**Chapter 12: The Migration-Trade Nexus: Migration Provisions in Trade Agreements**

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Abstract

Rather unnoticed from academic debates, a dynamic agenda on trade-related mobility rights has taken shape that sits at the nexus of liberal political economy and the regulation of one of the most sensitive matters of state sovereignty. The door to this agenda was opened in 1995 with the inclusion of so-called “mode 4” mobility of natural persons in the General Agreement on Trade in Services (GATS) of the WTO. Whereas current GATS mode 4 commitments are quite limited, this chapter shows that recent initiatives and particularly regional and bilateral Free Trade Agreements (FTAs) gradually expand these clauses beyond the former trade hegemons' original intentions.

**Introduction**

Migration policy has hitherto not been a stronghold of global governance. In contrast to the flow of goods and finance, where states have established strong international bodies, no parallel development has taken place for the mobility of persons. Despite ample attempts at stronger cooperation “there is still no consensus on whether global governance is really required, what type of global governance would be appropriate, and how it should develop” (Newland 2010: 331). With the exception of the international regimes for labour rights and refugees established in the interwar period, states have been reluctant to agree on binding multilateral migration norms (Betts 2011). International cooperation has been addressed mainly by "soft" law, such as the Global Commission on International Migration, the UN High Level Dialogue on International Migration and Development and the Global Forum on Migration and Development.

This reluctance towards international rules and coordination is however only one, even if perhaps the predominant side of the coin. A set of norms facilitating labour mobility has started to develop as part of trade agreements, particularly related to trade in services. Recognised as one essential mode of the cross-border trade in services, the temporary mobility of natural persons has become an essential element of newer trade agreements at the multilateral, plurilateral, regional and bilateral levels.

This trade-related labour mobility liberalisation finds explanations in theories of globalization, where greater international integration, economic interdependence and increases in trade flows have all led to the formation of the alleged “competition state” (Cerny 1994). From this perspective, labour mobility is a factor of production that has become commodified as part of economic transactions. Regulators have given suit to employers' demand for easing certain (primarily highly skilled) labour flows. At the same time, this economic and liberalizing logic of the "competition state" fits uneasily with many states' concern to maintain their sovereignty over the intake of foreign nationals.

In this chapter we retrace the trade-migration nexus and discuss its diverse triggers and restraints in both established and emerging economies. The first part elucidates the economic transformations that have sustained the entry of migration considerations in trade affairs. The empirical evidence is discussed in section two. The chapter concludes on the tension between economic and political dynamics affecting the regulation of migration flows through trade venues.

**The "trade-ification" of migration flows**

Migration, as the cross-border flow of people, constitutes the mobility of one factor of production amongst others. The European integration project has included this factor from the start, counting the mobility of workers (later 'people') together with capital, goods and services as one fundamental freedom of the single market. At the global level, this agenda is linked to two main developments: the new wave of trade liberalisation associated with the (neoliberal) 'competition state' (Cerny 1994) and the rise of the service sector. In developing and emerging countries, the transition to service economies has not (yet) occurred. Nevertheless, these countries have strongly embraced the trade-mobility agenda – promoting it further and in a somewhat different direction than what the limited openings agreed by the developed countries originally intended.

*The competition state*

The notion of the competition state has been coined to characterize the transformation of the state from the Second Industrial Revolution welfare system to the neoliberal trading state of the 1980s-1990s (Cerny 1994). In this perspective "the main function of the contemporary state is the promotion of economic activities, whether at home or abroad, which make firms and sectors located within the territory of the state competitive in international markets” (Cerny 1999: 199).

The demand and supply for foreign labour is no exception to this commodification of the factors of production. Whereas the potential exploitation of manual labour through the relocation of production processes from the industrial countries to low-wage economies in Africa and Asia has been observed from the 1970s onwards (Fröbel 1977), newer trade policies promoted by developed countries and multinational corporations target the facilitation of flows for highly skilled migrants. Conversely, developing countries have discovered their surplus of lower skilled workers, cheaper labour and the benefits of remittances as competitive advantages. This has led various countries (e.g. Bangladesh, China, Egypt, India, Indonesia, Pakistan, the Philippines, South Korea, Sri Lanka and Vietnam) to develop government-sponsored programmes to promote emigration in specific professions (Massey 1999).

