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Rising powers' venue-shopping on international mobility

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Introduction

Labour mobility has hitherto not been in the focus of international trade negotiations. The door to a trade-related mobility agenda was opened in 1995 with the inclusion of the so-called “mode 4” temporary mobility of natural persons as one out of four modes for trade services liberalization in the General Agreement on Trade in Services of the WTO (GATS). Whereas current GATS mode 4 commitments are quite limited, basically reflecting former trade hegemonies’ lowest common denominator, recent initiatives and in particular regional and bilateral Free Trade Agreements (FTAs) point at a gradual expansion of these clauses beyond the EU’s or US’ original intentions. As Indian diplomats and trade officials interviewed for this study put it, “GATS mode 4 is India’s strongest offensive interest in trade negotiations” (Interviews 6, also Interviews 12, 18). Correspondingly, India, supported by some other emerging economies, has increased pressure for more generous mode 4 liberalization in multilateral and bilateral trade negotiations. To the extent that these initiatives materialize, they are a salient example of the growing evolution of emerging economies from rule-takers to rule-makers in the regulation of international trade – and beyond. This evolution is particularly intriguing given that it takes place in a field that is excessively sensitive in established economies and faces significant obstacles to both the adoption of binding international commitments (GCIM 2005; Lahav and Lavenex 2012, Trachtman 2009) and liberalization more specifically.

What drives emerging countries' agenda for trade related labour mobility, which strategies do these countries and, above all, Indian negotiators use in pushing this agenda, and how far do shifts in market power depend also on domestic politics and regulatory capacity for sustaining emerging powers' attempts to shape international trade rules?

Emerging countries’ commitment on “mode 4” has been primarily driven by a developmentalist reasoning and the concern to realize their own competitive advantages in exchange for concessions to established powers (section one). Especially India has taken the lead shopping for appropriate venues to push this agenda, applying also discursive framing strategies dissociating temporary mobility from the politically sensitive notion of migration (section two). Whereas progress at the

¹ 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 „International Trade Regulation” (see <http://www.nccr-trade.org/>) and a project financed by the Swiss Network for International Studies SNIS (see http://www.snis.ch/call-projects-2012_3056_rule-takers-rule-makers-emerging-powers-regulation-international-trade). Funding by the Swiss National Science Foundation and SNIS is gratefully acknowledged.

multilateral level has been stalled, the analysis of all bilateral FTAs concluded by the US, EU, China, India and Mexico shows that the commitments undergone by emerging countries go beyond the status quo in EU and US trade agreements (section three). While India has established itself as the leading voice of developing countries on mode 4, the look at its domestic constellation draws a more nuanced picture (section four). On the one hand, an increasing gap between the government's developmentalist approach and the positions of India's most influential IT lobby association, the National Association of Software and Service Companies (NASSCOM) can be observed. On the other hand, further liberalization of mode 4 poses significant regulatory challenges; challenges that India itself would have difficulties to meet.

In conclusion, our findings show that rising market power gives emerging countries an opportunity to push for their own priorities in multilateral and bilateral trade negotiations. However, the case of India also shows that with its economic catch-up, its former 'developmentalist' priorities tend to move closer to the approach defended by its developed counterparts. As a result, the scope for shaping different rules in the trading system narrows, while the regulatory challenges coming along with this economic transition increase.

Our study is based, next to the analysis of pertinent secondary literature and primary documents, on a total of 41 semi-structured interviews with experts from relevant international organizations, the EU and India, Mexico and China² and a quantitative analysis of multilateral, plurilateral and bilateral trade agreements concluded by these countries (see Annex).

The developmentalist agenda on mode 4

The inclusion of "mode 4" liberalization in the GATS, that is temporary mobility rights for service providers, was promoted – albeit with different priorities – by western service industries and a number of developing countries. Influential western lobby groups, in particular the European Service Forum (ESF) and the US Coalition of Service Industries (CIS), persuaded western trade officials that certain provisions in domestic immigration laws constituted barriers to trade in so far as they inhibited the mobility of business visitors or intra-corporate transferees within multinational service enterprises (Lavenex 2006, Marchetti and Roy, 2009, Panizzon, 2010). Developing countries in contrast, led by India and Mexico, and with support from the United Nations Conference on Trade and Development (UNCTAD) argued that openings regarding services provided by natural persons

² More interviews with US, Mexican and Brazilian Trade officials are planned for April 2014.

were a necessary complement to the liberalization of commercial presence (so-called mode 3) which benefited one-sidedly the developed countries.

Mode 4 covers service suppliers that must be self-employed or employed as contractual service providers in their country of origin, as well as business visitors and intra-corporate transfers in which case the service supplier is sent by a company to its foreign affiliate in another Member's territory. The GATS commitments that apply to service providers are delineated in terms of most favour nation (MFN) treatment, market access and transparency. The first clause translates into a non-discriminatory treatment of Member states between service suppliers in terms of their country of origin. Market access refers to the commitments that members make in their individual service schedules, in a positive list format, meaning that members specifically defined the sectors to be opened and duration of stay. An important feature of these commitments is that once adopted, they are 'locked in' and bound against future market closures. Finally, the transparency requirement asks members to make available all relevant measures of application concerning trade in services.

The actual level of market access reached under the GATS is however very limited, as the positive listing imposes only minimal obligations for governments (Dawson 2012). Furthermore, commitments generally favor highly skilled intra-corporate transferees or contractual service suppliers linked to commercial presence (mode 3). Other categories of service suppliers, while potentially falling under the scope of GATS, have not been liberalized. Table 1 below gives an overview of categories of service providers differentiating between highly skilled and other persons as well as between "mode 3"-related categories that go along with the establishment of a commercial presence and other categories unlinked from mode 3. The bold entries reflect those categories for which the traditional trade hegemon, the EU and US have entered most commitments under the GATS.

