

Working Paper No 2015/02 | January 2015

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Research for this paper was funded by the Swiss National Science Foundation under a grant to the National Centre of Competence in Research on Trade Regulation, based at the World Trade Institute of the University of Bern, Switzerland.

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Flavia Jurje and Sandra Lavenex

## Abstract

This paper analyses the labour mobility reforms developed by the Association of Southeast Asian Nations (ASEAN) in particular for the envisaged 2015 ASEAN Economic Community (AEC). The Community Blueprint foresees the achievement of a free movement regime for skilled labour, mobility of selected categories of people associated mainly with trade in services and investment. Labour migration policies for other types of workers are not part of the regional integration framework. The agenda on services trade mobility, institutionalized at the multilateral level by the 1995 WTO General Agreement on Trade in Services under the so-called ‘mode 4’ temporary movement of service providers, has taken shape in other regions of the world as well. For instance, in North America (NAFTA), Europe (EU), or South America (MERCOSUR), services-related mobility provisions have coupled with other, more comprehensive, regional policies to migration (e.g. free movement of people in the EU, residence and work rights for all citizens of MERCOSUR and associated countries, etc.). Assessing the current context on labour migration within ASEAN and drawing on mobility models employed by other regional units, the study discusses the prospects for deeper labour market cooperation in Southeast Asia.

## Introduction

The ASEAN Economic Community (AEC) shall be the goal of regional economic integration by 2015, as stated by the heads of the ASEAN governments back in 2007 at the 13<sup>th</sup> Singapore Summit. To this end, the AEC envisages to transform ASEAN into a region with “free movement of goods, services, investment, *skilled labour*<sup>2</sup>, and freer flow of capital” (AEC Blueprint 2008: 5). While setting the goals for the 2015 single market, the AEC Blueprint underlines the need for “the movement of business persons, skilled labour and talents”, as a key element for achieving greater economic integration in the region. This paper assesses the labour market reforms undertaken by ASEAN, drawing on mobility liberalization experiences developed by other regional integration units, such as the EU,

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<sup>1</sup> This paper was written in the context of a larger research project on the trade and migration nexus within the National Centre for Competence in Research “NCCR Trade Regulation” (see: <http://www.nccr-trade.org/phase-3/wp4-1/412-1/>). Funding by the Swiss National Science Foundation is gratefully acknowledged. An earlier version of this paper was presented at the Academic Conference “Towards ASEAN Economic Community (AEC) 2015: Progress & Prospects” 14-15 October 2014, UPH Executive Education Center, Jakarta.

<sup>2</sup> Emphasized by the authors.

NAFTA, and MERCOSUR. In all these regional integration units, states have committed to more comprehensive migration policies: in the case of the EU and MERCOSUR, the agenda on trade-related mobility represents only one component of much more encompassing free movement regimes, while within NAFTA the mobility provisions exceed the GATS mode 4 template, by for example expanding the categories of people entitled to move, covering more sectors, introducing a special visa (i.e. Treaty NAFTA - TN-visa, for professionals entering the US), etc. Comparing these various regimes would shed light on the importance of the trade-mobility interlink for the development of regional migration policies, but also reveal potential policy shortcomings of focusing solely on trade-related mobility for managing the movement of people within a future economic community. The analysis is based on primary data collected through semi-structured interviews with key stakeholders from the ASEAN region, EU, NAFTA, and MERCOSUR, as well as coded mobility-related provisions included in relevant documents and trade agreements concluded by the selected regions. The coding scheme draws on previous efforts by Jurje and Lavenex (2014).

In the following, the paper presents the regional mobility models devised by ASEAN, EU, NAFTA, and MERCOSUR respectively. It elaborates on both opportunities and constraints encountered in liberalizing the movement of natural persons at the regional level. The study concludes with addressing further policy alternatives for the ongoing labour mobility reforms initiated by the Southeast Asian states.

### **Labour mobility within ASEAN**

Mobility of service providers within the Southeast Asian region was not part of the original Declaration, however it has become an important aspect of regional economic integration with the adoption of the 1995 ASEAN Framework Agreement on Services (AFAS) and then later with the initiative to conclude an agreement on Movement of Natural Persons (MNP). Mobility of skilled labor within ASEAN is also promoted through the so-called Mutual Recognition Arrangements (MRAs) of professional services. Finally, the goal to achieve the free flow of skilled labour and professionals within the forthcoming 2015 ASEAN Economic Community has brought along a series of reforms envisaged to enable member states to meet these liberalization targets. In addition, Aspects related to migrant workers' rights are covered in a regional Declaration signed by ASEAN leaders in 2007.

The developments related to ASEAN labour mobility framework are detailed below.

### *ASEAN Framework Agreement on Services*

Members agreed that “there shall be a freer flow of capital, skilled labor and professionals among Member States” (AFAS art.4 (e)). This agenda has evolved relatively at the same time with the WTO GATS mobility developments. The flow of skilled labour and professionals related to trade in services is associated with the so-called “mode 4” mobility of natural persons, one out of the four modes of cross boarder services supply, as defined by the 1995 WTO/GATS agreement.

The objective of the movement of natural persons was sought to expanding trade in services and deepening economic integration. So far, ASEAN members have negotiated eight packages of commitments within the AFAS framework, laying down Mode 4 conditions for market access and national treatment under the horizontal commitments (see details below). Moreover, the schedules of specific commitments and MFN exemptions lists contain provisions taken by individual countries in specific sectors, for certain categories of service providers (e.g. Singapore’s MFN exceptions allow the presence of unskilled/semi-skilled natural persons that come from traditional sources of supply<sup>3</sup>, measures under periodical domestic policy review; Indonesia reserves low level occupations/semi-skilled jobs to Indonesians, with limited exceptions for citizens from Malaysia, Singapore, Brunei Darussalam, Papua New Guinea and Australia). Despite these several rounds of services negotiations and commitments packages signed, ASEAN members have not moved much beyond the initial WTO/GATS outcome. In particular, commitments on mode 4 are mainly linked to investment and business flows, and seen as only facilitating the movement of professionals, managers, and qualified staff under the intra-corporate transferee category (Nikomborirak and Supunnadee 2013, ILO/ADB 2014). Recent developments have sought to include all mobility-related commitments in a separate binding document – the Agreement on Movement of Natural Persons – that would supersede all mode 4 provisions codified previously in AFAS.

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<sup>3</sup> The countries to which these measures apply are not specified in Singapore’s List of MFN Exceptions (under the 8th Package of Commitments under ASEAN Framework Agreement on Services).