*The rise of the service sector*

Although labour is an integral factor to all modes of production, the rise of the service sector has specific implications for labour migration. The delivery of a service is often not separable from the physical presence of the person providing it (Sapir 1999: 52). The expansion of trade in services began in the early 1980s and has by far exceeded growth patterns for trade in goods. The same evolution has not yet occurred in emerging or developing countries. The big exception is India, which has set up a competitive information technology sector (IT), and, to a smaller extent, Mexico. According to NASSCOM[[1]](#footnote-1), the lobby organisation of Indian IT businesses, IT is the highest impact service sector for India, with a share of 8.1% in the total GDP and the largest share in total services exports, up to 38%. Therefore India has embraced the services trade agenda early on and has tried to widen its scope to cover mobility of service providers at all level of skills. Other emerging economies such as Brazil or China have been slower in the development of their services industries, but have nevertheless also given support to multilateral trade in services liberalisation with the condition that this includes the mobility of service providers as one factor of production in which they have comparative advantages.

This focus on the mobility of persons contrasts with the perspective of Western service industries. The latter's main interest is linked to commercial presence abroad, thus implying the mobility of firms and, only in the context of this transnationalisation, also the mobility of managers and key personnel within these enterprises (Sassen 1998). Tight immigration laws and bureaucratic admission procedures have increasingly been identified as potential barriers to the inflow of foreign capital. In the absence of competitive MNCs, developing countries are detached from these liberalisation steps and have therefore negotiated in favour of liberalising the mobility of service providers independently from their attachment to MNCs.

**The invention of "mode 4"**

"Mode 4" is the technical term for the liberalisation of temporary mobility of service providers in the General Agreement of Trade in Services. It establishes a framework of rules for liberalising trade in services and national commitments on market access for services produced by foreign suppliers. GATS differentiates among four modes of trans-border trade in services: electronic commerce – a service moves electronically from one to another country (mode 1), movement of the consumer – a person goes to another country to consume a service (mode 2), movement of juridical persons/commercial presence – a firm moves to another country to establish presence (mode 3), and the movement of the service provider – a natural person delivers a service in another country (mode 4).

Movement of labour is often used in conjunction with other modes of delivery. According to Ghosh, "the greater the labour intensity of the service to be traded, the more it is likely to be affected by restrictions to market access through visas and work and residence permits" (Ghosh 1997: 51).

The inclusion of labour mobility in the GATS treaty was not self-evident. When the industrial nations and above all the USA decided to raise services onto the Uruguay Round in the mid-1980s, they faced opposition from the developing countries. Most developing countries are traders at the margin and not competitive in those sectors which interest the North, (esp. finance and telecommunications). Liberalisation of their markets was perceived as hindering the development of own service industries. As export of labour was initially not tackled by the multilateral negotiations, developing countries with labour surplus requested the inclusion of this factor in the negotiations, calling for “symmetrical” commitments (Ghosh 1997: 57ff).

The second round of negotiations (1989-1990) was then dominated by the clash of interest between developed and developing countries on how to address labour mobility. Western lobby, particularly the European Service Forum and the US Coalition of Service Industries, had persuaded their trade officials that certain provisions in domestic immigration laws constituted barriers to trade, inhibiting the mobility within multinationals (Lavenex 2006, Panizzon, 2010). This led developed countries to favour a limited liberalisation of temporary labour, primarily within multinational companies. Developing countries, in contrast, argued for a broader liberalisation. A group of eight countries (Argentina, Columbia, Cuba, Egypt, India, Mexico, Pakistan, Peru) presented a proposal which foresaw the (temporary) "cross-border movement of personnel covering unskilled, semi-skilled and skilled labour" (Art. 1(3)1) "without arbitrary distinction relating to skills or position in corporate hierarchies"(Art. 2(3)) and without infringing on national immigration, residence or citizenship laws (Art. 1(4))[[2]](#footnote-2). This proposal not only extended the range of workers falling under the Agreement, but also suggested to "permit firms providing services for which access has been granted under the Framework to recruit personnel from the source, among countries signatory, which is economically most advantageous" (Art. 3(1)), thus introducing free competition over the production factor 'labour'.