Table 1: Categories of service suppliers under GATS mode 4³

	Highly Skilled	Non Highly Skilled
Related to commercial presence	Intra-corporate transferees Business Visitors Traders/Investors	Trainees
Independent from commercial presence	Self-employed/independent professional Contractual Service Suppliers - these categories cover highly skilled service suppliers (like professionals), but also lower-skilled persons such as technicians, installers, care-workers	

The "**developmentalist agenda**" regarding mode 4 consists in widening the scope for legal mobility beyond the categories linked to commercial presence. In contrast to "mode 3" and the related

³ See also WTO 2006.

mobility of intra-corporate transferees and business visitors, which is mainly in the interest of Western multinationals, India and other developing countries have argued that for their economies, the main benefit of service liberalization would consist in broader openings for the mobility of natural persons. According to Winters et al. (2002: 2), a liberalization by destination countries of 3 per cent of their workforce would create about US\$ 156 billion per year in extra economic welfare, that is roughly four times the Official Development Assistance (Martin 2006: 9). As Self and Zutshi (2003: 38) argue, current practical commitments of GATS “barely touched the level of activity taking place in the provision of services by persons travelling to other countries”. Estimates show that temporary movement of persons was less than 2 per cent of the total world trade in services back in 2004 (see Conway 2004: 35) and currently it reaches less than 5 per cent, as one of the diplomats from the Indian permanent mission to WTO asserted (Interview 18 see also Martin 2006).

From this perspective, the largest gains from mode 4 liberalization would come from the movement of low-skilled workers, where the wage gaps are greatest, sometimes 20 to one or more (Martin 2006: 10). Drawing a parallel to trade in goods, the expectation is that mode 4 liberalization would narrow down these wage gaps by putting upward pressure on wages in sending countries and downward pressure on wages in receiving countries (Winters et al. 2002). Lower wages in developing countries give workers from such countries a “comparative advantage” in providing many labour-intensive services, especially as technologies and training in more occupations become globally standardized. Additional gains would come from the expected rise in remittances. And, finally, with regard to higher skills, the temporary nature of movements under mode 4 would also prevent the problem of brain drain in sending countries (Chaudhuri et al. 2004).

Over time, the more advanced developing countries have come to share also the developed countries' interest in the movement of skilled workers, in particular in the IT industry and sectors where they have competitive international companies. However, “the greater challenge is to draw in other developing countries by venturing down the skill ladder without sinking into the realm of political infeasibility” (Chaudhuri et al. 2004: 6).

The next section scrutinizes two strategies that developing countries, under the lead of India, have taken to meet this challenge: venue-shopping and coalition-building in the WTO and discursive framing strategies (which, to some extent, are shared by trade officials in the West).

II. "Rule-making" dynamics: venue shopping and power shifts

Which strategies do developing countries, and above all India, apply in pushing for legally binding international norms liberalizing temporary migration in times where Western countries have been increasingly worried with the maintenance of migration control and security concerns?⁴

Although liberalization, as mentioned above, has remained limited, two factors seem crucial for explaining the openings achieved so-far: the use of the trade venue to pursue wider (migration related) goals, including subtle framing strategies, and emerging countries' increased leverage due to shifts in market power⁵.

Venue-shopping and the dissociation of immigration politics

The seizing of WTO trade negotiations for mobility rights can be seen as a case of "strategically select[ing] the venues to gain a favourable interim decision for a specific problem" (Alter and Meunier 2009: 17). The possibility to choose between different international venues is particularly relevant in fields where actors disagree domestically. This is the case for migration policy in which economic actors' and developing countries' demands for wider liberalization competes with developed countries' home affairs concerns about control and sovereignty (and one could add the agenda on labour rights) (Betts and Nicolaidis 2009; Freeman 2005).⁶

In our case, the seizing of the trade policy venue and, in particular, the WTO provided a powerful venue for isolating the mobility agenda from the protectionist bias of domestic migration policies. The inclusion of market access provisions for natural persons in the GATS at the Uruguay Round was the result of diverse pressures by western services industries on the one hand (interested in facilitating mobility within multinational corporations) and developing countries on the other (interested in labour mobility more broadly) (Lavenex 2006). For the latter, the wish to balance

⁴ This question echoes Gary Freeman's ground-breaking analysis of why liberal democracies conduct expansive immigration policies in spite of restrictive publics (Freeman 2005).

⁵ Domestic legislation on the enforcement of GATS mode 4 commitments especially in receiving countries would also play a role in assessing the *de facto* openings for mobility of services providers, however in this paper we do not focus on this dimension.

⁶ The trade agenda, which spurs temporary migration rules in conjunction with the liberalization of trade in services contributes to the consolidation of a multilayered regime complex on international migration (Alter and Meunier 2009; Betts 2011; Raustiala and Victor 2004). This complex codifies service related mobility rules next to other labour migration provisions scattered across different multilateral (the WTO, the ILO), regional (EU, Ecowas, Mercosur, etc.) and bilateral (FTA, labour agreements) institutions (Kunz et al. 2011, Lahav and Lavenex 2013). Within this multilayered regime complex, developments at one level are likely to have repercussions onto the other ones, even if the migration and trade policy arenas have long been kept strictly separated.

western countries' one-sided focus on FDI and 'mode 3' liberalization with openings where developing countries would also have a comparative advantage was a major impetus.

The trade venue offered a favorable context for institutionalizing the mobility agenda in spite of restrictive domestic migration policies. Firstly, it took negotiations out of the usual migration politics constituency (in particular control focused home ministries) and gave the lead to trade ministries who in general were not very well coordinated with the home affairs ministries (Lavenex 2006). Thereby, multilateral trade negotiations allowed talking about mobility rights in a context relatively shielded from domestic debates and from the purview of migration/home affairs ministries.

