse than ever before. Amongst the most notable of these shifts has been a change from permanent to temporary migration.³³ For many, migration is not a one-way move away from their country of origin to a permanent home in a new destination country. In important ways, temporary migration is thus rendering more porous than ever before the borders around national labour markets.

B. Temporary Migrant Service Workers: Challenging the Labour/Trade Boundary

The single-minded pursuit of economic efficiency in regulating temporary labour migration is most apparent in the growing importance of the global trade in services. In the global era, the relationship between labour law and economic or trade law has often been portrayed as a conflictual one, and in need of reconciling for regulatory cohesion.³⁴ At the very least it is a complex relationship, and perhaps nowhere is this more evident than in the law relating to the temporary labour migrations that deliver the global services trade. To date less attention has been paid to the intersection of migration law and the trade/labour regulatory framework, which is the subject of the three chapters in Part II of this collection. This issue highlights the often disparate agendas of actors in sending and receiving countries—for instance, in the latter, trade unions are often seeking to protect local labour market conditions through the principle of wage parity, whilst the former countries argue in favour of more cross-country flows—and between global institutions—for example the WTO's normative concern with trade liberalisation and free movement contrasts with the ILO's rights-based agenda hinging upon equality and decent work. This tension at the multilateral and

³² Dilip Ratha et al, *Migration and Remittances: Recent Development and Outlook*, Migration and Development Brief (Washington, DC, World Bank, 2015).

³³ For an early prediction of this trend, see Graeme Hugo, 'Migrants and Demography: Australian Trends and Issues for Policy Makers, Business and Employers' in Mary Crock and Kerry Lyon (eds), *Nation Skilling: Migration and Labour Law in Australia, Canada, New Zealand and the United States* (Sydney, Desert Pea Press, 2002). In 2006, it was estimated that there were three times as many temporary as permanent migrants to OECD countries: OECD, *Temporary Labour Migration: An Illusory Promise?* (Paris, OECD SOPEMI, 2008).

³⁴ See, eg Christine Kaufmann, *Globalisation and Labour Rights: The Conflict between Core Labour Rights and International Economic Law* (Oxford, Hart, 2007).

institutional level is reflected in regulatory debates around how to manage the global trade in services.³⁵

Trade in services is usually facilitated through free trade agreements—whether at global, regional or bilateral levels—which make provision for global services to be delivered into another country, including by workers who move from their country of origin into a host country where those services are consumed.³⁶ Thus, article 1(2)(d) of the General Agreement on Trade in Services (GATS) (sometimes referred to as ‘Mode 4’), appended to the Marrakesh Agreement establishing the WTO,³⁷ envisages such a migratory movement of the worker.³⁸ Some regional trading blocs already have considerable experience of such migratory movements. In Europe, the ‘posted worker’ is the epitome of the practice. In late 2015, 12 Pacific-rim countries agreed to the Trans-Pacific Partnership (TPP). While seeking to achieve greater economic integration between the signatories, a notable omission was a binding provision on labour mobility. Instead, article 12.4 of the TPP operates as a positive list, meaning that it remains in the discretion of each country to make its own commitments to any binding obligations in this area. Still more multi-state agreements are in the process of negotiation, for example the Transatlantic Trade and Investment Partnership (TTIP), and the Trade in Services Agreement (TiSA).³⁹

While the negotiation processes for multi-state agreements usually extend over many years, bilateral agreements for trade in goods and services have proliferated more easily, and they often also incorporate provisions intended to facilitate the movement of natural persons between the two countries for the provision of services. The China–Australia Free Trade Agreement (ChAFTA) agreed in 2015, for example, is intended to increase greatly temporary labour flows from China to Australia and is significant for its ban on the latter using labour market testing, effectively allowing Chinese workers to replace local workers in the Australian labour market.⁴⁰

³⁵ For a recent discussion of these issues, see Olivier de Schutter, *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards* (Oxford, Hart, 2015).

³⁶ See, eg Tonia Novitz, ‘Trading in Services: Commodities and Beneficiaries’ in Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Cheltenham, UK, Edward Elgar, 2015).

³⁷ General Agreement on Tariffs and Trade (GATT) [1948] ATS 23; Marrakesh Agreement Establishing the World Trade Organisation (WTO Agreement) 1869 UNTS 299; 33 ILM 1197 (1994). The GATS is Annex 1B to the Marrakesh Agreement, part of the Final Act of the Uruguay Round of Trade Negotiations 1986–1994, http://www.wto.org/english/docs_e/legal_e/26-gats.pdf.

³⁸ Note that GATS art 1(3) may also involve the movement of persons to deliver a service.

³⁹ On the former, see Jeffrey S Vogt, ‘The Evolution of Labour Rights and Trade—A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership’ (2015) 18(4) *Journal of International Economic Law* 827.

⁴⁰ China–Australia Free Trade Agreement ch 10 Movement of Natural Persons, art 10.4, para 3.

Although to date the numbers involved in movement associated with global trade in services may be on a comparatively small scale, movement in this area is likely to increase.⁴¹ As developed countries move more and more to becoming service economies, the issue of global trade in services is of increasing importance to them. In turn, developing countries are seeking more opportunities to participate in such trade. A resurgence in the adoption of bilateral agreements regulating the provision of services by low-skilled migrants is also evidence of this.⁴² It is no surprise that increased liberalisation of world trade in services, and especially support of the growth of services exports from developing countries, remained high on the policy agenda of the WTO in the lead-up to the Doha round of negotiations in July 2015,⁴³ with developing countries requesting greater preferences in such arrangements, including no economic needs and labour market testing, and extending the duration of stays of their professionals. Indicative of the growing significance of trade in services, negotiations involving many WTO members, including the USA and Europe, commenced in 2013 for a new TiSA.⁴⁴

When an international contract for the delivery of a service by a provider in one country to a consumer in another country also entails the workers of the provider moving into the other country for the period in which they will produce and deliver the service, this might ordinarily be characterised as an example of a temporary migration of the worker who will be participating in the labour market of the country in which they work. Yet this is not how such movements and the labour of these global service delivery workers tend to be conceptualised in trade agreements. The Annex of GATS on the movement of natural persons, for example, asserts: ‘This agreement is not concerned with natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis’. The GATS leaves it to members to establish their own rules regulating the movement of these workers, including issues such as the requirement of visas for the temporary entry of

⁴¹ EU statements in 2014 suggest about 1.4 million posted workers. On growth in global services, see, eg Samuel Engblom, ‘Labour Law and the Global Market for Manpower’ (2012), paper on file with authors; Pasha L Hsieh, ‘Liberalizing Trade in Legal Services under Asia-Pacific FTAs: The ASEAN Case’ (2015) 18 *Journal of International Economic Law* 153.

⁴² See Piyasini Wickramasekara, *Bi-lateral Agreements and Memoranda of Understanding on Migration of Low-skilled Workers: A Review* (Geneva, ILO, 2015).

⁴³ See WTO, ‘WTO Members Move to Enact Bali Decision on LDC Services Waiver’, media release, 5 February 2015. The Doha Agreement committed the WTO to further liberalisation of trade in services. See Doha Work Programme, Ministerial Declaration adopted on 18 December 2005 at the WTO Ministerial Conference, Hong Kong, 13–18 December 2005 esp cl 2125-27 and Annex C (Hong Kong Declaration). There has been steady progress in this area: eg in 2011, the LDC Services Waiver was adopted at the 8th Ministerial Conference allowing WTO members to deviate from MFN obligations under the services agreement. All WTO documents are available on the WTO website: www.wto.org.

⁴⁴ In April 2015, these negotiations involved 51 WTO Member States.

those who labour in the provision of services. Likewise, under the European Posted Workers Directives, as interpreted, these workers do not seek access to the local labour market of the country where they work.⁴⁵

This conceptualisation treats the temporary movement of the worker to deliver a service as identical to delivery of goods into the destination country. In so doing, the economic and social dimensions of global trade remain separated, with the latter tending to be erased as the advantages of the former are expounded. On this view, proponents argue that there is no difference between freer trade in goods and services produced and delivered into another country by workers who remain in their home country and those delivered by service workers (including lower skilled workers) who also temporarily move into the destination country to do so. The broad economic impacts are seen as identical, as the logic of the global trade in goods is fully extended to services.⁴⁶ On this analysis, the liberalisation of world trade in services continues to have important redistributive effects and, while it is acknowledged that there are impacts on labour markets, these are depicted as being no different from those experienced in the wake of global trade in goods. Thus, in destination delivery and consumer countries, increased global competition has often meant the loss of jobs as a result of the movement of capital and ‘offshoring’, and a consequent de-skilling in relation to the production of particular goods or delivery of services. On the other hand, the loss of jobs in developed economies is counteracted by the gains made by those workers from developing countries, including more opportunities to contribute to service delivery. In fact, many developing countries have expressly called for greater liberalisation of service provision under Mode 4,⁴⁷ and some scholars from these countries have argued against wage parity because it effectively operates as a quota eroding ‘the cost advantage of hiring foreigners’.⁴⁸

⁴⁵ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (‘Posted Workers Directive’)[1997] OJ L18/1. See also Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘Posted Workers Enforcement Directive’) [2014] OJ L159/11.

⁴⁶ See, eg Alan Winters, *The Temporary Movement of Workers to Provide Services (GATS Mode 4)* (Washington, DC, World Bank, 2004); Alan Winters et al, ‘Liberalising Temporary Movement of Natural Persons: An Agenda for the Development Round’ (2003) 26(8) *World Economy* 1137.