The result of the GATS was an open compromise reached one year after the conclusion of the Uruguay Round in July 1995. Accordingly, "Members may negotiate specific commitments applying to the movement of all categories of natural persons supplying services...".[[3]](#footnote-3) This includes both service suppliers who are employed by a foreign or national firm and independent workers. While the Treaty thus adopted the open formulation favoured by the developing countries (irrespective of skills and hierarchical position), the actual scope of liberalization was however left to the Members' own commitments laid down in the GATS schedules.

This legal framework still determines the multilateral level of commitments in "mode 4". In the Doha round, labour mobility continued to be high on developing countries' agenda, and for some emerging markets, like India, it still constitutes "one of the most offensive interest" in trade negotiations (Interview 1[[4]](#footnote-4)). In 2008, developing countries formed again a coalition in the WTO submitting a “Plurilateral request on services”[[5]](#footnote-5) calling for wider commitments for Contractual Service Suppliers (CSSs) and Independent Professionals (IPs) – categories de-linked from commercial presence, as well as for the removal of economic needs tests (ENTs).[[6]](#footnote-6) Statement papers, submitted by India, and backed by Mexico further requested broader sectoral coverage and market diversification, longer periods of stay, elimination of quota restrictions, removal of the wage parity clause, introduction of GATS visas or a Business Travel Card facilitating mobility (Interview 2). As no progress has been achieved in the Doha negotiations, multilateral commitments on mode 4 are still governed by the 1995 GATS Agreement. Below we review the commitments undertaken by the EU, the US and India, the country which has been most vocal in the expansion of the trade-migration nexus.

**Scope of commitments under GATS**

The actual level of market access for mode 4 reached under the GATS is very limited, following a positive-listing approach[[7]](#footnote-7) and favoring the highly-skilled (Dawson 2013). According to an OECD analysis, 240 out of 328 entries relate to executives, managers and specialists, and 135 strictly to ICTs. Yet, only about 17% of all horizontal entries cover lower skilled personnel and just a few countries have allowed some forms of restricted entry to "other level" (OECD 2002: 31). Table 1 gives an overview of these categories, differentiating between highly-skilled and other persons, and between “mode 3”-related categories and those unlinked from commercial presence. The bold entries reflect those categories for which the traditional trade hegemons have entered most commitments.

*Table 1: Categories of service suppliers GATS mode 4*

|  |  |  |
| --- | --- | --- |
|  | Highly-Skilled | Non-Highly Skilled |
| Related to commercial presence | **Intra-corporate transferees****Business Visitors**Traders/Investors | Trainees |
| Independent from commercial presence | Self-employed/independent professionalContractual Service Suppliers (covers highly-skilled, but also lower-skilled persons such as technicians, installers, care-workers) |

The general limits of labour mobility under GATS are fixed in the *Annex on Movement of Natural Persons*. Its first paragraph states that commitments under this mode relate only to temporary admission of foreigners[[8]](#footnote-8) and the fourth paragraph contains a safeguard which won’t "prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protection the integrity of, and to ensure the orderly movement of natural persons across its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment."

Notwithstanding these limitations, the GATS does have an important impact on national immigration systems. It seeks to abolish domestic regulations hindering the international mobility of service providers like:

* Visa requirement procedures;
* Labour market regulations/working permits;
* Regulations defining foreigners' ability to work in individual areas.

Numerical quotas; licensing and qualification requirements; residency requirements and non-eligibility under subsidy schemes; discrimination on mandatory social insurance systems (e.g. denial of pension entitlements); restrictions affecting the mobility of family members do however fall under the scope of the Treaty and may be captured either under the general horizontal or in specific sectoral commitments (WTO 1998: 11ff.).

In the following we map existing GATS commitments undertaken by the EU, the US and India, discussing interests and reluctances on liberalisation on both sides.

European Union

The EU's horizontal commitments under GATS[[9]](#footnote-9) provide for the temporary presence of intra-corporate transferee[[10]](#footnote-10), or natural persons in a senior position, or who possess uncommon knowledge essential to the establishment's service, research equipment, techniques or management. The duration of "temporary stay" is defined by the Member States and, where they exist, Community laws and regulations regarding entry, stay and work, social security measures, minimum wages or collective wage agreements apply. These rather few horizontal openings for mode 4 are further restricted across sectoral commitments that in certain areas discriminate based on nationality or economic needs tests criteria.