### *Agreement on Movement of Natural Persons*

The MNP was signed by ASEAN states in 2012, however implementation varies considerably across ASEAN Members<sup>4</sup>. Besides incorporating all mode 4 commitments initially part of AFAS, it also aims to further facilitate the movement of natural persons engaged in trade in goods, services and investment through streamlined immigration procedures for the temporary entry and stay of those persons. The commitments on mobility inscribed initially in AFAS and then MNP remain nevertheless limited, similar to the ones agreed by the ASEAN Members in GATS. More specifically, the categories of service providers for which horizontal commitments have been made cover mainly Intra-Corporate Transferees (ICTs) (duration of stay between 2 up to 5/8 years) and Business Visitors (BVs) (allowed for 30 up to 90 days, and 120 days in Indonesia). Only Vietnam exceeds this focus on skilled, trade-related professionals in the MNP Agreement by allowing for the mobility of Contractual Service Suppliers (CSSs) (for a limited stay of maximum 90 days and subject to education and experience requirements), recently joined by Cambodia. In most of the cases, domestic immigration procedures, numerical quotas, Economic Needs Tests (ENT)/labour market tests apply, together with pre-employment requirements (health clearances, security clearances, and personal and professional references) and technological transfer conditions. Furthermore, the Indonesian government is requesting a so-called ‘compensation fee’ of USD 100/month per expatriate employee to offset the costs of training Indonesians (Interview 7). Some of these measures, e.g. technological transfer or compensation fees for investing in domestic education, are justified as part of broader developing policies employed by those countries.

### *Mutual Recognition Arrangements*

ASEAN members have also engaged in developing several Mutual Recognition Arrangements (MRAs), seen as another important step towards greater mobility and regional integration. These were intended to facilitate trade in services by mutual recognition of authorisation, licensing, or certification of professional service suppliers, however taking into account “domestic regulations and market demand conditions” (ASEAN Integration in Services 2009). Discussions about harmonization of professional services have evolved in

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<sup>4</sup> Indonesia, Philippines, and Lao PDR for example are still to ratify the agreement domestically (Interviews 5, 6).

eight sectors, covering engineering, accountancy, architecture, surveying, nursing, dental and medical practitioners, and tourism. Nevertheless, implementation of these MRAs is still work in progress, with levels of implementation varying considerably across the different professions and depending mostly on the national regulatory capacities. Notably, for professions like engineering and architecture, regional bodies, in the form of Chartered Professional Coordinating Committees, have been designed to develop and monitor mutually acceptable standards and criteria for facilitating practice of the respective professions within ASEAN states. Only these two professions stipulate eligibility of a so-called ASEAN Chartered Professional Engineer or ASEAN Architect. However, to obtain the standard certification, the applicant must hold a professional license issued by the regulatory body in the home country, which will then be reviewed by the ASEAN Chartered Professional Engineers Coordinating Committee or the ASEAN Architect Council. If the application is approved, a professional is allowed to work as “Registered Foreign Professional Engineer” in another ASEAN country, nevertheless subject to domestic rules and regulation. Nationality/citizenship requirements could thus constitute barriers to the movement of professionals within the region. Hence, a MRA does not equate automatic recognition and does not imply free movement of professionals in the ASEAN region (Interview 5). For the rest of professions, the MRAs in place only lay down the principles and framework for negotiating the recognition and mobility conditions for professionals on a bilateral or multilateral basis and remain subject to various national regulations. For instance, although the MRA for nursing provides in principle a great opportunity for nurses to practice in another country, language requirements could in fact raise serious barriers to mobility (e.g. for a Filipino nurse to practice in Thailand, the candidate must pass the national licensure exam in the Thai language).

Within the AEC 2015 vision, Members pledged for greater intra-regional mobility of professionals, efforts also supported by external partners. The program initiated by the Australian and New Zealand governments, the so-called “Regional Qualifications Reference Framework” represents such a project. The aim is to strengthen institutional capacities and support ASEAN states developing efficient policy instruments for accreditation and licensing of professionals. This is seen as a long term project (under the FTA/Economic Cooperation Work Program) on “Education, Training and Governance”, aiming to foster capacity building in the region and help ASEAN members constitute National Qualification Boards for all the relevant professions (Interviews 5, 6).

## *ASEAN Economic Community*

Back in 2003, ASEAN announced its intention to create a regional Community based upon three pillars: the ASEAN Economic Community (AEC), the ASEAN Security Community and the ASEAN Socio-Cultural Community. The AEC aims to achieve regional economic integration by 2015 and establish ASEAN as a single market, with a single production base that implies the free flow of the factors of production, including skilled labour and capital. This translates into a single market with new business and employment opportunities for some 600 million people, a region that experienced increasing economic performance since 2007, with an annual average growth of 5.1 per cent (see also ILO/ADB 2014). Also in 2007, the 13th ASEAN Summit adopted a comprehensive roadmap, the alleged ASEAN Economic Community Blueprint (AEC Blueprint), a systematic plan meant to guide the establishment of the 2015 AEC. Table 1 below summarizes the aspects related to migration cooperation at the regional level proposed by the members to be tackled within the AEC. However, this cooperation plan does not translate into immediate mandatory policies for the ASEAN states.

**Table 1: Labour mobility cooperation in AEC**

AEC Community	Labour-related actions in blueprints
<b>Political-security</b>	Strengthen criminal justice responses to trafficking in persons Protect victims of trafficking
<b>Economic</b>	Facilitate movement through issuance of visas and employment passes for business and skilled labour Recognition of professional qualifications Implement and develop new MRAs Human resources development in the area of services Core competencies and qualifications in priority services Strengthen labour market program capacities
<b>Socio-cultural</b>	Human resource development Promote decent work Protect and promote rights of migrant workers

Source: authors' compilation based on AEC Blueprint and other official documents.

As portrayed in the sections above, certain reforms for labour mobility have been initiated as part of the economic pillar. To this adds a call for greater cooperation among the ASEAN

University Network (AUN) institutions to increase mobility of students and academic staff. Cooperation under the socio-cultural pillar lead to the signing of the alleged Declaration on Migrants' Rights, however the implementation/domestic ratification phase in all these areas remains problematic (see below).