Next to the institutional context of the WTO, subtle framing strategies also played an important role. The WTO trade discourse framed negotiations in a highly technical language using expressions such as "mode 4", "intra-corporate transferees", "contractual service suppliers" etc.; terms hardly accessible to the general public and not very familiar among immigration officials – until today (Interviews 2, 10, 20, 38). A second discursive element is the suggestion that cross-border mobility of persons is inherent to international trade in services, while this would not apply to trade in goods.⁷ A third element of strategic framing is the promoters' standard assertion that GATS applies to trade in services, not labor migration, and that the two should be kept strictly separate. One of the Indian officials interviewed in Delhi underlined this point, arguing that there is a difference between migration and temporary mobility, so "keep it [migration] outside the trade negotiations" (Interview 33). Indeed, the GATS Annex specifies that the treaty does not apply to "measures affecting natural persons seeking access to the employment market" of another country [or] measures regarding citizenship, residence, or employment on a permanent basis" in another country. However, the categories of persons falling under the GATS can usually be considered as migrant workers under ILO Conventions, in particular if their stay exceeds one year (which is the case under some commitments for ICTs). The link to labour migration is also visible in the fact that the beneficiaries of mode 4 commitments still require a work permit from the receiving country. As the OECD/WB/IOM report on Trade and Migration (2004: 12) notes "while GATS is not an agreement on migration, the wider and more ambitious the scope of GATS mode 4, the more it enters the migration debate", further raising questions related to labour and social rights. To better grasp the nexus between trade and migration, the above mentioned international organisations have taken this issue on their working agendas, initiating several seminars and workshops with both trade and migration experts as well as scholars from these fields, aiming to provide domestic policy makers in sending and receiving countries with

⁷ This distinction which justifies the inclusion of mode 4 in service trade liberalization is however less straight forward than it seems. Whereas it is commonly argued that in contrast to trade in goods, trade in services usually pre-supposes the simultaneous presence of the person delivering the service (e.g. a hairdresser), it is not fully convincing why mobility of workers should not matter for trade in goods. This becomes salient in the case of temporary workers supplied by labor contractors to produce certain goods in foreign factories or farms (Martin 2006: 5).

an improved understanding on temporary mobility and the potential benefits and challenges attached to it that require further national policy coordination.

In sum, seizing the WTO venue allowed for the first time to address migration within the liberal normative framework of post-world war II international order. Not only did this introduce the free market perspective to a field commonly associated as “the last bastion of state sovereignty” (Dauvergne 2009: 47, Legomsky 2009). It also allowed overarching liberal norms such as non-discrimination, reciprocity, the MFN principle to enter a field hitherto protected from strong international commitments.

Power shifts and new opportunities for emerging markets

The seizing of the liberal trade venue would however remain of limited importance did the interests of western service lobbies remain limited to intra-corporate mobility and had the power configuration in the international trade arena not changed. As Dan Drezner critically observes, the capacity to venue-shop is linked to countries’ economic power and benefits the interests of the strong (Drenzer 2009).⁸ From a developing country perspective, the multilateral level clearly constitutes the best option because it allows them to countervail their relative power disadvantage by forming alliances among each other. With increased economic power, however, emerging economies gain the possibility to shop for their preferences also at other levels where their position used to be weaker, specifically in bilateral agreements. This is why we observe a particularly dynamic evolution at the level of bilateral FTAs (see below).

A salient example of developing countries coalition building in the WTO is the “Plurilateral request on services” filed by an alliance of 15 developing Members⁹ under the lead of India against target members (9 developed states¹⁰) in 2008. The request called for further commitments for skilled Contractual Service Suppliers (CSSs) and Independent Professionals (IPs), two categories of natural persons de-linked from commercial presence. The commitments in these categories were sought in a number of sub-sectors falling under Business, Construction, Environmental, Tourism and Recreational Services. The request also asked for the removal, or reduction and clarification of ENTs. Statement papers, submitted mainly by India, but backed also by Mexico took these general requests

⁸ This may be the reason why those scholars who have taken notice of the GATS openings before have generally viewed these to have only very limited impact on migration policies and flows (e.g. Betts 2011b).

⁹ The requesting Members are: Argentina, Brazil, Chile, China, Colombia, Dominican Republic, Egypt, Guatemala, India, Mexico, Morocco, Pakistan, Peru, Thailand and Uruguay.

¹⁰ The target Members are: Australia, Canada, EC, Iceland, Japan, New Zealand, Norway, Switzerland and United States.

a step further and underlined the need for clearly defined commitments on Mode 4.¹¹ These include: broader sectoral coverage and market diversification, longer periods of stay, elimination of quota restrictions on visas, elimination of the wage parity clause (minimum wages and/or salary thresholds based on average salaries in the host country were suggested by the requesting countries, especially for the case of CSSs), transparency of the process and procedures, introduction of GATS visas and/or a Business Travel Card equivalent to the one defined in APEC.

The next section maps the status quo of commitments undergone by the US, EU, and three emerging powers (China, India, Mexico) on mode 4 with a focus on the dynamic field of bilateral FTAs.

What has been achieved? International commitments on 'mode 4' beyond GATS

Towards a plurilateral Services Agreement

While progress in the DDA of the WTO has been stalled, representatives of initially 16 industrialized and advanced developing countries have decided to move forward the trade agenda in services and develop a plurilateral forum that would follow closely the GATS provisions, but operates outside the WTO arena (Hufbauer et al. 2012). Informal talks for drafting this Trade in Service Agreement (TiSA¹²) started at the beginning of 2012, and official negotiations were launched in 2013. Service industries have been quick to start lobbying for more openings in “mode 4”. Thus, a coalition of seven associations from the EU, the US and India have deposited several position papers with the European Commission and the European Parliament in this direction. Interestingly, whereas during the WTO Uruguay round negotiations, it was the European (European Services Forum) or the US associations engaged in lobbying, today, they have been joined by NASSCOM, the Indian industry association responsible for the IT sector.¹³ Contrary to the Indian government's position in multilateral negotiations, however, these position papers essentially focus on “mode 3” related mobility and highly skilled professionals, i.e. the categories traditionally supported by the industrialized countries. Notwithstanding NASSCOM's participation in this lobby coalition, India and all other BRICS countries are absent from the TiSA initiative – at least so far. Governments have said to oppose a plurilateral agreement outside the WTO as this would relinquish the objective of a ‘single undertaking’ for the Doha Round and would diminish their negotiating power. Trade ministers from Brazil, India, and

¹¹ Interview data with the WTO Secretariat as well as the Permanent Missions of India and Mexico to WTO, Geneva, 6-11.02.2013.