⁴⁷ This is evinced by the ‘plurilateral request’ to the WTO submitted by Argentina, Bolivia, Brazil, Chile, Colombia, India, Pakistan, Peru, Mexico and the Philippines. For information about this plurilateral request see WTO, ‘Movement of Natural Persons’, https://www.wto.org/english/tratop_e/serv_e/movement_persons_e/movement_persons_e.htm.

⁴⁸ Rupa Chanda, ‘Movement of Natural Persons and the GATS’ (2001) 24(5) *World Economy* 631, 635. See also Sumanta Chaudhuri, Aaditya Mattoo and Richard Self, ‘Moving People to Deliver Services: How Can the WTO Help?’ (2004) 38(3) *Journal of World Trade* 363, 366.

It may be that in the past some of the redistributive benefits following global trade in services have been overstated, and some of the risks understated. Philip Martin thought so in 2006, and so recommended a cautious approach in assessing the economic implications of GATS Mode 4.⁴⁹ Martin pointed out that the greatest benefits accrue to developing economies when low-skilled workers are involved, but that they are often not the target of GATS and other free trade agreements, which often work best for high-skilled workers employed by multinational corporations, who can remain for quite long periods of time in the destination country. However, with high-skilled workers, there is always the risk of brain drain as their ‘temporary’ migration often becomes ‘permanent’, and Martin thought that previous experience, such as that involving Indian IT workers deployed to respond to the ‘Millennium Bug’ scare, may not provide an appropriate template for future movements of workers involved in global service delivery. Such arguments invite constant re-assessment, especially as, in the intervening years since Martin’s evaluation, the evidence seems to indicate that there is now greater provision for low-skilled service delivery migration as part of the global trade in services with the proliferation of, for example, global construction agreements.

However, the crux of Martin’s critique is the insight that the GATS Annex risked eliding the movement of the worker and their (temporary) presence in another nation-state with other forms of global service delivery by workers who remained in their country of origin and with the global trade in goods. In so doing, the human condition of these workers is erased, and these temporary migrant labourers are effectively treated as commodities.⁵⁰ The aphorism ‘labour is not a commodity’ encapsulates philosophical explorations into the relationship of the human person to their labour, which also seek to explain the conundrum that work cannot be separated from the human person and yet is traded in the marketplace.⁵¹ Its deployment in political economy, and especially labour law, has a rich history.⁵² In relation to temporary labour migration, generally, some have found it to be particularly potent in critiquing the dominant economic considerations put forward in this context.⁵³

⁴⁹ Philip L Martin, *GATS, Migration, and Labour Standards*, Discussion Paper DP/165/2006 (Geneva, International Institute for Labour Studies, 2006).

⁵⁰ *Ibid* 20–21.

⁵¹ See philosophers as diverse as John Locke, Adam Smith, Karl Marx, Karl Polanyi and Hannah Arendt (to name but a few) for discussions of this idea.

⁵² See Judy Fudge, ‘Labour as a “Fictive Commodity”’: Radically Reconceptualising Labour Law’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford, Oxford University Press, 2011); Hugh Collins, *Employment Law* (Oxford, Oxford University Press, 2010) ch 1. See also Lucy Taksa and Dimitria Groutsis, ‘Managing Diverse Commodities? From Factory Fodder to Business Asset’ (2010) 20 *Economic and Labour Relations Law* 77.

⁵³ Stuart Rosewarne, ‘Globalisation and the Commodification of Labour: Temporary Labour Migration’ (2010) 20 *Economic and Labour Relations Review* 99. See also Catherine

Samuel Engblom, Nicola Kountouris and Åsa Odin Ekman's chapter extends these debates even further.⁵⁴ Not only do they challenge traditional conceptualisations of trade agreements, like the TPP, TTIP and TiSA, as being purely about economic co-operation regulating the trade in goods and services. They also argue that, given technological and other advances and the growth of global trade in services, the classifications pertaining to service delivery in these agreements are not descriptively precise enough to capture the labour intensification involved in global service delivery and, consequently, are deprived of normative force. By developing a matrix of cross-border human labour mobility processes, they provide illuminating insight into the power and potential of trade agreements to create greater economic integration without political integration. Although they argue that the current practice of wide-ranging exemptions and qualifications has meant the impact of free trade agreements on facilitating labour mobility has been minimal, they suggest that free trade agreements are unable to regulate complex human migration dynamics and, hence, are not the best vehicle for managing labour flows between countries. Instead, they argue that migration and immigration policies should be designed to promote long-term migratory patterns ensuring that workers' wages, conditions and rights are governed by their country of destination according to a principle of equal treatment and in accordance with international labour norms.

The idea of labour intensification reflects the reality that global services workers work in a particular physical, geographic location, even though in the longer term they may reside elsewhere. The social consequences for them as individuals, their families and communities (both the one in which they work, and the one in which they reside) are very real.⁵⁵ There are also substantial psychological costs associated with the 'normal' practice of temporary labour migration.⁵⁶ Thus, there are numerous individual and social issues, with potentially wide-reaching implications, turning on the denial

Dauvergne and Sarah Marsden, 'The Ideology of Temporary Labour Migration in the Post-Global Era' (2014) 18(2) *Citizenship Studies* 224, 232 relying on Hannah Arendt: 'The fact that labour is never self-contained, but is always productive of something more than itself, and is an aspect of being human, goes a great deal of the way to explaining why it is impossible for states to simply "import labour".'

⁵⁴ Samuel Engblom, Nicola Kountouris and Åsa Odin Ekman, 'Temporary Labour Migration and the Trade in Services: European and Global Perspectives in an Age of Economic Integration', ch 3 in this volume.

⁵⁵ Very similar issues are evident in relation to the work migrations of 'fly-in/fly-out' or FIFO workers within (and sometimes across) national borders. For example, see a recent inquiry into this issue by the West Australian Government Education and Health Standing Committee, 'Inquiry into Mental Health Impacts of FIFO Work Arrangements' (2014), [http://www.parliament.wa.gov.au/parliament/commit.nsf/\(InqByName\)/Inquiry+into+mental+health+impacts+of+FIFO+work+arrangements?opendocument](http://www.parliament.wa.gov.au/parliament/commit.nsf/(InqByName)/Inquiry+into+mental+health+impacts+of+FIFO+work+arrangements?opendocument).

⁵⁶ For an overview of research on this point, see Paul Collier, *Exodus: How Migration is Changing Our World* (Oxford, Oxford University Press, 2013) 169–76.

that global service workers are temporary migrant workers accessing the labour market in which they work. Their right to access social services while in the consumer/destination country is merely one, albeit an important one. In this collection, Gudrun Biffl and Isabella Skrivanek's chapter provides an important foray into this issue from a European perspective, by contrasting the situation of posted workers and seasonal workers.⁵⁷ They draw a key analytical distinction between the traditional reliance on seasonal workers' programmes and the growth in the number of posted workers. Temporary migrant labourers from outside Europe working on a seasonal basis are increasingly irrelevant for countries such as Austria given the expansion of the European Union and the freedom of movement of people and right to work accorded to its citizens. And as a corollary, the phenomenon of posted work is of growing importance. Biffl and Skrivanek suggest that the European social model must explicitly include all temporary migrant workers (including posted workers) or else, as a consequence of their currently differing impact on public revenues, risk the continuing erosion of redistributive principles and efforts by EU Member States.

In relation to the actual performance of their work, the essential problem in not recognising the movement and hence the human dimension of global service and posted workers temporarily based in the country into which services are delivered is a regulatory one. Under trade and regional agreements there is a strong risk that, rather than enjoying the same wages, terms and conditions as other workers alongside whom they work, these temporary migrants may be regulated by the laws of their home state. In the pre-globalised world, where the boundaries of old national economies were identical to the jurisdictional boundaries setting social laws, even the application of the rules of private international law to arrangements that might be described now as involving posted work ordinarily would not have overridden mandatory minimum work standards set by the jurisdiction in which the work was carried out.⁵⁸ However, the problem of workers effectively working side by side within the same jurisdiction but being subject to different legal arrangements has become more commonplace in the global era, making the importance of finding a solution to the intrinsic inequality and unfairness of such situations a more pressing one.⁵⁹ In the context

⁵⁷ Biffl and Skrivanek, 'The Distinction Between Temporary Labour Migration', ch 4 in this volume.

⁵⁸ See the special edition (2010) 31 *Comparative Labor Law and Policy Review*, devoted to labour issues and private international law.

⁵⁹ Agency or labour hire work is one of the ways in which this problem commonly manifests itself within labour markets. See Hugh Collins, 'Multi-segmented Workforces, Comparative Fairness, and the Capital Boundary Obstacle' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford, Hart, 2006).

of global service agreements, the idea that these temporary migrations to deliver services involve ‘workers without footprints’ who do not participate in, or access, the labour market of the consuming state has been labelled a ‘legal fiction’.⁶⁰

The implications of such arrangements have perhaps been most fully played out in Europe, where the phenomenon of the ‘posted worker’ has been of growing practical and legal significance.⁶¹ The ‘posted worker’ is conceptualised as an EU worker who is sent to another EU state by their employer who is a ‘service provider’ but who returns to their home state when the service is completed and does not gain access to the local labour market. The nomenclature signifies that the worker has been ‘posted’ in another country, implicitly for a short period of time and lacking any connection to the country in which they work. There is little precision about the length of stay of ‘posted workers’ who, in article 2 of the Posted Workers Directive, are defined as ‘a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works’.⁶²

The problems associated with posted workers, and especially the efficacy of the Posted Workers Enforcement Directive as a solution, have provoked much debate amongst scholars in Europe. The complex interactions of regulation in a changing context, including the intensification of transnational subcontracting practices, significant differences of living standards in the EU after its expansion, and the different labour standards to be found within it, are identified by some scholars as the source of the problems.⁶³ Given the constitutional right of freedom of movement in the EU, the transferability of lessons from the European to the global context is arguably even more complex. At the very least, however, the issue of posted work in Europe highlights the ways in which the boundaries of communities (regional or national), the differing nature of their intersections along different axes (political, social and/or economic), and the overlaying of labour markets within and across them, influences the operation and impact of regulatory regimes.⁶⁴

⁶⁰ Lydia Hayes and Tonia Novitz, ‘Workers Without Footprints: The Legal Fiction of Migrant Workers as Posted Workers’ in Bernard Ryan (ed), *Labour Migration in Hard Times: Reforming Labour Market Regulation* (Liverpool, Institute for Employment Rights, 2013).