Relevant sectoral bodies, and in particular the ASEAN Economic Ministers, are to be accountable for the overall implementation of the Blueprint, while monitoring and review of the implementation progress was assigned to the ASEAN Secretariat. The latter basically consists of periodical progress reports prepared for the heads of the governments and other key stakeholders based on statistical indicators, non-tariff barriers database and the alleged AEC scorecard. The Enhanced Dispute Settlement Mechanism (DSM) would not apply to the AEC Blueprint, as Section III, Art. 72 of the document stipulates that its use is merely "recommended". The AFAS commitments are binding, however, if member countries do not translate their obligations specified in the AEC Blueprint into AFAS commitments, then the DSM cannot be invoked (Nikomborirak and Supunnavadee 2013). Thus, there is no applicable 'hard' sanctioning mechanism in case of non-compliance with the milestones set in the Blueprint, member states having full control over the speed of adoption and degree of implementation of the envisaged targets. Furthermore, the AEC allows for flexibility in meeting the agreed targets. The Blueprint states that there should be "pre-agreed flexibilities to accommodate the interests of all ASEAN Member Countries". This is mainly justified by the economic development gaps among the countries in the region, however, if not periodically monitored this might also give states a "pretext" for non-compliance (Nesadurai 2013).

The AEC scorecard uses aggregate data on progress, offering a rather general picture that overlooks considerable challenges in implementation across countries and specific sectors. Assessing what has been implemented so far on services-related mobility, openings within the region remain confined to highly skilled persons, associated with ICTs and BVs, and qualified professionals. Out of the 8 MRAs completed for occupations, only those for engineers and architects prescribe eligibility to apply for license in another Member State, which is coordinated through domestic regulatory bodies (Interviews 5, 6, see also Das et al 2013). Work is still needed to effectively operationalise the other professional MRAs (nursing, medical, dental, accountancy, surveying and tourism), negotiations that generally have been conducted bilaterally (Interview 3). Obstacles to implementation are associated with high differences across members in education systems and testing for professional



accreditation, nationality restrictions for certain professions and finally, languages and cultural barriers. The ASEAN Agreement on Movement of Natural Persons has been drafted in 2012, but national ratification/enforcement is lagging behind (i.e. Indonesia, Philippines, Lao PDR have not yet ratified the Agreement domestically).

### *Declaration on Migrants' Rights*

Aspects related to migrant workers' rights are covered in a regional Declaration signed by ASEAN leaders in 2007, which however has not yet been ratified domestically by the member states (Interviews 5, 6; see also LO/ADB 2014). The alleged "ASEAN Declaration on Protection and Promotion of the Rights of Migrant Workers" aims to safeguard the rights of migrants in accordance with national laws and regulations. It incites members to enhance cooperation on matters related to promotion and protection of the rights of migrant workers, including of family members already residing with them; to offer appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers; as well as to coordinate on anti-trafficking cross border policies and intensify capacity building by sharing information, best practices, opportunities and challenges encountered by ASEAN Member Countries in relation to protection and promotion of migrant workers' rights. Exchanges of good practices and policy ideas between governments, workers' and employers' associations within the framework of the Declaration are closely coordinated by the ILO Regional Office for Asia and Pacific under the alleged "ASEAN Forum on Migrant Labour". There are also a few intra-ASEAN bilateral agreements<sup>5</sup>, in the form of memorandum of understanding (MoU), that mainly specify the conditions for domestic migrant workers related to duration of stay, language requirements, immigration procedures, etc.

### *Mobility of lower-skilled labour*

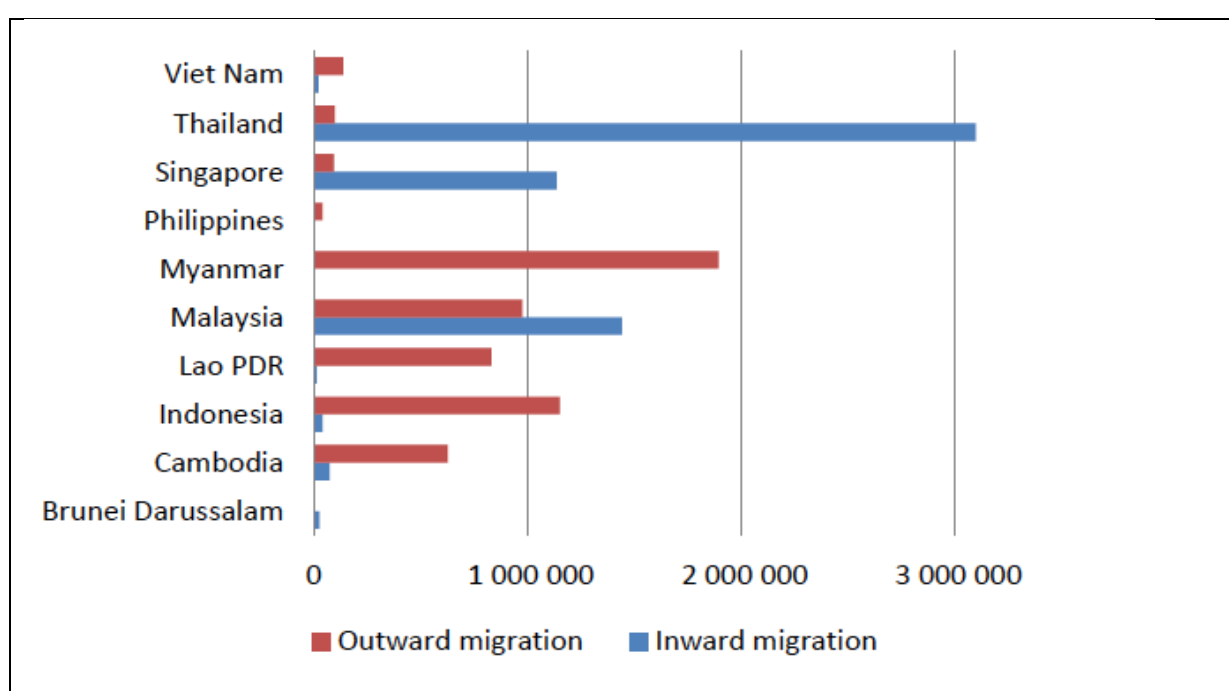
Besides formal arrangements made on services mobility, intra-ASEAN labour flows also occur independently of trade-related institutions, driven mainly by the large inter-country differences in labour supply/demand, wage differentials, as well as demographic factors

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<sup>5</sup> Existing MoUs, with the source countries given first, followed by destination countries: Cambodia-Malaysia (1999); Cambodia-Thailand (2003); Indonesia-Malaysia (2004 and 2006); Indonesia-Philippines (2003); Lao PDR-Thailand (2002); Myanmar-Thailand (2003); Vietnam-Malaysia (2003).