In 2005 several WTO members presented revised services offers, and the EU was among those who tabled improved offers for mode 4. However, due to the stalled negotiations at the multilateral level, this has not come into force. Some of the revised provisions were nevertheless taken up in bilateral FTAs signed by the EU. The envisaged horizontal commitments thought to extend mobility rights to graduate trainees (under ICTs or BVs), CSSs and IPs. Although restricted to a few sectors, for short terms, and subject to ‘laws, regulations and requirements of the European Communities and Member States’[[11]](#footnote-11), these latter openings would have been the biggest move in favour of developing countries. In the sector-specific commitments, the main limitations were related to residency and nationality requirements, and ENTs.

Overall, it should be noted that mode 4 remains restricted and subject to many domestic regulations. Even in the 2005 EU’s revised offer, seen as fairly ambitious, mode 4 commitments relate exclusively to highly-skilled individuals and specialists. The possibility to allow market access for the two categories delinked from commercial presence did not move beyond the status quo, as these categories are still supposed to cover only the highly qualified and are subject to various sectoral restrictions.

United States

The US’ schedules[[12]](#footnote-12) cover relatively similar categories of service providers as EU’s and are limited to highly skilled professionals. Horizontally it includes: services salespersons (otherwise also referred to as business visitors),[[13]](#footnote-13) whose duration of stay can go up to 90-days; ICTs such as managers, executives and specialists, who are allowed to stay up to 3 years, extendable for additional 2 years; personnel engaged in establishment for the purpose of establishing a commercial presence; fashion models and specialty occupations who can be admitted for a period up to three years. The focus on highly-skilled persons is also visible in the latter category which requires a bachelor’s degree and full licensure in the US. Contrary to the EU, whose power to negotiate quotas of immigrants is hitherto limited, the US have committed to a cap of 65,000 annual intakes in this category of speciality occupations, subject to wage parity conditions. The sector-specific commitments set further residency and nationality imitations. The US’ 2005 revised services offer did not touch upon initial mode 4 provisions.

India

The leading country among developing states, pushing for more openings in mode 4, has initially not exceeded much the mobility commitments undertaken by developed states[[14]](#footnote-14). The exception was openings for professionals, defined as natural persons with the necessary academic credentials and professional qualifications, three years work experience, and engaged by a juridical person in India as part of a services contract limited to 1 year and 3 months. India has also offered market access for Business Visitors (up to 90 days) and ICTs (managers, executives, specialists with 1-year experience, allowed up to 5 years).

In 2005, India has also submitted a revised offer[[15]](#footnote-15) that would have included greater openings for CSSs and IPs. Although, as in the case of the EU, these were to be limited to specific sectors[[16]](#footnote-16), sometimes subject to numerical quotas (e.g. tourist guides limited to a total ceiling of 500) and short durations of stay (up to 1 year and 3 months), the revised offer could have broadened the scope of mobility at the multilateral level, striving to achieve more openings for service providers detached from commercial presence.

Table 2 below summarizes these GATS mode 4 commitments undertaken by the cases analysed.

|  |  |  |  |
| --- | --- | --- | --- |
| **Categories**  | **US commitments** | **EU commitments** | **India commitments** |
| **BVs** | Services Salespersons, up to 90 daysPersonnel Engaged in Establishment | Representatives of a service supplier seeking temporary entry for the purpose of negotiating for the sale of services or entering into agreements to sell services for that service providerPersons working in a senior position responsible for the setting up of an establishment(temporary stay defined by EU MSs) | Up to 90 days  |
| **ICTs (managers, executives, specialists)** | 3 up to 5 years | Persons working in a senior position within a juridical person, who primarily direct the management of the establishment Persons working within a juridical person who possess uncommon knowledge essential to the establishment's service, research equipment, techniques or management(temporary stay defined by EU MSs) | Up to 5 years |
| **CSSs** |   |  | Natural persons in the field of physical sciences, engineering or other natural sciences, up to 1 year |
| **IPs** |  |  |  |
| **Others** | Fashion Models and Specialty Occupations, up to 3 years |  |  |
| **Qualifications requirements** | Qualifications and/or professional experience is required in various sectors | Qualifications and/or professional experience is required in various sectors | Necessary academic credentials and professional qualifications; various years experience |
| **Social rights** | No  | No  | No |
| **Visa/immigration requirements/other regulations** | Yes | Yes, laws and regulations regarding entry, stay, work and social security measures, period of stay, minimum wages as well as collective wage agreements | Yes |
| **Numerical quotas/ENTs** | Yes: 65,000 for Fashion models/specialty occupations | Yes: ENTs in sectoral commitments for certain professions | No mention |