¹² Initially it was called the “International Services Agreement”, a self-selected coalition of currently 22 WTO Members belonging to the so-called “Really Good Friends of Services” (RGFS) grouping.

¹³ Other participating association apart from the ESF and Nasscom are the American Chamber of Commerce To the European Union, BusinessEurope, the Computer and Communications Industry Association CCIA, the European-American Business Council, and Techamerica.

South Africa have ardently argued that such a plurilateral approach would “go against fundamental principles of transparency, inclusiveness and multilateralism” (Hufbauer et al. 2012: 2, see also *Washington Trade Daily*, January 30, 2012). The noninvolvement of BRICS countries might as well be interpreted as a sign of “disagreement” with existing multilateral priorities in trade in services that reflect developed countries interests, as TiSA was initiated by the US and Australia, pursuing thus mainly a service-related agenda setup by industrialized countries. Nevertheless, as one of the interview partners from the Mexican government in charge of mode 4 argued, this initiative could achieve positive results for the mobility of service providers in a relatively short time frame and could eventually serve as a basis for future multilateral negotiations on these matters (interview 18). And, in fact, interviews with public officials and industry associations in India suggest that the proclaimed opposition might be less solid and that the government's position is rather one of “wait and see”(Interviews 31, 32, 33, 37). Meanwhile, more developments have occurred in bilateral FTAs.

Evolving mobility provisions in bilateral FTA

The proliferation of bilateral FTAs yields some dynamics in mode 4 commitments. At this level we see the inclusion of commitments on semi-skilled or lower-skilled migrants, categories of labour providers that are not covered at the multilateral level (see also Hufbauer and Stephenson 2007).

In order to better grasp how various mobility-related provisions have been inserted in FTAs, what categories of service suppliers are covered, and to what extent and in which cases these offer more commitments than GATS, in the following a systematic analysis of the US and EU FTAs is conducted. This in turn will be compared to the approach taken by developing states such as India, Mexico, and China. The analysis in this section is based on primary data collected both via interviews with relevant experts pertaining to the government, business associations, private companies, think tanks, academia, etc. from India (Mexico and China to a lesser extent) as well as a quantitative data base on migration commitments included in trade agreements developed by Lavenex and Jurje (2012, 2013).

Below, Figure 1 and Table 2 compare the commitments undergone by the US, the EU and our three emerging countries (China, India, Mexico) bilateral FTAs (only those covering services). Figure 1 shows how many commitments countries have taken on the different categories of service providers in their concluded FTAs (measured as percentage of respective commitments out of the total number of FTAs covering services concluded by each country). The analysis based on these figures is detailed in the next sections.

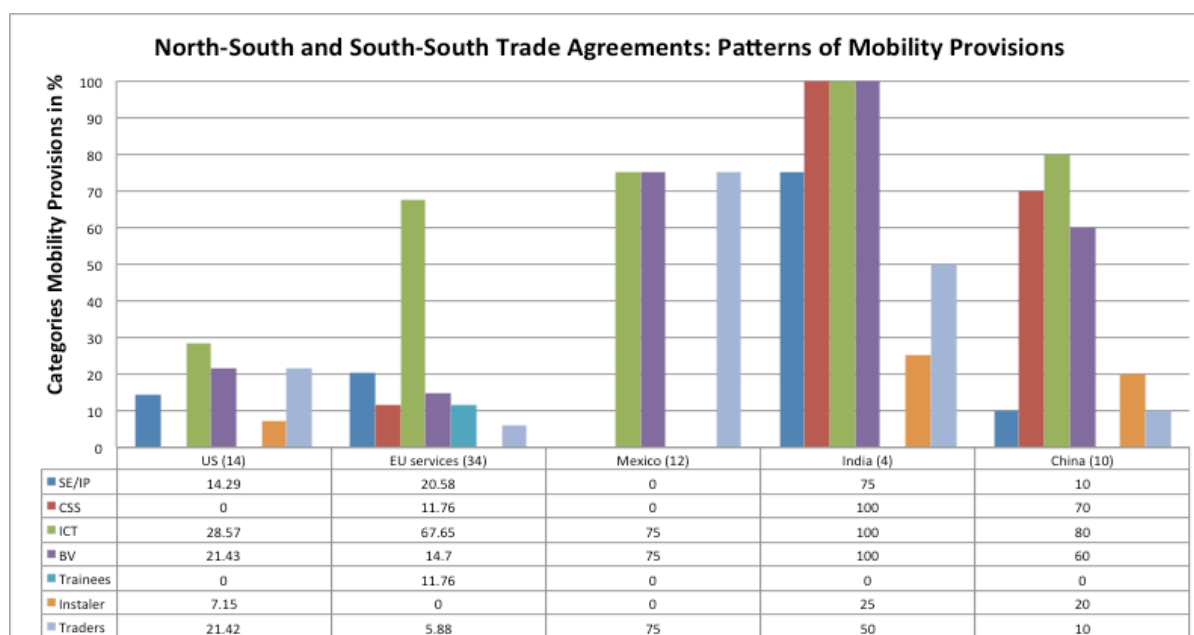


Figure 1 Mobility-related provisions identified in North-South and South-South Trade Agreements (numbers in brackets indicate the total number of FTAs)

Figure 1 shows at a first glance that the three emerging economies include systematically provisions on mode 4 in their FTAs, whereas the EU and US have inserted limited commitments in the agreements covering trade in services. Among the three emerging countries, India stands out with a full (100%) inclusion of mode 4 commitments regarding CSS, ICT and BV, next to frequent commitments in other categories.