(Chia 2013). According to various studies conducted by the Asian Development Bank (ADB) and ILO, the overwhelming share of both recorded and unrecorded labour flows within ASEAN is actually in low- and semi-skilled labour (see ADB 2013, ILO/ADB 2014, Huelser and Heal 2014). According to UN Global Migration Database (2013), some 6.5 million ASEAN citizens were reported to reside in other ASEAN states, although this is probably a large underestimate, given unrecorded migration (Figure 1). Although flows of skilled labour in ASEAN have increased, the vast majority of these migrants searching for work are unskilled or semi-skilled (Huelser and Heal 2014).

**Figure 1 Intra-ASEAN migration: stock of total migrants (2013)**



Source: UN DESA Global Migration Database in Huelser and Heal (2014)

The categories of workers range from domestic helpers in Malaysia and Singapore (from the Philippines and Indonesia), agricultural labour in Malaysia (from Indonesia) and Thailand (from CLM countries) to various service sectors such as construction in Malaysia and Singapore and food processing in Thailand (ILO/ADB 2014, Capannelli 2013).

The AEC does not address movement of low(er) skilled people within the region, despite the fact that the majority of migrants are low-skilled (and many irregular) and greater economic integration is likely to intensify labour flows (Huelser and Heal 2014). As the ILO/ADB (2014: 93) study highlights, an increased demand for lower skilled workers in specific sectors, would lead to the so-called 'migration hump', where countries like Malaysia,

Singapore, and Thailand seen as ‘migration hubs’ could benefit from freer trade by employing more migrants. As the case of Thailand depicts, labour force is likely to shrink by 2022 and demand for medium- and lower skilled migrants to sustain production and growth (especially in sectors like construction, fishing, food processing, garment industries and domestic work) will rise. Thus, Thailand is developing a need for migration policies that adequately deal with labour migration. The magnitude of the migratory phenomenon in the region suggests that both sending and receiving countries from the region may develop an interest for a strategy to manage migration and protect migrant workers, offering clear migration channels, incentives for migrants to use institutionalized routes and be assured against exploitation and trafficking. Thus far it seems that the AEC will only have a small regulatory impact on overall flows of labour migration. And while acknowledging that there are clear challenges and political sensitivities in liberalizing low-skilled labour, given mainly the economic-cultural diversity within ASEAN, a regional economic community comprising a single market and production base may constitute a valuable venue for addressing labour flows on a systematic basis.

The agenda on labour mobility has also spread within bilateral/plurilateral trade agreements concluded by ASEAN with third countries or separately by various member states, in particular Singapore, Malaysia and Thailand. Below we review this external dimension of labour mobility.

#### *Extra-regional mobility in bilateral and plurilateral trade agreements*

Sometimes more ambitious mobility commitments have been achieved in extra-regional trade agreements, or bilaterally, in individual FTAs signed by various ASEAN members. A prominent example is the ASEAN-Australia-New Zealand FTA. The agreement delineates more categories of service suppliers, including CSSs and Independent Professionals (IPs), natural persons de-linked from commercial presence. Australia even grants full working rights to family members for those service suppliers staying on its territory from more than 12 months. Moreover, the most developed economies in the region have engaged in bilateral FTAs, moving beyond the ASEAN status quo. Notably, Singapore has concluded trade agreements encompassing generous mode 4 commitments with industrialized countries such as the US, New Zealand, Korea, Japan, the EU most recently but also with developing economies among which India and China. The far-reaching US-Singapore FTA even entails

visa concessions from the US side, allowing for Singaporean professionals to enter the US under a specific visa (H1-B1) without any labour market tests, action that turned extremely controversial in the Congress and was not replicated afterwards. Within the FTAs with Korea and Japan, the category of CSSs and a number of professional service providers were liberalized. Similarly, these categories de-linked from commercial presence were included in the agreements signed by Singapore with India and China respectively. Other bilateral agreements broadening the scope of mode 4 commitments are for instance the one concluded by Philippine, Thailand, Malaysia with Japan (also Malaysia with New Zealand, Australia, Korea, India, China). These agreements cover, in addition to ICTs and BVs also CSSs and specific independent professions (e.g. cooks, instructors, care-workers, etc.). More bilateral FTAs are currently under negotiations, including some launched by the EU with Vietnam, Thailand and Malaysia (Interviews 7, 8). It's worth mentioning that four members (Singapore, Malaysia, Brunei Darussalam, and Vietnam) are also involved in the Trans-Pacific Partnership negotiations where mobility of persons is part of the negotiations' agenda.

These external mobility developments can of course be explained by the high differences in economic performance of the ASEAN individual markets, with the frontrunners having concluded broader bilateral FTAs. However, what seems intriguing is that despite a commitment towards an integrated regional economy where free flow of skilled labour is a key element, progress on liberalizing the movement of natural persons remains relatively low, Members more often being inclined to offer wider deals to external trading partners than to their ASEAN fellows (Interviews 5, 7, 8).

In sum, intra-ASEAN movement of natural persons has sought to deepen regional economic integration and a series of reforms have been initiated to achieving this goal, notably the developments within AFAS/MNP and conclusion of various MRAs. Nevertheless, the commitments undertaken by members so far have been rather limited to categories related to investment and commercial presence. Labour mobility of lower skilled workers is not covered in the AEC. In various instances ENTs or numerical quotas restrict mobility of professionals and domestic regulations prevail when it comes to accreditation of qualifications. Reasons for this are often associated with regulatory heterogeneity across countries in the region, problematic institutional capacity in some cases, and lack of enforcement mechanism, to which adds an overall lack of trust and apprehension of member states in taking comprehensive binding commitments (Interview 9). In contrast, ASEAN

states have achieved more concessions extra-regionally. Various ASEAN-third countries agreements and bilateral FTAs signed by individual member states have broader and deeper chapters on mobility of natural people. Movement of labour has been liberalized at different skill levels and provisions for service providers detached from investment/commercial establishment occur more often.