*Table 2: Summary of GATS mode 4 commitments by the US, EU and India*

GATS is the first multilateral treaty to include binding multilateral rules on migration. Although the treaty allows for a great degree of flexibility, it also has direct implications for national immigration systems and labour market regulations, especially since once adopted these commitments cannot be unilaterally reversed. Assessing both developed and developing countries’ WTO commitments on mode 4, it is to be noted that mobility provisions at the multilateral level remain limited. But the WTO iterative rounds of negotiations have created a propitious momentum for norm expansion outside GATS, in regional and bilateral trade agreements. In support for greater mode 4 openings, adds market forces, labour shortages in developed economies and the pressure of the service industries. In Europe and North America, service industries have joined forces in two influential interests groups, the European Service Forum and the US Coalition of Service Industries. More recently, these western interest groups have been joined by NASSCOM, India's powerful lobby of IT business. At the same time the Indian government has established its role as spokesperson of the developing countries, pursuing its attempts to achieve mobility for lower- and semi-skilled work force, especially for those categories detached from commercial presence. The developments occurring in bilateral and regional agreements are reviewed in the next section.

**'Mode 4' in plurilateral and bilateral free trade agreements**

*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 operate outside the WTO (Hufbauer et al. 2012). Official negotiations for this Trade in Service Agreement (TiSA) were launched in 2013. Service industries from the EU, the US and India have rushed to deposit position papers with the European Commission and the European Parliament. Interestingly, whereas during the WTO Uruguay round negotiations, it was the European Services Forum or the US associations engaged in lobbying, today, they have been joined by NASSCOM, the Indian IT industry association.[[17]](#footnote-17) Contrary to the Indian government's position in multilateral negotiations, however, these position papers essentially focus on "mode 3"-mobility and highly-skilled professionals, 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 negotiations, at least so far[[18]](#footnote-18). Governments in developing countries have long opposed 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 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). The non involvement of BRICS countries might as well be interpreted as a sign of “disagreement” with existing multilateral priorities in trade in services that mainly reflect developed countries interests. Nevertheless, as one of the interview partners from the Mexican government 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 (Interview 2). 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 3, 4, 5, 6). Meanwhile, more developments have occurred in bilateral FTAs.

*Evolving mobility provisions in bilateral FTAs[[19]](#footnote-19)*

The proliferation of bilateral FTAs yields some dynamics in mode 4 commitments. At this level we also find commitments on semi-skilled or lower-skilled migrants. Below, Figure 1 and Table 2 compare the commitments undergone by the US, the EU and India in bilateral FTAs (only those covering services).

*Figure 1 Mobility-related provisions in US, EU and Indian Bilateral Free Trade Agreements (numbers in brackets indicate the total number of FTAs)*

Figure 1 shows the frequency of commitments of the different categories of service providers taken on by the analyzed cases in their concluded FTAs.[[20]](#footnote-20) At a first glance, it indicates that India includes systematically provisions on mode 4 in its FTAs, whereas the EU and US have fewer. India stands out with a full (100%) inclusion of mode 4 commitments regarding CSSs, ICTs and BVs, next to frequent commitments in other categories. However, this has to be interpreted with caution, as India has only concluded 4 FTAs so far that cover services.