⁶¹ See European Commission, ‘Posting of Workers: EU Safeguards against Social Dumping’, Memorandum, 13 May 2014; and see Biffl and Skrivanek, ‘The Distinction Between Temporary Labour Migration’, ch 4 in this volume.

⁶² For a discussion of this and other definitional problems in terms of the employing entity and the nature of the services, see Hayes and Novitz, ‘Workers Without Footprints’ (n 60).

⁶³ Nicola Kountouris and Samuel Engblom, ‘Civilising the European Posted Workers Directive’ in Mark Freedland and Jeremias Prassl (eds), *Viking, Laval and Beyond* (Oxford, Hart Publishing, 2014).

⁶⁴ See Catherine Barnard, ‘More Posting’ (2014) 43 *International Labour Journal* 194.

III. TEMPORARY LABOUR MIGRATION IN PURSUIT OF ECONOMIC EFFICIENCY

To date, an economic perspective has been at the forefront of global policy discussions about temporary labour migration. Indeed, the very concept of temporariness, as Catherine Dauvergne and Sarah Marsden have observed, performs a significant function in attempting to transform ‘people into “pure” economic inputs who will depart when their labour is no longer necessary’,⁶⁵ turning on its head Max Frisch’s oft-quoted aphorism about post-war Europe: ‘we asked for workers, but got people’.⁶⁶ Temporary migration, it is said, results in an economic triple win: for the individual migrant, for the sending country and for the receiving country. Although that orthodoxy is increasingly contested,⁶⁷ there still remains a risk of the case in support being articulated in one-dimensional fashion, focusing on economic outcomes and ignoring other factors. The ILO suggests that, in order for the triple win to be realised in practice, there must be proper instruments of governance regulating temporary labour migration which guarantee that migrant workers receive ‘a *fair share of the prosperity* which migration helps to create’ (emphasis added).⁶⁸

At the international level, temporary labour migration has been particularly embraced as part of the development agenda. Prestigious global institutions have encouraged temporary labour migration. In 2005, the World Bank estimated that moving an additional 14 million workers from low- to high-income countries would increase global income by \$350 billion,⁶⁹ and the Global Commission on International Migration recommended the careful design of temporary migration programmes in order to address the economic needs of both sending and receiving countries.⁷⁰

However, despite the conventional triple win formulation, which suggests sending countries benefit from temporary labour migration, especially

⁶⁵ Dauvergne and Marsden, ‘The Ideology of Temporary Labour Migration’ (n 53) 232.

⁶⁶ Max Frisch, ‘Vorwort’ in Alexander J Seiler, *Siamo Italiani* (Zürich, EVZ-Verlag, 1965) 7.

⁶⁷ See, eg Castles and Ozkul, ‘Circular Migration’ (n 6); Piyasiri Wickramasekara, *Circular Migration: A Triple Win or a Dead End*, Discussion Paper No 15 (Geneva, Global Union Research Network, 2011); Dauvergne and Marsden, ‘The Ideology of Temporary Labour Migration’ (n 53).

⁶⁸ ILO, *Fair Migration: Setting an ILO Agenda*, Report of the Director-General (Report I(B)) to the International Labour Conference, 103rd session, Geneva (June 2014) 4.

⁶⁹ World Bank, *Global Economic Prospects 2006: Economic Implications of Remittances and Migration* (Washington, DC, World Bank, 2005) 31.

⁷⁰ Global Commission on International Migration, *Migration in an Interconnected World: New Directions for Action* (Geneva, Global Commission on International Migration, 2005) 16.

through remittances,⁷¹ the lens of remittance transactions is too narrow to evaluate labour migration costs. Those costs, it has been argued, must be seen in the broader context of employment and labour markets, and take into consideration issues such as the persistence of unacceptable work conditions and risks such as skill depletion.⁷² Other costs—such as the social and cultural costs of separation from family and community, and the costs of reintegration of workers into their communities—have also been identified.⁷³

The economic rationale for temporary labour migration has featured strongly in the discourse around the viability of these programmes in receiving countries. It is assumed that states only permit temporary labour migration if there is a net economic benefit to their own citizens. Martin Ruhs has identified economic efficiency as a functional imperative of states in designing temporary labour migration policies. In a broad sense, temporary labour migration is seen to benefit local job creation, business investment and economic growth, particularly through the introduction of new skills into the economy and by filling skill shortages, and also as a means of countering the phenomenon of an ageing population.⁷⁴

Nonetheless, as noted above, the economic case for temporary labour migration schemes is not universally accepted.⁷⁵ There are a number of debates around particular aspects of the argument that these schemes inevitably produce economic prosperity. The extent to which temporary labour migration programmes stimulate job growth or lead to the replacement of local jobs is difficult to quantify.⁷⁶ Philip Martin identifies the displacement of local workers by temporary migrant workers as a non-linear process,⁷⁷

⁷¹ For example, the World Bank has commissioned a number of studies that identify the economic benefit to countries of origin of labour migration. See, eg Samuel Maimbo and Dilip Ratha (eds), *Remittances: Development Impact and Future Prospects* (Washington, DC, World Bank, 2005); Manjula Luthsia et al, *At Home and Away: Expanding Job Opportunities for Pacific Islanders Through Labour Mobility* (Washington, DC, World Bank, 2006); Pablo Fajnzylber and J Humberto Lopez, *Remittances and Development: Lessons from Latin America* (Washington, DC, World Bank, 2008); Quentin Wodon, *Migration, Remittances and Poverty: Case Studies from West Africa* (Washington, DC, World Bank, 2009).

⁷² See Wickramasekara, *Circular Migration*; ILO, *Promoting Decent Work For Migrant Workers*, Discussion Paper (Geneva, ILO, 2015).

⁷³ See, eg Alexander Reilly, 'The Ethics of Seasonal Labour Migration' (2011) 20 *Griffith Law Review* 127, 135.

⁷⁴ Ruhs, *The Price of Rights* (n 12) 26–32.

⁷⁵ See, eg Graeme Hugo, 'Best Practice in Temporary Labour Migration for Development: A Perspective from Asia and the Pacific' (2009) 47 *International Migration* 23.

⁷⁶ For further discussion on this point, see Inter-Parliamentary Union, International Labour Organization and the Office of the United Nations High Commissioner for Human Rights, *Migration, Human Rights and Governance, Handbook for Parliamentarians* No 24 (Geneva, Inter-Parliamentary Union, 2015) 22.

⁷⁷ Philip Martin, *Illegal Immigration and the Colonisation of the American Labor Market*, Paper 1 (Washington, DC, Center for Immigration Studies, 1986).

and WR Boehning explains that competition for jobs between the two groups is far more likely for certain categories of workers than for others.⁷⁸ According to demographer Graeme Hugo, employers ‘will always have a “demand” for foreign workers if it results in a lowering of their costs’.⁷⁹ The simplistic notion that employers will only go to the trouble and expense of employing a migrant worker when they want to meet a skill shortage skims over a range of motives an employer may have for using a migrant worker. These could be a reluctance to invest in training for existing or prospective staff, a desire to move towards a de-unionised workforce or, for a (perhaps small) minority of employers, a belief that it is easier to avoid paying minimum wage rates and conditions for temporary migrant workers.⁸⁰

It is clear that economic efficiency is by no means a guaranteed fruit of conventional temporary labour migration programmes. Further, the economic impact of visas that allow temporary migration for a non-work purpose but permit the visa holder to work extensively in the country of destination is often ignored. More robust assessments suggest the need for a broader consideration of the nature and distribution of any economic benefits. Thus, while temporary labour migration is often linked to the development needs of sending countries and also the economic and labour market needs of receiving countries, it also has much broader political, social, economic and cultural dimensions.

In this collection, two contributions problematise employer demand as a regulatory mechanism for determining the composition of a country’s temporary labour migration intake. Joanna Howe’s chapter examines the employer-driven nature of Australia’s 457 visa programme and develops three concrete regulatory solutions as to how employer requests to access migrant labour could be tempered.⁸¹ Her proposals stress the importance of regulatory design in ensuring that migrant workers are not used to replace local workers, the role of enforcement agencies, and the need for regulatory cohesion between labour law and immigration law. Her contribution, coupled with Mimi Zou’s chapter on the UK approach, examine the problems arising from deference to employer needs in the design of policies and laws of receiving countries designed to facilitate the process of temporary labour migration. Zou’s chapter provides a comprehensive

⁷⁸ WR Boehning, *Studies in International Labor Migration* (London, Macmillan, 1984) 86–93.

⁷⁹ Hugo, ‘Best Practice in Temporary Labour Migration’ (n 75) 59.

⁸⁰ See, eg Joanna Howe, ‘Is the Net Cast Too Wide? An Assessment of whether the Regulatory Design of the 457 Visa Meets Australia’s Skills Needs’ (2013) 41 *Federal Law Review* 443.