Of course, the quantitative frequency with which FTAs include mode 4 commitments says nothing on the quality of these commitments. Therefore, Table 2 below gives an overview of the rights granted to the different categories of persons under the agreements. This shows that commitments undergone by these emerging countries are not just quantitatively but also qualitatively more far-reaching than the US or European ones.

Table 2 Comparison of Mode 4 commitments across countries

Categories	US commitments	EU commitments	India commitments	Mexico commitments	China commitments
Business visitors	Up to 90 days	Up to 90 days in any 12 month period	Up to 180 days (multiple entry)	30 and up to 183 days	Up to 6 months
Intra-corporate transferees (managers, executives, specialists)	3 up to 5 years; no mention of ENTs	Managers, specialists: up to 3/5 years Graduate trainees: 1 year ENT/num. quotas abolished for sectors liberalized, unless otherwise specified (e.g. Colombia and Peru)	Up to one year/max 5years	1 year, may be extended 4 times for each and equal period of time	Up to 3 years
Contractual service suppliers		Up to 6 months, in any 12 months period or duration of contract, whichever is less. CSSs must have at least 3 years professional experience (with CARIFORUM) Specific list of professions, subject to numerical ceiling and ENTs (except where otherwise indicated)	Up to 1 year or the period of contract, whichever is less Installer/servicers: up to 3 months or the period of contract, whichever is less		Up to 1 year Installers/servicers: not exceed 3months (subject to the duration of the contract)
Independent professionals	Temporary entry	Up to 6 months, in any 12 months period or for the duration of the contract, whichever is less; conditioned on ENT	Up to 1 year or the duration of contract, whichever is less		
Traders and investors	Temporary entry	Up to 90 days in any 12-month period	Between 1-3 years, may be extended “appropriate educational and professional qualifications”; sometimes work experience required	1 year, may be extended 4 times for equal period of time	Limited to 90days
Recognition of qualifications	“develop mutually acceptable standards and criteria”	Qualifications and/or professional experience may be required		No	Education or experience may be recognized
Social rights	No	No (in other trade-related agreements yes, but not in the FTAs)	Yes - spouses or dependents	No	No
Visa/immigration requirements	Yes	Yes	Yes	Yes	Yes
Numerical quotas	Yes	Should not maintain numerical quotas	No mention	No mention	Should not maintain numerical quotas

Table 2 shows that emerging countries' FTAs define more categories of service providers, and also clearly indicate the period of stay for all of them that are sometimes longer than those given by the US and the EU. Secondly, India even includes social and employment rights for spouses and dependents in its agreements. This is a development that goes much beyond what was originally thought for mode 4 liberalizations in the WTO. Furthermore, while in some cases, developed countries impose numerical quotas and/or economic needs tests (ENT), this is not the case for any of the emerging markets analyzed.

In the following, we provide a detailed discussion of the commitments undergone by each of these countries.

Mobility-related provisions in US FTAs

The bilateral agreements concluded by the USA are a salient example of the delicate balance of negotiating mobility rights within a trade context on the one hand and the prerogatives of ownership over the immigration agenda defended by the political actors responsible for migration policy on the other hand.

The United States have concluded FTAs with 20 countries (including the NAFTA countries¹⁴), following in all but one case (the FTA concluded with Jordan in 2001) a negative-listing approach to scheduling commitments in services. This translates into a generalized liberalization of sectors, unless otherwise indicated in specific reservation lists. Mode 4 is usually covered under the chapter on cross-border trade in services and reservations to the chapter's obligations, as well as the Annexes, including measures restricting mode 4. The concessions offered by the US essentially follow the GATS model, mode 4 being covered under the so-called 'professional services' that means services, the supply of which requires specialized, post-secondary education, or equivalent training or experience, and for which the right to practice is granted or restricted by a Party. There are only a few exceptions where specific categories of service providers (e.g. independent professionals, business visitors, traders) are clearly defined. In the FTA with Jordan, the US grants access to Jordanian nationals that are eligible for the alleged 'treaty-trader' and 'treaty-investor' visas (E-1 and E-2 visas categories, Carzaniga 2009:485). There are only 2 agreements (with Chile and Singapore signed in 2004) that include a specific chapter on the temporary entry of business persons, setting regulations for categories of service suppliers such as business visitors (covering also after sale installer services), professionals, intra-corporate transferees, traders and investors. In addition, these agreements

¹⁴ These are: US-Israel, US-Canada-Mexico, US-Jordan, US-Australia, US-Chile, US-Singapore, US-Bahrain, US-Morocco, US-Oman, US-Peru, US-Dominican Republic, US-Panama, US-Colombia, US-South Korea. All these FTAs have been coded by the authors of this paper.

include a prominent commitment: the temporary entry visas for professionals (it was decided a number of 1,400 and 4,500 visas to be granted annually to professionals from Chile and Singapore). This link to visas liberalization (a very sensitive topic, associated mainly with immigration policies) created great controversies in the Congress. The final outcome was to place these visas under the category of H-1B program and count them under the overall visas cap. The US Trade Representative (USTR) has subsequently been blocked by Congress in making additional visa concessions under Mode four (Betts and Nicolaidis: 69). Nevertheless, the US-Australia FTA of 2005 contains a concession on temporary entry in the form of E-3 visas for Australian nationals that are hired by a US employer to perform services in the form of 'specialty occupation' and have at least a bachelor's degree (Carzaniga 2009: 488).¹⁵

Iterating the reservation of GATS, US FTAs also provide that "No provision of this Agreement shall be construed as imposing any obligation on a Party regarding its immigration measures, including admission or conditions of admission for temporary entry", sometimes reinforcing these provisions in Side Letters on Immigration.