Table 2 below summarizes both internal- and external-mobility commitments undertaken by ASEAN, and compares these provisions with those found in EU's, NAFTA's, and MERCOSUR's trade agreements. The ASEAN trade-mobility has followed closely the WTO/GATS approach, commitments undertaken internally reflecting the similar provisions inscribed in the GATS Treaty. In external FTAs, ASEAN states have made greater mobility concessions. More developments within the region could take shape with the cooperation on mobility of professionals as part of the MRAs. The case of EU internal movement of people was one founding principle of the back then European Economic Community (1957) formed by originally six Member States and today citizens of all 28 EU Members are entitled to equal treatment in access to employment and working conditions. In its trade agreements (with chapters on services) concluded with third countries, the EU has liberalized mobility of people, covering various categories of workers, including the two categories de-linked from commercial presence, namely contractual services suppliers and independent professionals (Jurje and Lavenex 2014). The NAFTA model has liberalized trade (in goods and services) as well as investment between the US, Canada and Mexico. A particularly interesting development is the introduction of the Trade-NAFTA visa for professionals in about 70 sectors from Mexico and Canada entering the US. Finally, MERCOSUR has gradually achieved a free movement of people internally, comparable to the EU model at least formally, and is engaging in trade-related mobility through openings of their service markets.

**Table 2: Mobility commitments in trade agreements: ASEAN, EU<sup>6</sup>, NAFTA, MERCOSUR**

Categories	ASEAN (internal)	ASEAN (external)	EU (external)	NAFTA (internal) <sup>7</sup>	MERCOSUR (internal) <sup>8</sup>	MERCOSUR (external)
SE/IP			Up to 6 months, in any 12-months (ENTs)		1 year, renewable (indef. for duration of working contract in Argentina)	1 year, renewable for the period of working contract
CSS	Vietnam: up to 90 days Cambodia: up to max 5 years (professional experience required)	90 days (e.g. FTA with Republic of Korea; FTA with China), up to 12 months (in AANFTA)	Up to 6 months, in any 12 months period; (professional experience required)		1-2 years, renewable (indefinitely for the duration of working contract in Argentina)	1 year, renewable for the period of working contract
ICT	2 up to 5/8 years, often subject to ENTs	1 up to 14 years (for executives in the AANFTA)	Managers, specialists: up to 3/5 years Graduate trainees: 1 year	3 up to 7 years	1-2 years, renewable (indefinitely for the duration of working contract in Argentina)	1-3 years renewable (in Argentina for duration working contract)
BV	60 up to 120 days	1 up to 12 months	Up to 90 days in any 12 month period	6 up to 12 months	Up to 180 days (permanent residence in Brazil for investments > USD 30,000)	Up to 180 days
Investors		Up to 1 year (AANZFTA FTA)	Yes	Yes	Yes	Yes
Professionals	8 professions under MRAs (mobility as ICTs)	Yes, in some FTAs	Sectoral commitments (e.g. CARIFORUM)	Approx. 70 sectors	Selected professions/technical activities	
Others		Installer - up to 3 months (AANFTA, China)	Installer - up to 90 days		Graduate trainees, students - 1 year	Graduate trainees
Recognition of qualifications	Selected professions, subject to domestic legislation	Selected professions (e.g. Japan-Singapore FTA, Ch. 9, art. 93)	Selected professions, domestic legislation	Selected professions	Domestic legislation	Domestic legislation
Social rights	No bidding commitments	Yes, selected (e.g. AANZFTA)	Yes, selected	Yes (NAACL)	Yes	
Visa/immigration requirements	Domestic regulations	Domestic regulations	Domestic regulations	TN-visa facilitation, dom. regulations	Domestic regulations	Domestic legislation
Numerical quotas	Yes	No mention	Should not maintain (exception CARIFORUM FTA)	Removed in 2004	No mention	No mention

<sup>6</sup> The EU internal regime is not included here, as service providers (except for certain professions regulated domestically) are entitled to move freely and provide services within the EU (cf. EU free movement principle, see also the EU service directive 2006/123/EC). Persons moving on a temporary basis (for up to two years) while staying covered by their home country's social security system are categorized as posted workers and may exercise their profession in another member state without needing a work permit. Posted workers need not have their professional qualifications recognized but may need to make a written declaration for some professions.

<sup>7</sup> NAFTA has not signed external trade agreements.

<sup>8</sup> In addition, internal mobility in Mercosur is liberalized through the Residence Agreement, see below.

## **Mobility of people within the EU**

Among the regional free trade agreements, the EU has clearly the most liberal mobility regime. The free movement of workers (later 'people') together with capital, goods and services constitute the four fundamental freedoms of the European single market act (Art. 18 EC). The Treaty of Rome included three types of economic activity in the free movement provisions: work (Article 39 EC, old Art. 48); self-employment (Article 43 EC, old Art. 52); and service provision (Article 49 EC, old Art. 59). These provisions abolished discrimination on the ground of nationality between workers of member states as regards their employment, remuneration and other conditions of work and employment. Limitations to these rights were held narrow and are circumscribed by states' serious concerns of public policy, security and health. All occupations were opened up to workers from other member states with the exception of occupations in the public service. The full free movement of workers was introduced in 1968 with Regulation 1612/68. Following the decision in the 1987 Single European Act to fully realize the single market by 1992, the free movement norm was extended from the group of workers to the economically inactive and today covers all EU citizens as well as their foreign relatives. Special provisions apply to the service sector for persons who maintain their employment contract with an employer in their home country and stay enrolled with their home country social security systems but move to another EU country to work for a period of up to two years. These 'posted workers' are excluded from the need of a work permit and do not need to go through a recognition of their professional qualifications (but sometimes need to make a written declaration on the latter) (Directive 96/71/EC).

EU migrant workers and their family have the right to the same taxation and shall enjoy the same social advantages as compared to their fellows in the host state (e.g. child raising allowances, right to education for children, etc.). EU Member States have coordinated social security systems and established a framework that mutually recognizes qualifications (Deacon et al 2011). Social rights for 3rd country nationals have been addressed in the EU Long Terms Residents Directive (2003/109/EC) and the EU Family Reunification Directive (2003/86/CE).

A strong symbol of the free movement regime finally is the abolition of controls at the internal borders of the EU, which was decided in the 1985 Schengen Agreement and realised in 1996. This abolition of internal border controls was taken as impetus for cooperating on external migration to the EU. The conditions for crossing the EU external border, visas for stays shorter than three months, and wide sections of asylum policy are regulated by EU rules. Although the

EU lacks a full-fledged competence on economic immigration from third countries, directives have been adopted concerning specific groups such as the highly skilled (for example the recently adopted directive for intra-corporate transferees, 2014/66/EU), students, researchers, or seasonal workers (Interviews 28, 29).