⁸¹ Joanna Howe, ‘Contesting the Demand-Driven Orthodoxy: An Assessment of the Australian Regulation of Temporary Labour Migration’, ch 6 in this volume.

examination of the regulatory mechanisms used within the UK system and, of particular relevance to the growing international interest in the role of expert commissions,⁸² she identifies the essential role of the UK's Migration Advisory Committee (MAC) in contributing to migration policy.⁸³ Given the tendency of migration policy to be characterised by a high degree of executive discretion justified according to an imperative of providing a flexible and timely response to employer requests to access migrant labour, Zou's analysis of the MAC presents an important case study of an alternative approach to migration policy-making that is both transparent and publicly accountable.

IV. TEMPORARY LABOUR MIGRATION AND THE PRODUCTION OF PRECARIETY

When state policy and regulation are focused primarily on economic issues, there is a risk that their damaging social effects, encapsulated by the precarity of temporary migrant labour, are ignored. There is a rich literature examining the precarity of temporary migrant work.⁸⁴ The potential for exploitation is increased for low-skilled migrant workers,⁸⁵ particularly those in certain industries,⁸⁶ and is often exacerbated by the presence of migration intermediaries seeking to capitalise from the commercialisation of migration.⁸⁷ Temporary labour migration worldwide has featured exploitative work conditions, substandard housing and underpayment

⁸² See, eg the special issue of the journal *Migration Letters* dedicated to this topic: 'Expert Commissions and Migration Policy Making' (2014) 11(1) *Migration Letters*.

⁸³ Mimi Zou, 'Employer Demand for "Skilled" Migrant Workers: Regulating Admission under the United Kingdom's Tier 2 (General) Visa', ch 5 in this volume.

⁸⁴ See, eg Costello and Freedland (eds), *Migrants at Work* (n 7). See also the special edition on 'Migrant Workers' in (2009) 31 *Comparative Labor Law and Policy Journal*; the special edition on 'Vulnerabilities of Regular Labour Migration in the EU' in (2015) 31 *International Journal of Comparative Labour Law and Industrial Relations*; Laurie Berg, *Migrant Rights at Work: Law's Precariousness at the Intersection of Labour and Migration* (London, Routledge, 2015).

⁸⁵ Barbara Deegan, *Integrity/Exploitation*, Visa Subclass 457 Integrity Review Issues Paper No 3 (Canberra, Department of Immigration and Citizenship, 2008).

⁸⁶ See, eg ACL Davies, 'Migrant Workers in Agriculture' in Costello and Freedland (eds), *Migrants at Work* (n 7); Judy Fudge, 'Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers' (2012) 34 *Comparative Labour Law and Policy Journal* 101.

⁸⁷ See Jennifer Gordon, *Global Labor Recruitment in a Supply Chain Context*, ILO Fair Recruitment Initiative Series No 1 (Geneva, ILO, 2015); Dimitria Groutis, Di van den Broek and Will S Harvey, 'Transformations in Network Governance: The Case of Migration Intermediaries' (2015) 41 *Journal of Ethnic and Migration Studies* 1558.

of wages,⁸⁸ evincing a phenomenon that Joo-Cheong Tham, Iain Campbell and Martina Boese call ‘the structural reality of non-compliance’.⁸⁹

In this collection, two chapters identify ways in which precarity arises not only from features often inherent in the design of temporary labour migration programmes but also from the regulatory choices made in response to problems and the context in which that regulation operates. Drawing upon Australia as a case study, Tham, Campbell and Boese argue in their chapter that the structural design of temporary labour migration programmes invites and facilitates non-compliance by employers and that in certain industries, where there is greater likelihood of non-compliance, these structural features render it inevitable that most employers will employ temporary migrant workers in breach of immigration laws and policies. The sobering realisation from Tham, Campbell and Boese’s chapter is that the phenomenon of temporary labour migration produces non-compliance with labour law that is not aberrational but the norm.

Judy Fudge deploys the analytical concept of ‘unfree labour’ to depict a broader phenomenon whereby the structural features of labour migration programmes create the conditions for exploitation to occur.⁹⁰ In her case study of domestic migrant workers, Fudge observes the practice of both the Canadian federal and British Columbia governments of regulating the problem of abuse of temporary domestic migrant workers through the lens of modern slavery. She argues that the choice to use the criminal law is ‘neither natural nor inevitable’ and operates to ignore the role of labour market and immigration institutions in cultivating conditions that are conducive to exploitative practices. By using the criminal law to attack the worst cases of exploitation, problems are characterised not as systemic but as individual aberrations. In this way, violations of labour standards have become normalised and accepted because only the most egregious forms of labour exploitation are targeted. While acknowledging the complexity of regulatory intersections, Fudge stresses that ‘unfreedom’ cannot be understood as simply a matter of legal jurisdiction without consideration of the broader social, political and economic context.⁹¹

⁸⁸ See, eg Mark J Miller, ‘Introduction: Temporary Workers: Programs, Mechanisms, Conditions, Consequences’ (1986) 20(4) *International Migration Review* 740, 747; Joanna Howe, ‘The Migration Amendment (Worker Protection) Act 2008: Long Overdue Reform, But Have Migrant Workers Been Sold Short?’ (2010) 24 *Australian Journal of Labour Law* 13; Reilly, ‘The Ethics of Seasonal Labour Migration’ (n 73).

⁸⁹ Tham, Campbell and Boese, ‘Why is Labour Protection for Temporary Migrant Workers so Fraught?: A Perspective from Australia’, ch 8 in this volume.

⁹⁰ Sociologists, in particular, have coined the term ‘unfree labour’ to denote a situation where migrant workers are constrained from freely circulating in the labour markets of receiving countries. See, eg Robert Miles, *Capitalism and Unfree Labor: Anomaly or Necessity* (New York, Tavistock, 1987); Tanya Basok, *Tortillas and Tomatoes: Transmigrant Mexican Harvesters in Canada* (Montreal, McGill-Queens University Press, 2002).

⁹¹ Judy Fudge, ‘Migrant Domestic Workers in British Columbia, Canada: Unfreedom, Trafficking and Domestic Servitude’, ch 7 in this volume.

A. The Pursuit of Decent Work for Temporary Migrant Workers at the International Level

Despite its tendency to be associated with precarious work, a number of global institutions have promoted temporary migration as a means of development. The global challenge has thus been to ensure ‘decent work’ for all, including for temporary migrant workers.⁹² As long ago as 2004, the World Commission on the Social Dimensions of Globalisation indicated that (increased) migration was one of the pathways to achieving a fairer globalisation. The proviso was that it must occur in a framework of uniform and transparent rules for cross-border migration that balanced the interests of migrants, and of countries of origin and destination.⁹³ Similarly, the ILO has played a major role since 2004 in championing a fair deal for migrant workers through an equality, rights-based approach.⁹⁴ The ILO’s ‘fair migration agenda’ continues to highlight the need for decent work in countries of origin, the formulation of orderly and fair migration schemes in regional integration processes, the importance of arrangements for well-regulated and fair migration in bilateral arrangements between states, fair recruiting practices, the countering of unacceptable situations, such as trafficking in people, and the realisation of a rights-based approach, and to identify them as priorities for future action.⁹⁵

The urgency of these issues has also garnered the attention of the world community more broadly.⁹⁶ Indeed, the international agenda for action has accepted the importance of the recognition of the human rights of all migrants and attention to the special vulnerabilities of various migrants groups, such as women and girl migrants, and young people; the need to respect and promote international labour standards and promote the rights

⁹² ILO, *Decent Work*, Report of the Director-General, International Labour Conference, 87th session (June 1999).

⁹³ World Commission on Social Dimension of Globalisation, *A Fairer Globalization: Creating Opportunities for All* (Geneva, ILO, 1994); see also International Labour Office, *International Labour Migration: A Rights-Based Approach* (Geneva, ILO, 2010).

⁹⁴ See ILO, *International Labour Migration*. This report was largely based on ILO, ‘Towards a Fair Deal for Migrant Workers in a Global Economy’, Report VI, 92nd International Labour Conference, Geneva, June 2004. See also ILO, ‘Resolution Concerning a Fair Deal for Migrant Workers in a Global Economy’, 92nd International Labour Conference, Geneva, June 2004; Shauna Olney and Ryszard Cholewinski, ‘Migrant Workers and the Right to Non-discrimination and Equality’ in Costello and Freedland (eds), *Migrants at Work* (n 7).

⁹⁵ ILO, *Fair Migration* (n 68). See also ILO, *Promoting Fair Migration*, Report of the Committee of Experts on the Application of Conventions and Recommendations, General Survey concerning the migrant workers instruments, International Labour Conference, 105th session, 2016.

⁹⁶ The Global Commission on International Migration reported to the Secretary General of the UN October 2005; the Global Migration Group was formed in 2006; High Level Dialogue on International Migration and Development was held in 2006 and 2013; and the Global Forum on Migration and Development met first in 2007.

of migrants in workplaces; the importance of reducing the costs of labour migration, especially recruitment costs;⁹⁷ the elimination of the exploitation of migrants; the importance of the integration of migration into the development agenda; and the enhancement of partnerships and international co-operation.⁹⁸

It is evident that at the level of global rhetoric there is considerable recognition of the need to consider the broader context of labour standards and labour markets in evaluating the costs of migration⁹⁹ and also acceptance of the equality of migrant workers. The principle of non-discrimination and equality for all, and for all workers including migrant workers, is a fundamental principle underpinning international law.¹⁰⁰ It is incorporated into relevant general human rights conventions of the United Nations, as well as the specific conventions of both the ILO and the UN relating to migrant workers.¹⁰¹ Yet in the international regulatory system, deficiencies remain in seeking to address the precarious work endured by many temporary migrants.¹⁰² As the ILO acknowledges, its conventions specifically relating to migrant workers were developed in an earlier era and different context.¹⁰³ Some migrants are excluded from the scope of these conventions, and the rights of permanent and temporary migrants are in some important respects distinguished.¹⁰⁴ Furthermore, these conventions have attracted few signatories.¹⁰⁵ While the more recent UN convention on migrant workers is generally considered an improvement in a number of respects, it too excludes

⁹⁷ See Philip Martin, 'Reducing Worker-Paid Migration Costs', ch 17 in this volume.