Mobility-related provisions in EU FTAs

As in the case of the disputes between the USTR and Congress highlighted above, in the EU too migration policy is conducted in a very different context than trade negotiations. As one of the official from DG Trade puts it "mode 4 is strictly about trade and not about immigration", these are "not the same domain" and "there is no interference into each others' domain" (Interview 39). However, the overlaps between both agendas are becoming increasingly obvious and first links between trade- and non-trade related migration provisions are starting to take shape. In the words of another EU expert from DG Home this is highlighted as follows: "trade people want to use visas as leverage for trade agreements" while "home affairs officials want to use visas as leverage for readmission agreements" (Interview 38).

In general, the EU has been very hesitant to move beyond GATS commitments in bilateral agreements. From a total of over 65 trade-related agreements concluded by the EU with third countries so far, only about 50% include provisions relevant for the mobility of service suppliers. These cover generally the newer agreements (like FTAs, Accession Partnerships, Stabilisation and

¹⁵ In turn, US trading partners have decided to offer a more favorable situation for American service suppliers. For example, Jordan although it uses mainly the GATS model, it improves by offering an automatic renewal of the period of stay (aspect which is not clearly specified in GATS). Also, Jordan offers access to US citizens under treaty-trader and treaty-investor categories. Chile, Singapore and to a certain extent Morocco as well offer considerably more commitments than in the GATS agreement (here commitments are limited to ICTs - Carzaniga 2009:489) with the inclusion of service providers categories such as business visitors, installers, traders and investors or professionals.

Association Partnerships) concluded by the EU from mid 2000 onwards. Nevertheless, most of these mobility liberalizations are linked to commercial presence (mode 3) and 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 with trade in services chapters) and self-employed persons within the companies established and effectively controlled by these nationals in the territories of the EU. There are a few 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). However, 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 capacity¹⁶. 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 some 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. So-far, however, the inclusion of these categories is the exception in EU FTAs (11 per cent for CSSs and about 20 per cent for IPs respectively out of the totality of EU trade agreements).

The most far-reaching commitments are likely to result from the current FTA negotiations with India in which mobility has become one of the main issues and a potential stumbling block over which the negotiations could come to a failure (Interviews 6, 19, 39; see the summary of India's negotiation stance below).

Despite EU trade negotiators' “great caution” not to overstep the border to issues perceived to pertain to the domain of immigration ministers (Interview 39), the links between the mode 4 agenda and immigration policy are becoming “more and more salient” (Interview 38, also a similar idea iterated by interviewee 31).

Clear manifestations of this are not only the requests of trade officials in the Commission towards their colleagues from DG Home, dealing with immigration, for possible concessions to offer to trade partners (Interviews 19 and 20), but also the elaboration of a the so-called EU Directive for intra-

¹⁶ 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).

corporate transfer of non-EU skilled workers, currently under discussion within the European Parliament and the Council. This directive, which is integrated in the EU migration policy agenda, proposed by DG Home and negotiated among immigration ministers (instead of trade) will ease the movement conditions of skilled migrants from non-EU countries, providing services under the category of ICTs in the EU, thereby implementing also the commitments made under the GATS and FTAs.

South-south trade agreements

Turning now to emerging countries and assessing their south-south trade relations, we focus on the particular cases of India, Mexico, and, to a lesser extent, China. As already mentioned above, India (and Mexico to a certain degree) were very active at the multilateral level in pushing forward the negotiations on services and mobility of natural persons, especially during the DDR, and have already moved well beyond GATS commitments in several of their bilateral FTAs. China's role has been less outspoken, but its recent FTAs and information gathered in our interviews suggest that China is not disinclined to stronger commitments on mode 4. With their growing economic weight, it can be assumed that these countries will succeed in introducing these priorities in FTAs negotiated with the EU or the US.

India

India has so far concluded four FTAs that also cover trade in services, with Singapore (in 2005), Korea (in 2010), Malaysia and Japan (both in 2011). These FTAs cover the largest number of sub-categories of service suppliers¹⁷ de-linked from commercial presence – notably, contractual service suppliers and independent professionals, categories that appear in almost all agreements (see above Figure 1). Also, there is no mention of ENTs or any quota restrictions, and generally the requirements with regard to visa and duration of stay are clearly outlined. Another development is related to mobility and working rights for families (spouses, dependents) of service providers offered for the same duration of stay. Actually, from the group of emerging markets analyzed, India is the only country that included this type of “family rights” provisions in its trade agreements. India’s trading partners have offered similar commitments, in some cases even a better outcome. For example, in the FTAs

¹⁷ Besides the general categories of intra-corporate transferees, business visitors, contractual service suppliers, and independent professionals, India has defined sub-categories such as service seller, goods seller, investor, trader, and installer, servicer of machinery. Also independent professionals in the form of nurses, instructors of yoga, Indian cuisine, classical music and dance, English teachers were liberalized in the FTA concluded with Japan.

with Japan, the duration of stay for CSSs coming from India is initially agreed to three years, with the possibility of renewal, while India offered to the Japanese CSSs a maximum period of one year.