The extension of the mobility regime to non-EU member states confirms the strong economic logic behind this approach. Full freedom of movement has been introduced through the Treaty on the European Economic Area (EEA) of 1992 with the remaining members of the European Free Trade Association (EFTA) and Switzerland by bilateral treaty of 1999. In addition, partial free movement rights were included in the Agreements concluded with the candidate countries for EU membership (now full EU members) and two Balkan countries (Macedonia and Croatia, the latter also now a member). The subsequent trade-related agreements with chapters on services concluded by the EU with third countries also incorporate mobility provisions (see Table 2). Most of these mobility liberalizations cover the category of intra-corporate transferees or in the EU terminology “key personnel” (category present in almost 70 per cent of the EU agreements) and self-employed persons within the companies established and effectively controlled by these nationals in the territories of the EU. There are some exceptions that also give rights for service suppliers de-linked from commercial presence. One is the EPA concluded with the distant Cariforum countries. The significance of these commitments is however contested. They are said to be “crowded with economic needs tests, which remove certainty” (Kategekwa 2008:11). Nevertheless, as Dawson (2012: 15) points out, in contrast to the EU GATS offer that is quite ambiguous, the EPA provides clear and understandable terms for temporary movement, straightforward requirements regarding training and certification, with a focus on specific sectors in which Cariforum states have services capacity<sup>9</sup>. Numerical quotas for key personnel and graduate trainees in the sector liberalized have been eliminated (see also CRNM, 2009: 25). The FTAs signed with South Korea (in force from 2010), Columbia and Peru (concluded in 2011), are also cases where GATS+ provisions have been granted, in particular with regard to the maximum duration of stay of highly skilled personnel, but also the inclusion of CSSs and IPs, service suppliers independent from commercial presence.

In sum, economic integration (‘Single Market’) has triggered free and full movement of people within the EU and external labour mobility is present in all EU’s FTAs that have a chapter on services. Besides the mobility of people associated with commercial establishment (i.e. ICTs,

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<sup>9</sup> Twenty-nine sectors have been opened to allow for service suppliers from CARIFORUM firms that are not already established in Europe for up to 6 months and eleven sectors for self-employed service providers (CRNM, 2009: 25).



BVs), there are also openings inscribed for the other categories, a notable example being the FTA concluded by the EU with the distant Cariforum states.

## NAFTA

The North American Free Trade Agreement was signed in 1994 by Mexico, Canada and the US. Chapter 16 of the Agreement establishes criteria and procedures for the temporary entry of business people<sup>10</sup>, covering: 1) business visitors (duration of stay up to 6 months in the US and Canada, and 1 year in Mexico); 2) traders and investors who seek to carry out substantial trade in goods or services, and establish, develop, administer or provide advice/key technical services for investment (duration of stay 2 years with the possibility of renewal indefinitely provided that they maintain their status within the enterprise in the US, 1 year up to additional 2 years in Canada, 1 year up to additional 4 years in Mexico); 3) intra-company transferees (3 up to 7 years, depending on managerial level in Canada, 1/3 years up to 5/7 years in the US, and 1 up to 4 years in Mexico); and 4) professionals with minimum baccalaureate degree working in specific sectors as approved in the Appendix 1603.D.1 of the agreement. Contrary to the WTO GATS agreement, these businesspeople are not limited to services and may include persons engaged in activities related to agriculture or manufacturing.

It should be mentioned that until 2004 professionals from Mexico entering the US under NAFTA were limited to 5,500 per year. A special Treaty NAFTA (TN) non-immigrant visa category has been created for such professionals from Mexico and Canada that have a certification of employment. The TN-visa is initially valid for 1 year, but may be renewed indefinitely provided that there is no intention of pursuing full-time employment. TN-visa holders receive temporary residence and spouses and children under the age of 21 who are accompanying them are entitled to receive a derived visa. However, this does not grant working rights, but it allows for studying.

Specific provisions on certification and recognition of licensing are contained in Article 1210, requiring objective and transparent criteria of evaluation. Specifically for professionals, the parties have agreed upon MRAs in the professions of accountancy, architecture and engineering. The MRA for architects in particular, is an example where a strong professional body, the Mexican Federation of Architects, has played a substantial role for the final outcome achieved.

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<sup>10</sup> Annex 1603 of Chapter 16 provides the conditions for granting short-term entry to specific categories of business people. Businesspersons are defined as citizens of a Party who are engaged in trade in goods, the provision of services or the conduct of investment activities.

Together with counterparts from the US and Canada, they have established a so-called “Tri-national Council” for architects responsible for licensing based on a dossier/portfolio of the applicant and possibly an interview, but without additional examination that applies for other professions (Interviews 1, 4).

NAFTA is a free trade area, but not a customs union, therefore it cannot engage in external FTAs. Besides trade, it has nevertheless a social dimension in the form of the North American Agreement on Labour. This was the first international agreement on labour to be linked to an international trade agreement. While focusing on the domestic implementation of labour rights vis-à-vis own nationals, the NAALC states that the Parties must provide “migrant workers in a Party's territory with the same legal protection as the Party's nationals in respect of working conditions” (Annex 1 principle 11). The agreement establishes sanctioning mechanisms if a labour right complaint is accepted by the appropriate institution (the National Administration Offices in Mexico and Canada or the Department of Labour's Office of Trade and Labour Affairs in the U.S.; NAALC Annex 39, 41B). Analyses of NAALC's implications for the rights of Mexican workers in the US have however shown a limited effectiveness of this mechanism (Human Rights Watch 2001; Russo 2010). Referring to NAFTA and the NAALC, the American Court of Human Rights had got involved with the US refusal to extend basic labour rights to undocumented Mexican workers. Reflecting provisions of the UN Migrant Workers Convention, the Court held in an Advisory Opinion (Oc-18/03) in 2003 that the rights to equality and non-discriminatory treatment are *jus cogens* and applicable to any resident of a state regardless of that resident's immigration status.

Commitments under the NAFTA Treaty are binding for member states and subject to dispute settlement mechanisms. However, concerning a refusal to grant temporary entry, dispute settlement provisions can be invoked only for matters that involve a pattern of practice and once the natural person has already exhausted the available administrative remedies (Nielson 2002). The treaty has also established a Working Group on Temporary Entry, comprising representatives of each Party, including immigration officials, which meets every year to monitor implementation and discuss possible options to facilitate temporary entry of business persons on a reciprocal basis (Interviews 1, 2).

Overall, the NAFTA provisions for temporary entry eliminated or reduced some of the hurdles related to labour certifications, work permit, or numerical restrictions. The system has introduced elements of harmonization for business mobility, transparency and faster processing of

applications, allowing the movement of professionals in a number of important sectors. Although sometimes seen as complex and difficult to expand its coverage to additional categories of people, it is a system that exceeds initial GATS mode 4 provisions in many respects and enables flow of persons associated with trade in goods, services, and investment.