⁹⁸ See Declaration of the High-level Dialogue on International Migration and Development, UNGA Res 68/4 (1 October 2013) 68th session UN Doc A/RES/68/4.

⁹⁹ See ILO, *Promoting Decent Work for Migrant Workers*.

¹⁰⁰ See Olney and Cholewinski, 'Migrant Workers and the Right to Non-discrimination' (n 94). See also Piyasiri Wickramasekara, 'Globalisation, International Labour Migration and the Rights of Migrant Workers' (2008) 29 *Third World Quarterly* 1247.

¹⁰¹ For the main specific international instruments governing migrant workers see ILO Convention Concerning Migration for Employment (Revised) 1949 (No 97); ILO Convention Concerning Migrant Workers (Supplementary Provisions) Convention 1975 (No 143); ILO Migration for Employment (Revised) Recommendation 1949 (No 86); ILO Migrant Workers Recommendation 1975 (No 151); International Convention on the Protection of all Migrant Workers and their Families UN GA Res 45/158 (18 December 1990) UN Doc A/Res/45/158. See also earlier instruments, eg ILO The Protection of Migrant Workers (Underdeveloped Countries) Recommendation 1955 No 100; ILO Plantations Convention (No 110); ILO Plantations Recommendation 1958 (No 101).

¹⁰² See, eg Leah F Vosko, 'Out of the Shadows? The Non-Binding Multilateral Framework on Migration (2006) and Prospects for Using International Labour Regulation to Forge Global Labour Market Membership' in Davidov and Langille (eds), *The Idea of Labour Law* (n 52).

¹⁰³ See, eg ILO, *Fair Migration* (n 68).

¹⁰⁴ See especially Convention No 97 arts 8, 11; Convention No 143 art 11.2.

¹⁰⁵ Of 186 Member States of the ILO, only 49 have ratified Convention No 97 and 23 have ratified Convention No 143. This despite the fact that No 97 was designed in two separate parts which could be separately ratified, in an attempt to assuage concerns about the possibility for it to undermine temporary labour migration programmes. See especially Vosko, 'Out of the Shadows?' (n 102).

some temporary migrants from its scope, where they migrate primarily for purposes other than work, for example as students and trainees, regardless of the fact that they may nonetheless also be entitled to work during their stay in the destination country.¹⁰⁶ Significantly, under part V, states are able to limit the rights of some temporary migrants: frontier workers, seasonal workers, itinerant workers, project-tied workers or specified employment workers. In these ways, the international conventions specifically governing migrant workers convey the message that some temporary migrant workers are somehow less equal than others.¹⁰⁷ Thus, despite the acceptance of the principle of equality ‘in the abstract’, achieving a deep consensus on its practical attainment and implementation for temporary migrant workers remains elusive and controversial.¹⁰⁸

V. CHALLENGES IN REALISING DECENT WORK FOR TEMPORARY MIGRANT WORKERS

The challenges in realising equality and attaining decent work for temporary migrant workers are explored in Part V of this collection. As well as reflecting on some of the issues relating to the precarity of temporary migrant workers that are addressed in Part IV, all of these chapters consider those issues in the context of Europe and so, in addition, highlight the complexity arising from the regulatory intersection of regional and national legal systems.

Given the significance of the European Convention on Human Rights, Virginia Mantouvalou situates her discussion of temporary labour migration in the context of debates about the rationale for considering labour rights as human rights and its implications for regulatory content.¹⁰⁹ Drawing upon an empirical study she conducted, she examines migrant domestic work in the United Kingdom. Significantly, most of the women she interviewed had experienced a double migration, and so in entering the United Kingdom with their employer they also brought with them in their already established work relationship the regulatory traces of another national jurisdiction.

¹⁰⁶ See Dauvergne, *Making People Illegal* (n 23) 19–24 on the limits of the UN convention. See also Olney and Cholewinski, ‘Migrant Workers and the Right to Non-discrimination’ (n 94).

¹⁰⁷ The ILO itself is very much alert to the criticisms. See eg ILO, *Fair Migration* (n 68). For a more optimistic view see WR Böhning, ‘The Protection of Temporary Migrants by Conventions of the ILO and the UN’, paper presented at International Institute for Labour Studies Workshop on Temporary Migration: Assessment and Practical Proposals for Overcoming Protection Gaps, Geneva, 18–19 September 2003.

¹⁰⁸ See Olney and Cholewinski, ‘Migrant Workers and the Right to Non-discrimination’ (n 94).

¹⁰⁹ Virginia Mantouvalou, ‘Temporary Labour Migration and Modern Slavery’, ch 10 in this volume.

Like Judy Fudge, Virginia Mantouvalou is critical of a regulatory focus on ‘modern slavery’. While she accepts that it may be a necessary response to certain outcomes, she argues it is not sufficient and deflects attention from the laws, practices and regulations that produce the vulnerability of these migrant workers in the first instance.

The EU Seasonal Workers Directive provides an example of regulatory efforts at the supra-national level to enable temporary migrant workers to realise decent work.¹¹⁰ Veronica Papa argues in her chapter that it is highly problematic that the directive allows seasonal workers’ residency status in destination countries to be linked to their employment status.¹¹¹ Drawing upon the regulatory framework envisaged under the directive, Papa examines the situation of seasonal migrant workers in Italy and argues that their precarity in the labour market results from a public policy paradigm criminalising irregular migration, thereby obscuring the real issue of exploitation of seasonal migrant workers.

On the same theme of seasonal workers, in her chapter Julia López López examines and tries to resolve the difficult question of how to provide genuine security for these workers despite the overriding economic imperative of providing flexibility for employers.¹¹² She critiques the far-reaching consequences flowing from the EU’s free movement of people, producing a melting pot involving substantial numbers of unemployed local workers, large outflows of Spanish workers chasing better employment prospects in other EU countries, the presence of a significant group of undocumented workers, particularly from Africa, and the continuing, and often unsated, need of Spanish agricultural employers for seasonal migrant labour. The complex interactions of these groups within the Spanish labour market remains a tremendous challenge for regulators seeking to foster compliance with labour law and migration regulations whilst addressing the challenge of labour supply.

In contrast to the difficulties of realising decent work for temporary migrant workers in the United Kingdom, Spain and Italy, Sweden’s evolving model of temporary labour migration has been regarded as an ‘exceptional case’ by scholars and by the OECD.¹¹³ This has been attributed to its

¹¹⁰ Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L94/375.

¹¹¹ Papa, ‘Regulating Temporariness in Italian Migration Law’, ch 12 in this volume.

¹¹² López, ‘The Regulation of Temporary Immigration’, ch 11 in this volume.

¹¹³ See, eg Martin Ruhs, ‘Immigration and Labour Market Protectionism: Protecting Local Workers’ Preferential Access to the Local Labour Market’ in Costello and Freedland (eds), *Migrants at Work* (n 7) 76–77. See also Samuel Engblom, ‘Reconciling Openness and High Labour Standards? Sweden’s Attempts to Regulate Labour Migration and Trade in Services’ in Costello and Freedland (eds), *Migrants at Work*; OECD, *Recruiting Immigrant Workers: Sweden* (Paris, OECD, 2011).

reliance on labour market regulation (namely that temporary migrants be employed at collectively agreed wages) to constrain employer demand for labour.¹¹⁴ This is said to prevent employers relying upon these workers as a way of undercutting local job opportunities, which has been made possible in Sweden because of its strong history of collectivism and the continuing role played by unions in regulating the labour market.¹¹⁵ Nonetheless, in this collection, Petra Herzfeld Olsson questions the success of Sweden's deregulated approach to temporary labour migration and its reliance on the equal treatment principle to show how the promises contained in the offer of employment made to prospective migrant workers often go unrealised and unenforced once this work is taken up.¹¹⁶ In fact, Herzfeld Olsson argues that, far from being an ideal, Sweden's regulation of temporary labour migration with its reliance on the equal treatment principle ends up undermining equality for temporary migrant workers. Drawing upon a labour law approach, she proposes a new kind of employment contract for temporary migrant workers.

VI. CONTESTING TEMPORARINESS: STATUS AND THE SOCIAL EFFECTS OF THE LEGAL REGULATION OF TEMPORARY LABOUR MIGRATION

Employers' permanent demand for (and in some cases dependence upon) temporary migrant labour is often noted.¹¹⁷ Yet, consistently, receiving states tend zealously to guard and constrain the conversion of temporary workers' migrant status into membership. At the same time, it would be incorrect to assert that citizenship is always the aspiration of temporary migrant workers. An increasing number of people have allegiances to many territories and places. Individuals often have multiple familial, social and cultural ties in complex networks of communities around the world. Work relations often constitute one such network. But given the large numbers involved and the fact that temporary labour migration is often a stepping stone to permanent residency, the architectural foundations of temporary labour migration programmes continue to have far-reaching implications

¹¹⁴ Ruhs, 'Immigration and Labour Market Protectionism' 76–77. See also Engblom, 'Reconciling Openness and High Labour Standards?.'

¹¹⁵ Engblom, 'Reconciling Openness and High Labour Standards?.'

¹¹⁶ Petra Herzfeld Olsson, 'Empowering Temporary Labour Migrants in Sweden: A Call for Unequal Treatment', ch 9 in this volume.