Apart from these agreements with other Asian countries, India has been negotiating with the EU on the conclusion of an FTA since 2007. Greater commitments on mode 4 have been and remain India's main offensive interest in these negotiations. Interestingly however, India's negotiation stance has somewhat shifted over the years. Whereas originally, demands on the EU clearly followed the developmentalist agenda outlined above (and reflected also in the FTAs with the Asian partners), most recently, commitments relating to ICTs and the intersection between mode 4 and mode 3 have gained more priority. Although negotiations are not concluded, the EU has been willing to offer commitments that go well beyond what it has given so far on mode 4. The clearest manifestation of this is the offer of national quotas per EU Member State on the admission of CSS and IP, that is categories of persons not related to commercial presence and not necessarily highly skilled. However, to the EU's surprise, this offer has not been received with enthusiasm from the Indian side. The reasons are firstly that Member States would retain the possibility to activate a so-called "safeguard trigger", meaning that once a given threshold is reached, the EU could apply ENTs for the rest of applicants.¹⁸ Secondly, and more importantly, the quotas offered did not match India's country preferences. In other words, the main EU destination for Indian service providers is clearly the UK, hence, as some interviewees put it, quotas of some 60'000 service providers to be allowed to enter the Czech Republic or any other new EU member state would not do the trick. Consequently, and under the influence of the main lobby in mode 4 matters, NASSCOM (Interviews 24, 25, 33), Indian negotiators have advanced, apart from the claim to eliminate numerical quotas, the ambitious demand for an EU-wide work permit or visa being offered to service providers. Clearly, this would be a major benefit for Indian companies being based in one Member State who want to expand their services to other Member States without being obliged to open other commercial presences, for instance in the IT business. While particularly attractive at the junction between modes 3 and 4, an EU wide work permit would also be advantageous for CSSs and IPs. Other items on the agenda are the introduction of a specialized visa for the mobility of service providers (like for example in NAFTA); transparent and clear methods for recognition of qualifications; and flexibility regarding the wage parity condition and labour standards.

To date, it is not clear whether a deal between the EU and India will be struck. Other sensitive issues on the table are EU demands regarding tariffs in the automobile industry or the EU's refusal to recognize data security in India, thereby limiting the outsourcing of IT services. Before the upcoming

¹⁸ The implementation of quotas has also been questioned because in the absence of a specialized visa it is nearly impossible to keep track of the number of natural persons entering the EU on "mode 4" commitments.

general national elections in India, no major progress will be done. As several of our interviewees told us, however, an EU offer covering an EU wide work permit would be a major incentive to sign the agreement for India. Should this happen, this would not only be a major innovation in trade regulations but also signify a major integration step in the EU's internal immigration policy. Moreover, the rather protectionist economy of India, as seen by some scholars and trade negotiators (World Bank 2013), opens the door for speculations about an alleged “tactical” approach on the Indian negotiators’ side, meaning that requests on mobility were intentionally set at a too high threshold for the EU not to be able to accommodate them, and at least for the time being, to cease the FTA negotiations.

Mexico

Another emerging country that is ardently supporting the mode 4 agenda is Mexico. In the multilateral system, Mexico was closely following India and supporting the initiatives advanced by the former. Contrary to India, however, Mexico has decided to join TiSA plurilateral negotiations, trying to push forward their domestic agenda regarding mobility of service providers, one of the “top priorities of the country”, as highlighted by one of the Mexican official (Interview 21). In the meantime, however, the main avenue to promote its trade regime has been the negotiations of the FTAs (Mena 2003).

As transpires from the analysis of all Mexican FTAs with third countries as well as discussed in face-to-face semi-structured interviews with diplomats from the Permanent Mission of Mexico to WTO, the Mexican administration generally opted for the model adopted in NAFTA that has a GATS+ nature, but does not offer to many rights to service suppliers independent from commercial presence. In its FTAs Mexico has liberalized the mobility of intra-corporate transferees, business visitors, and traders (in 75 per cent of the agreements), but no provisions for independent professionals or contractual service suppliers were offered. The FTA concluded with Japan has a more detailed nature, some of the mobility-related provisions from NAFTA chapters being further revised and adjusted to capture the trading realities between the two countries.

Although the mobility of highly skilled migrants tends to prevail some clauses on temporary mobility of semi-skilled migrants were also granted by Mexico. One such example is the new category of “technicians”¹⁹ that was liberalized in the recently concluded agreement with Peru. More commitments on semi-skilled “professional service providers” are covered by Mexico’s “Mutual

¹⁹ This mainly refer to technical professionals as business person of a Party that holds a special occupation, having a post-secondary education or technical education between a 1 and 4 years of study, related to a specific area of knowledge, with theoretical and practical expertise in that area.

recognition agreements". One such example highlighted by the diplomat interviewed at the Mexican delegation to WTO is the one with Spain.

China

China has been much less vocal in the WTO regarding mode 4 negotiations, which is in parts due to its late accession, but also to the fact that it sees less potential in a possible liberalization for itself (Interview 7) – which is probably also due to the lack of an influential industry like the Indian IT lobbying for more openings. Nevertheless, our interviewees in the Chinese delegation to the WTO and Beijing assert that the Chinese government supports in principle India's agenda on mode 4. As we were told, this is not so much because of national interests than because China finds it necessary to balance 'western' demands on service liberalization with commitments that would benefit the developing countries. However, one important request formulated by China is related to visa facilitation, ranging from diplomats to various categories of service suppliers. As one governmental official from the Ministry of Commerce stated when asked about visa issues: "It is not a problem if the project is in a developing country but if the project is in the EU or in the US, it is pretty hard for the workers to get visa" (Interview 23).

Furthermore, notwithstanding its low profile in the WTO, Chinese FTA's do go beyond the "western consensus" and include entries on non-highly skilled service providers such as installer/servicer (for example in the FTA with Pakistan and the newly concluded one with Switzerland), but also practitioners of traditional medicine, cuisine chefs, martial arts, or Chinese guide tours (see e.g. the FTA concluded with New Zealand in 2008). Even more, in the FTA with New Zealand student related mobility provisions in the form of student visas and the establishment of a Doctoral Research Scholarship Program have been included.