## **MERCOSUR**

In South America, labour mobility has gradually evolved and it is now embraced as a basic freedom attached to citizenship (Mármora, 2010; Ceriani, 2011). This “open door” approach to regional migration (Acosta and Geddes 2014: 23) has first developed within MERCOSUR and has recently extended to the whole subcontinent (Interview 10). Besides trade liberalization (see below), several other processes contributed to the current approach to mobility of people within this region. MERCOSUR’s initial Treaty of Asunción (1991) stated that the free movement of factors of production (including labour mobility) is one of the main objectives of the Common Market. The Common Market Group introduced a tripartite Working Group No.10 composed of representatives of labour ministries, unions and employers associations to deal with labour migration and employment issues (Interviews 10, 11). In 1998, the alleged Social-Labour Declaration was adopted that, emulating many of the provisions included in the 1990 UN Migrant Workers Convention, provides the main plan of action of the Working Group No. 10. This group has focused on the free movement of workers, the portability of social security benefits or mutual recognition of qualifications (Interview 11). The free movement regime within the region was finally achieved with the signing of the so-called Residence Agreement in 2002. One of the objectives behind this Agreement was to regularize the large amounts of illegal migration occurring across the region. It entered into force in 2009 and currently grants MERCOSUR citizens, as well as nationals of Bolivia and Chile the right to work and live within the territory of the State Parties, provided that they have no criminal record within the past five years (Interviews 12, 19). This right of residence and work is initially issued for 2 years, and may then be transformed into a permanent one. The Residence Agreement guarantees migrant workers equal civil, social, cultural and economic rights as compared to nationals (Art. 9). The right of residence can be transferred to members of the migrants’ families irrespective of their own nationality (Maguid 2007). The other South American countries Bolivia, Colombia, Ecuador, and Peru have also adhered to the Residence Agreement, thus rendering parallel initiatives in the Andean Community (Santestevan 2007). Discussions on citizenship have also evolved, and the

alleged Statute of Regional Citizenship was adopted in the MERCOSUR Council Decision in Foz de Iguazú in December 2010 with a plan of Action that shall be completed by 2021, MERCOSUR's 30th Anniversary (Interview 10).

Services trade mobility evolved from 1998, when the Council of the Common Market approved the inclusion of a specific provision on the movement of service providers under the Protocol of Montevideo on Trade in Services. The last (7th) round of services trade liberalization was concluded by MERCOSUR members in 2009, allowing for temporary mobility of several categories of service providers (e.g. IPs, graduate trainees, CSSs, ICTs, BVs, technicians, etc. – Interviews 14, 22, 23). The services liberalization process exceeds current commitments under the GATS, covering broader categories of persons (see above) for longer periods of stay (e.g. ICTs, IPs, CSSs admitted initially for 1-2 years, permit renewable in all countries and indefinitely in Argentina if the working contract/service supplied is ongoing; BVs - 180 days and possibility to receive a permanent residence in Brazil if investment exceeds USD 30,000). However, in some cases domestic labour legislation apply (e.g. Brazil can require economic needs tests for foreign service providers) and recognition of qualifications goes through a domestic accreditation process that sometimes meets resistance from national professional associations (Interviews 22, 23).

Regarding external services-related mobility commitments, there are not many trade agreements concluded by MERCOSUR so far that cover services. One exception is the FTA with Chile signed in 1996, that covers the following categories: IPs, CSSs – allowed initially for 1 year, but with the possibility to prolong the duration of stay for the entire duration of the contract; ICTs, (1 up to 3 years), BVs (90 days); as well as it extends coverage to graduate trainees and interns (1 year duration of stay with the possibility to prolong it). The FTA currently under negotiation with the EU has attracted great attention to services - with active involvement of key stakeholders such as the European Services Forum and Confederations of Industries in MERCOSUR members (Interviews 13, 22). Mobility of natural persons is an important issue on the agenda, some of the MERCOSUR countries (e.g. Brazil) sizing the opportunity to engage in mobility schemes for students and professionals with the EU (Interview 13). There are also negotiations in progress with Colombia, where mobility provisions are covered (Interview 22).

In short, mobility within MERCOSUR and the associated countries is regulated by a very liberal regime (at least formally), comparable to the EU free movement model. Nevertheless, the level of legalization is relatively weak, and, without independent monitoring and legal enforcement mechanisms, implementation is patchy. The process of services liberalization would add another

dimension to mobility of selected service providers and business people, aiming to facilitate their movement in a relatively short time frame. However, implementation of the last package of services negotiations is still not complete. Extra-regionally, mobility has only recently started to be addressed through FTAs.

### **Labour Mobility: lessons and prospects**

Broader economic integration goals and trade liberalization have played significant roles for the development of mobility regimes in all regional integration units analysed in this paper. While within NAFTA and ASEAN labour flows are directly linked to trade, the other two regional units analysed, the EU and MERCOSUR, have developed much broader approaches to migration, intra-regionally culminating with free movement regimes and social rights for migrants.

NAFTA is a free trade area where barriers to mobility for various categories of labour associated with trade in goods, services and investment have been eased (including for professionals from over 70 sectors), labour movement for these groups bringing along a set of social rights and liberties for themselves and their families. Broader labour rights are covered in an associated agreement, the NAALC. For the EU, in parallel to the internal free movement regime, the trade agenda has enabled movement of service providers from third countries, mobility commitments exceeding multilateral GATS mode 4 openings. Trade-related mobility within MERCOSUR is just one component of the regional approach to migration, seen as a modality to facilitate business movements, while all citizens are entitled to move freely and seek employment. The trade-associated mobility dimension could further expand in next trade agreements concluded by MERCOSUR (e.g. with the EU, Colombia).