¹¹⁷ See, eg Ruhs and Anderson (eds), *Who Needs Migrant Workers?* (n 28); Andrew Geddes and Sam Scott, 'UK Food Businesses' Reliance on Low-Wage Migrant Labour: A Case of Choice or Constraint?' in Ruhs and Anderson (eds), *Who Needs Migrant Workers?*; Valeria Ottonelli and Tiziana Torres, 'Inclusivist Egalitarian Liberalism and Temporary Migration: A Dilemma' (2012) 20 *Journal of Political Philosophy* 202.

for the configuration of national populations as well as the workings of labour markets.

A key reason for temporary migrant workers' vulnerability in receiving states is their temporary status. In assessing the inadequacy of the UN Migrant Workers Convention, Catherine Dauvergne and Sarah Marsden observe that the convention may simply incorporate the logic that is inherent in the concept of temporariness.¹¹⁸ In their view, while rights talk might improve some of the conditions of temporary migrant workers, it also masks the fundamental inequality at issue in temporary labour migration. Without erasing the subordination that arises from the right of the state to exclude that is implicit in 'temporariness', it is too easy (Dauvergne argues) to fall back on assertions that temporary migrant workers should have fewer rights than others. On this view, the basic inequality that needs remedying first is that which is inherent in the 'temporary' status. For many scholars, there is an ethical limit to temporary labour migration programmes and the exclusion of migrants from full membership of the community in which they work.¹¹⁹ In his contribution to this collection, Alexander Reilly argues in favour of giving temporary migrant workers rights to residency, membership and ultimately citizenship of the receiving state.¹²⁰ In his view, the essence of citizenship is to focus on the real connections between persons and states that can be created through temporary migrant workers' longstanding contribution through the labour market to the host country. Along with Ruhs' contribution to this collection, Reilly's chapter builds upon existing scholarship to develop a template for temporary labour migration that seeks to realise the dignity of migrant workers without necessarily tampering with employer demand, which has traditionally been a key ordering principle of temporary labour migration programmes worldwide.

Nonetheless, receiving states' migration laws tend to prioritise national sovereignty, which the international regulatory framework has found difficult to erode. The admitted inadequacy of existing international law to respond to the issues relating to migrant workers has led more recently to the 'soft law' approach that is embodied in the Multilateral Framework on Labour Migration of 2006 developed under the auspices of the ILO.¹²¹ Under it, the role of international labour standards is to provide a framework for 'coherent, effective and fair' national policies. The framework is

¹¹⁸ Dauvergne and Marsden, 'The Ideology of Temporary Labour Migration' (n 53).

¹¹⁹ See, eg Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (New York, Basic Books, 1983) ch 2; Reilly, 'The Ethics of Seasonal Labour Migration' (n 73).

¹²⁰ Reilly, 'The Membership of Migrant Workers', ch 13 in this volume.

¹²¹ ILO, *Multilateral Framework on Migration: Non-binding Principles and Guidelines for a Rights Based Approach to Labour Migration* (Geneva, ILO, 2006).

presented as a non-binding guidance, intended for adoption at national, regional and international levels, and also proffers a collection of principles and best practice examples. While in some respects reaching further than international instruments in the embrace of principles of equality, the framework ultimately falls back on the recognition of national sovereignty in the formulation of migration policy. In this sense, it stands as evidence that, as Catherine Dauvergne has argued, ‘in contemporary globalizing times, migration laws and their enforcement are increasingly understood as the last bastion of sovereignty’.¹²²

The prospects for this framework contributing to a successful resolution of the major issues relating to migrant workers have been questioned, perhaps unsurprisingly, by scholars such as Leah Vosko.¹²³ Vosko goes further to argue that there is an irreconcilable tension between the recognition of the sovereignty of nation-states to determine immigration policy and the rights and principles of international law. The multilateral framework is thus, from her perspective, merely another phase in the use of citizenship concepts to classify migrants into various tiers, each qualifying for different levels of rights, and one in which the rights of temporary migrant workers remain diminished.¹²⁴ In her view, the only real solution is to develop alternative membership norms embracing the entire global labour market. In contrast to this approach, Brian Langille has suggested, more generally, that the quest for a ‘Geneva consensus’ in response to global issues may be as flawed as any other version of consensus (in particular, he refers to the ‘Washington consensus’ regarding deregulation and the primacy of the free market). For Langille, even if ‘the golden age (roughly 1978–2008) of “de-regulatory capture” is over’, debate must remain around whether any single approach can advance labour rights in the new global era more effectively than a more diversified ‘bottom-up’ approach.¹²⁵

¹²² Dauvergne, *Making People Illegal* (n 23) 2. See also Catherine Dauvergne, ‘Sovereignty, Migration and the Rule of Law in Global Times’ (2004) 67 *Modern Law Review* 588.

¹²³ See especially Vosko, ‘Out of the Shadows?’ (n 102).

¹²⁴ Vosko identifies four phases of approaches to migration: the earliest phase (pre-1945), when only citizen workers were given full rights; the period pre-1990, when there was preferential treatment for citizens and permanent residents; recognition of an expanded range of categories, and treatment differentiated in relation to them, including temporary and permanent migrants were distinguished; beyond 1990, when some of these distinctions were abolished but continued to enable states to limit temporary migrants’ free choice of work and other work conditions. See also Leah Vosko, *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Work* (Oxford, Oxford University Press, 2010).

¹²⁵ Brian Langille, ‘Imaging Post “Geneva Consensus” Labour Law for “Post Washington Consensus” Development’ (2009) 31 *Comparative Labor and Policy Law Journal* 523, 523. For a robust refutation of Langille’s argument see Anne Trebilcock, ‘Putting the Record Straight about International Labor Standard Setting’ (2009) 31 *Comparative Labor and Policy Law Journal* 553.

VII. THE GLOBAL CHALLENGE OF TEMPORARY LABOUR
MIGRATION: REGULATORY RESPONSES AND POSSIBILITIES

Despite the apparent consensus around an equality and rights-based approach, at the international level there is also a clear recognition that there remains a regulatory gap in relation to temporary migrant labour. In advocating a ‘fair migration agenda’, the Director-General of the ILO has indicated that it is ‘essential to identify those elements that must be built into the design of the [temporary labour migration] schemes to ensure they meet basic considerations of fair treatment’.¹²⁶ The unfair and disadvantageous situation in which temporary migrant workers often find themselves remains a key challenge. In many instances, the very parameters of temporary labour migration schemes may, by definition, hinder equal treatment. The temporary nature of the schemes and specified restrictions on temporary migrants, such as in relation to either the labour market (their employer or industrial sector) or geographic mobility,¹²⁷ wages or savings, limitations on the capacity to access other schemes or family reunion, the absence of access to social protection or other non-employment related restriction have all been identified as problematic.¹²⁸ Even the concept of equality of treatment, often perceived to require a comparator, can prove particularly problematic in the face of, for example, labour market segmentation and segregation.¹²⁹ Indeed, in light of the restrictions that define the status of very many temporary migrant workers, some critics argue that in reality they are controlled through ‘contracts of indenture’.¹³⁰

Historically, the legitimacy of law and legal systems has often been portrayed as based on objectivity, as well as independence and (above all) autonomy and distinctiveness from social, economic and political systems.¹³¹ For many lawyers, implicit in a rights-based approach is the idea

¹²⁶ ILO, *Fair Migration* (n 68) 77.

¹²⁷ The binding of temporary labour migrants to individual employers, industrial sectors or a geographic area is very common. See, eg, Israel where binding to individual employers was declared unconstitutional in 2006, only to be replaced by sectoral binding in 2011. See Hila Shamir, ‘A Labor Paradigm for Human Trafficking’ (2012) 60 *UCLA Law Review* 76, 121.

¹²⁸ See Martin Ruhs, *Temporary Foreign Worker Programs: Policies, Adverse Consequences and the Need to Make Them Work* Perspectives on Labour Migration 6 (Geneva, International Labour Office, 2003) 8–9. See also ILO, *The Future of ILO Activities in the Field of Migration* (Geneva, ILO, 1997) identifying many of the problems with time-bound migration and problems with recruiting agencies.

¹²⁹ See ILO, *Fair Migration* (n 68) 78. See generally Mark Freedland, ‘The Segmentation of Workers’ Rights and the Legal Analysis of Personal Work Relations: Defining a Problem’ (2015) 36 *Comparative Labor Law and Policy Journal* 241.

¹³⁰ Rosewarne, ‘Globalisation and the Commodification of Labour’ (n 53).

¹³¹ Supporters of neo-liberalism also portrayed a close, natural alliance between globalisation, de-regulation and privatisation, and the primacy of an economic perspective, and facilitated the view that labour standards were inefficient interventions distorting the natural contractual relationships of the marketplace. See Rosemary Owens, Joellen Riley and

that rights trump other interests: in a profound sense, rights are not fungible. Despite this, for others including notable economists, the regulatory challenges posed by temporary labour migration programmes can be overcome. In his chapter in this collection, Martin Ruhs calls for a reframing of the human rights–based approach to migration by developing a universal set of core rights applicable to all migrant workers, whilst explicitly permitting temporary restrictions of a few specific rights.¹³² Ruhs’ chapter responds to criticisms that his approach violates important international human rights principles and norms, suggesting instead that his core rights approach would have the benefit of stimulating the ‘further liberalization of international labour migration’, thereby increasing access to temporary labour migration to more people from countries of origin.¹³³ Paul Collier also believes in the transformative possibilities of temporary labour migration. He proposes a policy package for host countries that includes a ceiling for the gross level of migration; selectivity based on a number of criteria; and integration initiatives to enable migrants to be absorbed well into the economy and society of the host country.¹³⁴ It is not only the economists who regard migration as capable of being regulated and managed to improve the situation of all the individual, private/business and public/state actors involved. However, there are still a number of legal challenges involved at the interface of migration and work, especially temporary migration and work, which have seldom been examined in a sustained way.¹³⁵

There are many possible layers of explanation for this. In part, no doubt, this is because so many regulatory arenas—including migration law, labour law, trade law, human rights, development law, refugee and asylum law, criminal law and national security law, to name but a few—are involved. Examining the intersections between multiple fields of regulation is complex, and yet essential to understanding the construction of labour markets

Jill Murray, *The Law of Work*, 2nd edn (Oxford, Oxford University Press, 2011) 46ff. Simon Deakin’s work, and that of other scholars, has been particularly important in providing the empirical evidence debunking these ideas. See, eg Simon Deakin, ‘The Evidence-Based Case for Labour Regulation’ in Sangheon Lee and Deidre McCann (eds), *Regulating for Decent Work: New Directions in Labour Market Regulation* (Geneva, Palgrave Macmillan/ILO, 2011). See also Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford, Oxford University Press, 2005).