Below the surface: Contingencies in emerging countries' rule-making

The case of India²⁰ is instructive of the ambivalences involved in emerging countries' shift towards potential rule-makers in the international trade arena. On the surface, India has been influential in establishing a developmentalist agenda on GATS mode 4 both at the multilateral and bilateral levels. Beyond the trade arena, India's strategic importance is also reflected in the fact that it is the first non-neighbouring country to which the EU has accorded a dialogue based on a so-called

²⁰ We focus here on India because we have just concluded intensive field-work in this country, interviews in Mexico and Brazil are scheduled for April and July, and for China we will have to go again.

“Common Agenda on Migration and Mobility” (CAMM), a framework designed to allow for mutual coordination on migration matters (Memo, 2013, also interview 20).

Despite this achievement, however, India's position is internally deeply divided. On the one hand, the Ministry of Overseas India Affairs (MOIA) and the lead negotiators in the Ministry of Commerce have stuck to the developmentalist agenda and maintain the need to foster mode 4 commitments de-linked from the interests of multinationals or commercial presence (mode 3). At the same time, however, negotiators have also started to recognize that these priorities may no longer fully mirror India's comparative advantages in service trade. In particular, while the 'old' developmentalist discourse assumes that the main gains can be drawn from the mobility of low-skilled labour (see above), in the meantime, several industries in India have reached a competitive status that generates a genuine interest not only on mobility for personnel, but also for firms themselves (Interviews 25, 26, 31, 32). This stance, which is strongly promoted by the main lobby group, NASSCOM, shifts India's priorities much closer to the ones of the developed countries and their service industries – a fact that also shows in the joint lobby activities by NASSCOM, the EU and US service industry associations in the context of TiSA (see above). This transition of India away from the typically developmentalist priorities is further reflected in the fact that stakeholders in the government increasingly realize that mode 4 commitments targeted at destination countries for its own nationals will at the same time allow citizens from poorer neighbouring regions to enter India – given the Most Favored Nation principle attached to GATS (Interviews 26, 28) – a potential evolution that is regarded with a similar type of suspicion as we know from the West.

This divide is also salient in the different views that relevant ministries take on what should and could be achieved through trade negotiations on mobility or migration. Thus, while the Ministry of Overseas Indian Affairs argues bluntly for a "comprehensive labour migration framework" in FTAs, the Ministry of Commerce has understood from its interaction with the EU and US that the biggest challenge with the EU is “to make them understand that this is just to deliver efficient service and not about migration” (Interview 35). This internal divide has ambiguous effects on India's international stance. While Indian negotiators have become increasingly criticized by liberal forces (e.g. domestic think tanks) close to the export industries for remaining "stuck in mode 4" and not realizing the gains from a more offensive strategy on mode 3, government representatives maintain that in their negotiations with western partners, they have to take into account India's diverse interests and also those of other developing countries. In other words, Indian trade officials have progressively internalized their role as voice of the developing world and – although it is undeniable that India still is in wide respects a developing country itself – this role limits the government's capacity to adapt to a changing domestic landscape.

Next to the challenge of unequal economic transition, a second important challenge to India's evolution into an international "rule-maker" stems from the weakness of its internal governance apparatus and the lack of regulatory capacity to develop, maintain and implement corresponding policies. For instance, whereas Indian negotiators have been asking certain migration concessions from developed countries, internally India lacks a consolidated policy on international migration and responsible ministries are only slowly being established. A related problem that may weaken India's leverage in international negotiations is the question to what extent the Indian state is itself capable to implement strong commitments on international mobility. Notably, while Indian trade negotiators have often invoked the wish to have mutual recognition of qualifications as a facilitation for cross-border service delivery, several interviewees have emphasized that for India itself it would be probably impossible to get its professional associations (like the architects) embark on a Mutual Recognition Agreement (MRA). India's insecurities whether to join or not TiSA and the "wait and see approach" adopted so-far may thus be less an expression of an unbroken commitment to multilateralism than of the profound ambiguities involved in the evolution from a developing country to an emerging power.

Conclusion

Labour mobility is one of the few issue areas where developing countries have long had offensive interest towards the "West". The inclusion of "mode 4" in the 1995 GATS was the result of a diverse alliance of western service industries pushing for highly skilled mobility mainly within MNC and developing countries' less successful lobbying for mobility rights for broader categories of natural persons. Shifts in market power have given these voices under the lead of India a greater salience and bilateral FTAs concluded or being negotiated by emerging economies all go well beyond the EU/US/WTO status quo. Whether this GATS+ agenda will materialize in multilateral commitments or in FTAs with the (former) trade hegemony depends on many issues, not least on domestic politics in the lead negotiators. As the case of India shows, economic transition and rising market power has ambiguous effects on the government's capacity to establish itself as a "rule-maker" on international trade. With the strengthening of domestic industries, trade liberalization interests have increasingly converged with those maintained by the developed countries, thereby narrowing the scope for alternative agendas. Secondly, with the growing attractiveness of the domestic market, the cost-benefit calculations regarding mode 4 commitments have changed, and Indian officials increasingly fear being negatively affected by more openings on low-skilled labour, a fear that is well known from developed economies. Finally, mode 4 liberalization touches a "far-beyond-the-border" issue, a sensitive question of national sovereignty that is attached to a multitude of regulations regarding

access to work, labour regulations, recognition of qualification, social and economic rights, etc. In the absence of a consolidated domestic immigration policy, social and labour rules, and without the commitment of relevant domestic actors such as professional associations, it is doubtful whether countries like India already possess the regulatory capacity to act as pacesetters on "mode 4".

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Annex

List of Interviews

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Interview 2: European Commission, DG Justice, Freedom and Security, Brussels, 9 October 2009.

Interview 3: European Commission, DG Trade, 7 October 2009.

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Interview 5: Mexican Delegation to the WTO, Geneva, October 2012

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