The ASEAN model is confined to selected categories of workers, with limited market access and temporary entry rights, internal mobility not exceeding the GATS mode 4 provisions. In some cases external mode 4 provisions go beyond the concessions agreed internally as part of the AFAS/MNP. Labour migration of lower skilled workers is not addressed at the regional level and despite the fact that a regional Declaration on migrants' rights have been signed, not much progress has been done with implementation. Compared to the other regional frameworks, ASEAN mobility scheme is similar to NAFTA's approach, but the regional integration scope, as stated by its leaders, goes beyond NAFTA's objectives. However, when compared to the EU and MERCOSUR it stops short with regard to the reforms advanced so far on labour migration. This

is not to deny the efforts undertaken by ASEAN governments in realizing the community and the AEC will certainly mark a milestone in the economic integration process in Southeast Asia. Nevertheless, restricting mobility to skilled professionals and not addressing the vast majority of labour flows (a reality in the region), would leave out opportunities and positive developmental impacts associated with a well-managed labour migration approach. Future sustained regional policies aiming to a cooperative scheme, covering all labour could increase the benefits in sending and receiving countries, and would also assure protection for the migrants themselves. Deeper labour market cooperation would include policy developments in the following areas (see also ILO/ADB 2014, Huelser and Heal 2014):

- **Services-related mobility:** The MNP Agreement is not yet implemented across Member States. Service sector integration in the region will trigger greater flows of services providers, thus in future rounds of trade negotiations, mode 4 could extend its coverage and encompass also categories of service suppliers delinked from commercial presence, as well as harmonize/remove visa and immigration requirements, other barriers related to economic tests or numerical quotas and foreign workers levies associated with the mobility of skilled people;
- **MRAs and mobility schemes for lower skilled migrants:** The institutional and policy reforms concerning the qualification reference framework as well as implementation of existing MRAs are on the way. Over time, ASEAN leaders could consider mutual skills recognition arrangements for medium-skill occupations (e.g. construction, garment workers, fishermen, etc.) – this might provide a more manageable and transparent channel to address labour movement that is already taking place in the region, in the short and medium term helping to respond to demographic and income disparities among Member States. Well managed temporary schemes for lower skilled workers could channel irregular migration into legal programs, reassuring receiving countries that migration can be managed;
- **Protection of migrant workers and security portability:** The Declaration on Social Rights ensures protection of labour migrants, coverage and portability of social securities could be extended, as well as adequate measures for decent payments enforced. Whereas low-wage, low-skill migrant labour may offer short-term gains, on the medium and longer term it can create disincentives to advance technologically and improve economic outputs in both sending and receiving countries. Ratifying international Conventions and implementing the ASEAN Declaration on the Protection and promotion of Rights of Migrant Workers (Cebu Declaration), would contribute to fight against the exploitation of

migrant labour and to ensure an orderly movement of people in the region. Until now in ASEAN only Cambodia, Indonesia and Philippines have ratified all Fundamental Conventions on Migrants, all these countries being net migrant sending countries, and none of the destination countries have ratified relevant treaties, such as the Discrimination Convention 111/1958 (ILO/ADB 2014: 96), which prohibits discrimination related to employment and occupation. Finally, introducing a regional scheme of portable social security would enhance economic security and reduce costs with returning migrants who lack security coverage and at the same time diminish incentives to overstay.

While acknowledging that these principles vary with regard to policy implementation complexities and costs, the experience accumulated in different regional integration schemes and international conventions provide templates to deal with intra-regional mobility. NAFTA represents a case of trade-related mobility, with a wider coverage of categories of people entitle to move than the case of ASEAN and could offer a source of policy inspiration for deepening the agenda on services mobility within ASEAN. The cases of the EU and MERCOSUR are instructive for the regional policies created to address the general flows of migration, allowing all types of workers (people overall) to move freely and benefit from social rights and security protection in host countries (see detailed information in the respective sections above). While 2015 is not an end, but rather the start of what is envisaged to be a regional integrated market, the realization of these reforms may take inspiration from the diverse experience in other regional integration frameworks.

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## **Annex**

### **List of interviews:**

Interview 1: Secretariat of Economy, Federal Government of Mexico, Mexico City, 01.04.2014  
Interview 2: National Institute of Migration, Federal Government of Mexico, Mexico City, 07.04.2014  
Interview 3: Ministry of Education, Federal Government of Mexico, Mexico City, 08.04.2014  
Interview 4: National Academy of Architects, Mexico City, Mexico, 08.04.2014  
Interview 5: ASEAN Secretariat, AEC Department, Jakarta, Indonesia, 19.06.2014  
Interview 6: Ministry of Manpower and Transmigration, Jakarta, Indonesia, 17.06.2014  
Interview 7: Ministry of Trade, Services Division, Jakarta, Indonesia, 07.10.2014  
Interview 8: Delegation of the European Union to Indonesia, 19.06.2014.  
Interview 9: University of Indonesia, Jakarta, Indonesia 18.06.2014.  
Interview 10: Ministry of Labour, Employment and Social Security, Buenos Aires, Argentina, 23.07.2014  
Interview 11: University of Lanus, Argentina, 22.07.2014  
Interview 12: Ministry of Interior and Transport, National Direction for Migration, Buenos Aires, Argentina, 22.07.2014  
Interview 13: EU Delegation to Brazil, Brasilia, 29.07.2014  
Interview 14: Ministry of Development, Industry and Foreign Trade of Brazil, Department of International Negotiations, Brasilia, 29.07.2014  
Interview 15: IOM Regional Office Jakarta, Indonesia, 14.10.2014  
Interview 16: ILO Country Office for Indonesia and Timor-Leste, Jakarta, Indonesia, 08.10.2014  
Interview 17: Secretariat for Strategic Affairs (SAE), Brasilia, Brazil, 17.07.2014  
Interview 18: National Immigration Council, Ministry of Labour and Employment, Brasilia, Brazil, 18.07.2014  
Interview 19: National Migration Office, Ministry of Interior and Transport, Buenos Aires, Argentina, 23.07.2014  
Interview 20: ILO Brasilia, Brazil, 30.07.2014  
Interview 21: Ministry of Justice, Brasilia, Brazil, 18.07.2014  
Interview 22: Ministry of Development, Industry and Foreign Trade, Secretariat of Commerce and Services, Brasilia, Brazil, 16.07.2014  
Interview 23: Ministry of Foreign Affairs, Services Division, Brasilia, Brazil, 15.07.2014  
Interview 24: Office of the United States Trade Representative, Washington DC, US, 26.03.2014  
Interview 25: Coalition of Service Industries CSI, Washington DC, US, 26.03.2014  
Interview 26: US Mission to the WTO/USTR Geneva, 20.03.2014  
Interview 27: Congressional Research Services CRS, Washington, US 25.03.2014  
Interview 28: DG Home, Brussels, 18.09.2013  
Interview 29: DG Trade, Services Division, Brussels, 17.09.2013  
Interview 30: DG Trade, EU-US Negotiations, Brussels, 18.09.2013  
Interview 31: European Service Industries Association, Brussels, 18.09.2013  
Interview 32: WTO Secretariat, Geneva, 20.03.2014