¹³² Ruhs, ‘Protecting the Rights of Temporary Migrant Workers’, ch 14 in this volume. See also Ruhs, *The Price of Rights* (n 12) 196.

¹³³ Ruhs, ‘Protecting the Rights of Temporary Migrant Workers’, ch 14 in this volume.

¹³⁴ Collier, *Exodus* (n 56) 255–65.

¹³⁵ See Costello and Freedland (eds), *Migrants at Work* (n 7). See also the special edition on ‘Migrant Workers’ in (2009) 31 *Comparative Labor Law and Policy Journal*; Berg, *Migrant Rights at Work* (n 84). Although each of these contains groundbreaking recent work on the intersection of labour law and migration, none provides a sustained and singular focus on temporary labour migration.

as well as the nature of work relationships and the ways in which legal, political, social, economic and cultural contexts give them shape and meaning, and in turn are shaped by them.¹³⁶ This is no less so for those involving temporary labour migration.

Nor is this to deny contestation over the significance of, or the priorities within, these intersections. In tackling trafficking, which has become a significant source of temporary labour migration in many countries, for example, Hila Shamir has argued that utilising a human rights approach, while responding to its gendered elements, is not effective at dealing with the issues of economic exploitation.¹³⁷ A labour law approach, according to Shamir, would be a more constructive approach by attending to the structure of labour markets and facilitating a greater focus on preventing criminalisation and deportation, eliminating binding arrangements, reducing recruitment fees and the power of intermediaries, guaranteeing the right to unionise, and extending and enforcing the application of labour and employment laws to all vulnerable workers. Likewise, Costello has also argued that separating labour law from migration law is the only sure way to deal with the problem of forced labour.¹³⁸

Further complications arise from the separate challenges and transformative possibilities opened up by globalisation in each of the regulatory fields. To take the example of labour law,¹³⁹ under pressures arising in the context of globalisation, the subjects of labour law have been redefined, not least through the production of precarious work, which has become normalised as the old industrial model of the male breadwinner has broken down irretrievably under the incessant demand for flexibility to meet the reduced production time frames of the market.¹⁴⁰ The challenges to the regulation of work posed through fragmentation, informalisation and commercialisation, amongst others, are also redefining the boundaries of the discipline.¹⁴¹ The transformation of the firm through 'vertical disintegration',¹⁴² the capacity

¹³⁶ See Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution, and Regulation of Labour Markets and Work Relationships* (Sydney, Federation Press, 2006).

¹³⁷ Shamir, 'A Labor Paradigm for Human Trafficking' (n 127).

¹³⁸ Cathryn Costello, 'Migrants and Forced Labour: A Labour Law Response' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Oxford, Hart Publishing, 2015).

¹³⁹ See, eg Joanne Conaghan, Richard Michael Fischl and Karl Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford, Oxford University Press, 2002); John DR Craig and S Michael Lynk (eds), *Globalization and the Future of Labour Law* (Cambridge, Cambridge University Press, 2006).

¹⁴⁰ See, eg Fudge and Owens, *Precarious Work* (n 24); Guy Standing, *The Precariat: The New Dangerous Class* (London, Bloomsbury Academic, 2011).

¹⁴¹ See Judy Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Oxford, Hart Publishing, 2012).

¹⁴² See Hugh Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies* 353.

of the corporation to operate through a network of independent but related entities, and the disaggregation of the modes of production through the formation of global supply chains have all provided further challenges to legal and regulatory systems in identifying employing businesses and responding to the demands of globalisation.¹⁴³ The reconfiguration of the divide between, and the acknowledged interdependency of, the public and private spheres, both work–family and market–state, have further produced and complicated the regulatory challenges for labour law.¹⁴⁴ The significance for temporary labour migration of these challenges to labour law are patent. Temporary migrant workers are amongst some of the most precarious.¹⁴⁵ It is in this global context, for instance, that standards for the regulation of domestic labour, which is frequently performed by temporary migrant workers and has traditionally often been excluded from labour law in many countries, were addressed with a growing sense of urgency by the ILO.¹⁴⁶ In virtually all sectors, the regulatory challenges associated with the precariousness of temporary migrant labour operate at every level from recruitment, often as part of complex global labour supply chains, through to the exercise of rights, including freedom of association and collective bargaining rights, and their enforcement.¹⁴⁷ Philip Martin’s chapter in this collection provides a means to address the regulatory issues arising in the recruitment stage by minimising the costs borne by workers themselves. His chapter draws upon the situation of migrant workers from Korea, Kuwait and Spain and he proposes a cooperative framework between governments from sending and receiving countries. In Martin’s view, ‘worker-paid migration or recruitment costs are the new frontier in

¹⁴³ On the problems of regulating supply chains see Mark Anner, Jennifer Blair and Jeremy Blasi, ‘Towards Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks’ (2013) 35 *Comparative Labor Law and Policy Journal* 1; Gordon, *Global Labour Recruitment* (n 87). On the problems of identifying the employer see Jeremias Prassl, *The Concept of the Employer* (Oxford, Oxford University Press, 2015).

¹⁴⁴ See eg Joanne Conaghan and Kerry Rittich (eds), *Labour Law, Work and Family* (Oxford, Oxford University Press, 2005).

¹⁴⁵ See eg Nicola Kountouris, ‘The Legal Determinants of Precarious Work in Personal Work Relations: A European Perspective’ (2012) 34 *Comparative Labor Law and Policy Journal* 21, identifying immigrant status as a key determinant of precariousness.

¹⁴⁶ See ILO Convention Concerning Decent Work for Domestic Workers (No 189) adopted 2011. See also Adelle Blackett, ‘The Decent Work for Domestic Workers Convention and Recommendation, 2011’ (2012) 106(4) *American Journal of International Law* 778.

¹⁴⁷ On the regulation of global supply chains and temporary migrant labour, see Gordon, *Global Labour Recruitment* (n 87); and on efforts to gain meaningful access to collective bargaining rights, see Leah F Vosko, ‘Tenuously Unionised: Temporary Migrant Workers and the Limits of Formal Mechanisms Designed to Promote Collective Bargaining in British Columbia’ (2014) 43 *Industrial Law Journal* 451; Leah F Vosko, ‘National Sovereignty and Transnational Labour: The Case of Mexican Seasonal Agricultural Workers in British Columbia, Canada’ (2013) 44 *Industrial Relations Journal* 514.

making the international labour migration system more efficient and protective of migrant workers'.¹⁴⁸

Philip Martin's elucidation goes beyond labour law in finding a solution to the challenge of workers' costs in the temporary labour migration phenomenon, exemplifying how in this context the global deregulatory agenda has challenged the capacity of labour law to fulfil its 'traditional' purposes and in the process also redefined or re-ordered them.¹⁴⁹ Certainly in recent times the protective and redistributive roles of labour law have been augmented even more sharply by goals avowedly aimed at enhancing the capacity of labour markets to meet the demands for flexibility and productivity from the global marketplace. Modifications and adaptations of both have witnessed an emphasis, for instance, on concepts such as the development of human capabilities, maximising the opportunities to develop 'human capital' and ensuring its deployment in ways that not only fulfil individual goals but at the same time enhance the general social welfare.¹⁵⁰ Still others have focused on the role of labour law in correcting market failures.¹⁵¹ In addition, the idea that, conceptually, labour law can be treated as an autonomous field of study is being simultaneously defended and also steadily dismantled in recognition of the increasing significance of the intersections with other areas of law and their transformative possibilities.¹⁵²

An examination of the regulatory challenges invites not only a consideration of the complex array of purposes driving the formulation of law and policy in the global era, but also an examination of its nature and operation. Of all the disciplines, law, based as it is on assumptions related to the existence, structure and power of the nation-state, has stood to be most profoundly disrupted by globalisation.¹⁵³ Despite this and for all their inadequacies the legal systems of nation-states have also proved remarkably resilient in the face of globalisation, perhaps nowhere more so than in the area of migration. Nonetheless, as the distribution of economic and

¹⁴⁸ Martin, 'Reducing Worker-Paid Migration Costs', ch 17 in this volume.

¹⁴⁹ For a discussion of the multiple purposes of labour law and their ordering, see the essays in Davidov and Langille (eds), *Boundaries and Frontiers of Labour Law* (n 59). See also Fudge and Owens (eds), *Precarious Work* (n 24); Davidov and Langille (eds), *The Idea of Labour Law* (n 52).

¹⁵⁰ See, eg Amartya Sen, *Development as Freedom* (New York, Anchor, 1999); Amartya Sen, *Rationality and Freedom* (Cambridge, MA, Belknap Press, 2002). See also Brian Langille, 'Labour Law's Back Pages' in Davidov and Langille (eds), *Boundaries and Frontiers of Labour Law*.

¹⁵¹ See Alan Hyde, 'What is Labour Law?' in Davidov and Langille (eds), *Boundaries and Frontiers of Labour Law* (n 59).

¹⁵² See various contributors to Bogg et al (eds), *The Autonomy of Labour Law* (n 138), especially Jeremy Prassl and Cathryn Costello.

¹⁵³ See Rosemary Owens, 'The Future of the Law of Work: A Review Essay of Labour Law in the Era of Globalization: Transformative Practices and Possibilities' (2002) 23 *Adelaide Law Review* 245, 247; William Twining, *Globalization and Legal Theory* (Cambridge, Cambridge University Press, 2000).

political power has been reconfigured, contest over the optimal level of regulation and its institutional locus (international, regional, nation-state, industry, trade union, non-government organisation, firm or enterprise, or individual), as well as its nature and mechanisms (whether public or private, imposed or voluntary, and hence its democratic legitimacy) has become more intense.¹⁵⁴

Under the pressures and effects of globalisation, the structure of the regulatory landscape has thus been transformed.¹⁵⁵ Importantly, it continues to change and develop. This is so, not only within national legal and regulatory systems, but also at the global level. As the dynamics of political debates about the impacts of globalisation have changed and developed, so too have the arguments about the legitimacy and role of regulation in the new global order. However, even if it is generally conceded that the ‘golden age of de-regulatory capture’¹⁵⁶ has begun to wane, neither the perimeter and topography of the ‘new regulatory plateau’ supported by international institutions such as the World Bank are yet to be clearly defined, nor their regulatory interactions with other international agencies such as the ILO clearly delineated.¹⁵⁷

Scholars have devoted much time and attention to addressing the promise of regulatory theory in the global era, in spite of the many pitfalls that remain apparent. With the benefit of hindsight, it is obvious that early ideas on ‘responsive regulation’ in the global context were always overoptimistic. ‘Responsive regulation’, it was said, only required the state to intervene when the private players, who would exercise primary regulatory responsibility, failed to act effectively, thus assuming a strong sharing, if not identity, of interests and goals amongst the state, and the various players and stakeholders.¹⁵⁸ The development of various private transnational labour regulatory mechanisms aimed at supplementing the deficits of traditional public regulation (whether at the international level, in the home countries of multinational corporations or in developing countries) through ‘self-regulation’ remains under active scholarly consideration.¹⁵⁹

¹⁵⁴ See, eg Brian Bercusson and Cynthia Estlund, *Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions* (Oxford, Hart, 2008).

¹⁵⁵ For an overview of the changes at the global level See Owens et al, *The Law of Work* (n 131) 46–92.

¹⁵⁶ Langille, ‘Imaging Post “Geneva Consensus” Labour Law’ (n 125) 523. An important element in escaping from ‘deregulatory capture’ has been the evidence that regulating labour standards might in fact improve economic outcomes. See, eg Deakin, ‘The Evidence-Based Case for Labour Regulation’ (n 131).

¹⁵⁷ See Deidre McCann, ‘Labour Law on the Plateau: Towards Regulatory Policy for Endogenous Norms’ in Bogg et al (eds), *The Autonomy of Labour Law* (n 138).

¹⁵⁸ See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford, Oxford University Press, 1995). See also John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge, Cambridge University Press, 2000).

¹⁵⁹ See, eg, Ralf Rogowski, *Reflexive Labour Law in the World Society* (Cheltenham, UK, Edward Elgar, 2013); Kevin Kolben, ‘Transnational Labour Regulation and the Limits of

Regulatory theory recognises the importance of the contributions made by a wide range of systematic attempts by both private and public actors to influence behaviour for certain goals and outcomes.¹⁶⁰ While it is well recognised that legal regulation plays an important role in the construction, constitution and maintenance of labour markets generally,¹⁶¹ to date the insights of regulatory theory have not been applied in a systematic way to temporary labour migration. Regulatory theory also invites a greater emphasis on exploring the wide range of regulatory instruments or mechanisms that can be used to respond to work arrangements in the global era.

Three chapters in this collection explore the regulatory possibilities in responding to the precarious position of temporary migrant workers and the difficulty these workers face in accessing legal remedies. Two chapters explore the role of unions and other non-government actors in regulating the supply chain and improving the wages, working conditions and job security of temporary migrant workers. In her chapter in this collection, Jennifer Gordon draws upon the benefits accruing from union organisation of Mexican farm workers employed by US growers to illustrate how job security and improved wages and conditions can be achieved.¹⁶² This system permits migrant workers to voice violations of their rights during the season without fear of recrimination, dismissal or not being hired during the following year. In his chapter, James Brudney explores other regulatory responses to assess the precarious work status of temporary migrants.¹⁶³ Brudney refers to the success of the Coalition of Immokalee Workers (CIW) in developing bilateral agreements with major brands in the corporate food industry, a worker-driven code of conduct reinforced by effective complaint resolution and a comprehensive auditing structure which is enforced through market consequences. In terms of the latter, growers must comply with the code and pass the auditing process or they lose their ability to sell their tomatoes to buyers who have signed bilateral agreements with the CIW. What is striking about both Brudney's and Gordon's chapters is the use of a joint stakeholder method to develop a mutually agreed regulatory framework, albeit a highly resource-intensive one, to address the challenges presented by employer reliance on temporary migrant workers.

Governance' (2011) 12 *Theoretical Inquiries in Law* 403; Kevin Kolben, 'Dialogic Labor Regulation in the Global Supply Chain' (2015) 36(3) *Michigan Journal of International Law* 425.

¹⁶⁰ See, eg, Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-regulatory World' (2001) 54 *Current Legal Problems* 103.

¹⁶¹ See Arup et al (eds), *Labour Law and Labour Market Regulation* (n 136).

¹⁶² Jennifer Gordon, 'Roles for Workers and Unions in Regulating Labour Recruitment in Mexico', ch 15 in this volume.

¹⁶³ James Brudney, 'Decent Labour Standard in Corporate Supply Chains: The Immokalee Workers Model', ch 16 in this volume.

Beyond industry or site-specific solutions, Rosemary Owens' chapter examines the possibilities and challenges arising from the use of labour inspectorates to enforce migrant workers' rights.¹⁶⁴ Her chapter critically examines the use of Australia's Fair Work Ombudsman (FWO) to ensure temporary migrant workers are employed in compliance with Australia's labour laws. Australia's use of a labour inspectorate is distinctive when compared with some of the other regulatory approaches in this collection where governments have preferred to use the criminal law or migration law to address issues of worker exploitation. Although Owens identifies the enforcement challenges of the FWO's work, in particular resourcing, Australia's geography, information-gathering capabilities and the difficulties involved in using different enforcement mechanisms such as litigation or enforceable undertakings, her chapter develops the possibilities of this regulatory approach which chooses to focus on varying degrees of exploitation, rather than just the most extreme cases where a trafficking situation or similar is involved.

At the global level, there have been calls for greater development of regulatory frameworks to achieve more effective international governance of both the usual types of temporary worker programmes, as well as the growing demand for trade in services. Livi-Bacci observes that, whilst there is a powerful international body (the WTO) to promote and regulate the liberalisation of trade in commerce, no such organisation exists to manage migration.¹⁶⁵ The creation of a Global Commission on Migration and Development by UN Secretary General Kofi Annan in 2003 has not made significant inroads into creating a regulatory framework. Its proposal of an International Global Migration Facility to co-ordinate and integrate policy planning in this area has not been realised in the ensuing decade.¹⁶⁶ Nor has any progress been made on the more ambitious goal identified by the Commission in 2006: 'to bring together the disparate migration-related functions of existing UN and other agencies within a single organisation and to respond to the new and complex realities of international migration'.¹⁶⁷ Similarly, at the scholarly level, there is debate as to how international governance of migration would best be achieved, with Jagdish Bhagwati's proposal for a World Migration Organization contested by others such as Philip Martin and Susan Martin, who identify the drawbacks of a top-down

¹⁶⁴ Rosemary Owens, 'Temporary Labour Migration and Workplace Rights in Australia: Is Effective Enforcement Possible?', ch 18 in this volume.

¹⁶⁵ Livi-Bacci, *A Short History of Migration* (n 4) 121.

¹⁶⁶ Global Commission on International Migration, *Migration in an Interconnected World* 77.

¹⁶⁷ *Ibid* 75.

approach to regulation of international migration.¹⁶⁸ The latter distinguish between the liberalisation of trade in goods, which is said to benefit all countries, and the liberalisation of trade in services where there is disagreement as to whether this inexorably and inevitably produces greater national and global economic growth for both sending and receiving countries.¹⁶⁹ As we noted above, while the ILO has assumed a significant role in setting an agenda for achieving decent work for migrant workers, it acknowledges that much remains to be done.

In summary, temporary labour migration in the global era continues to present a wide range of regulatory challenges at the international, regional and national levels as well as for other players such as global business, trade unions and non-government organisations. This collection of essays is offered, as we stated at the outset, as a contribution to the further development of the conversation about these issues, especially in thinking about whether temporary labour migration can be ethically, equitably and efficaciously achieved and so deliver decent work to workers.

¹⁶⁸ Jagdish Bhagwati, 'Borders Beyond Control' (2003) 82(1) *Foreign Affairs* 104; Philip Martin and Susan Martin, 'Global Commission on International Migration: A New Global Migration Facility' (2006) 44(1) *International Migration* 5, 11. See also Kathleen Newland, *The Governance of International Migration: Mechanisms, Processes and Institutions* (Geneva, Global Commission on International Migration, 2005) 11, 17.

¹⁶⁹ Martin and Martin, 'Global Commission on International Migration', *ibid.*