Of course, the quantitative frequency with which FTAs include mode 4 commitments says nothing on the quality of these commitments. 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 India are not just quantitatively, but also qualitatively more far-reaching than the US or European ones. Table 3 highlights that India's FTAs define more categories of service providers, offer longer durations of stay, and include social and employment rights for spouses and dependents. This is a development that goes much beyond what was originally thought for mode 4 liberalizations in the WTO. While in some cases, developed countries impose numerical quotas or ENTs, this is not the case for India.

|  |  |  |  |
| --- | --- | --- | --- |
| **Categories**  | **US commitments** | **EU commitments** | **India commitments** |
| **BVs** | Up to 90 days | Up to 90 days in any 12 month period  | Up to 180 days (multiple entry) |
| **ICTs (managers, executives, specialists)** | 3 up to 5 years; no ENTs | Managers, specialists: up to 3/5 years Graduate trainees: 1 year ENT/num. quotas abolished for sectors liberalized, unless otherwise specified  | Up to one year/max 5years |
| **CSSs** |   | Up to 6 months, in any 12 months period;CSSs must have at least 3 years professional experience (with CARIFORUM)Specific list of professions, numerical ceiling and ENTs apply | Up to 1 year or the period of contract, whichever is lessInstaller/servicers: up to 3 months  |
| **IPs** | Temporary entry | Up to 6 months, in any 12-months; conditioned on ENTs | Up to 1 year  |
| **Traders and investors** | Temporary entry | Up to 90 days in any 12-months | Between 1-3 years, may be extended |
| **Qualifications requirements**  | “develop mutually acceptable standards and criteria”  | Qualifications and/or professional experience may be required | “appropriate educational and professional qualifications”; sometimes work experience required  |
| **Social rights** | No | No (in other trade-related agreements yes, but not in the FTAs) | Yes (spouses or dependents) |
| **Visa/immigration requirements** | Yes | Yes | Yes |
| **Numerical quotas** | Yes  | Should not maintain numerical quotas  | No  |

*Table 3: Summary of mode 4 commitments by the US, EU and India in bilateral FTAs*

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

US have concluded FTAs[[21]](#footnote-21) with 20 countries (including NAFTA), following in all but one case (FTA with Jordan from 2001) a negative-listing approach to scheduling commitments in services. This translates into a generalized liberalisation of sectors, unless otherwise indicated in specific reservation lists. 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/experience, and for which the right to practice is granted or restricted by a Party. Two agreements (with Chile and Singapore signed in 2004) stand out for providing quotas on entry visas for professionals (1,400 visas for Chilean professionals and 4,500 for Singaporeans granted annually). This link to visas liberalization created great controversies in the Congress, which stated that it was beyond the competence of trade officials to negotiate visa concessions. 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 has subsequently been blocked by the Congress in making additional visa concessions under Mode 4, thereby pointing at the sensitive limits of the trade-migration nexus.

These limits are also salient in the EU negotiation context. As one of the official from the Commission's Directorate General (DG) on Trade put it “mode 4 is strictly about trade and not about immigration"; "there is no interference into each others' domain" (Interview 8). However, the overlaps between both agendas are becoming increasingly obvious. 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 7).

The EU has been quite hesitant to move beyond GATS commitments in most bilateral agreements. From a total of over 65 trade-related agreements concluded by the EU, only about 50% include services provisions relevant for mobility. These are generally the newer agreements concluded from mid-2000 onwards. Most of these provisions are linked to commercial presence, covering ICTs or in the EU terminology “key personnel” (present in almost 70% of those agreements) and self-employed persons within the companies established by these nationals in the territories of the EU. There are a few exceptions that also give rights to 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 ENTs, which remove certainty” (Kategekwa 2008:11). Nevertheless, as Dawson (2013:15) points out, in contrast to the EU GATS quite ambiguous offer, the EPA provides straightforward requirements for certification and has a broader sectoral coverage[[22]](#footnote-22). Numerical quotas for key personnel and graduate trainees in the sector liberalized have been eliminated (CRNM 2009: 25).

The FTAs signed with South Korea (2010), Columbia and Peru (2011), are also cases where GATS+ provisions have been granted, particularly regarding duration of stay of highly-skilled personnel, but also the inclusion of CSSs and IPs. However, the inclusion of these categories seems to be quite exceptional (in only 11% of the agreements for CSSs and about 20% for IPs). The most far-reaching commitments are likely to result from the current FTA negotiations with India – should they ever be concluded. In these negotiations, service-trade related mobility has become one of the main issues and a potential stumbling block over which the negotiations could come to a failure (Interviews 8, 9). As indicated by our EU interlocutors, fulfillment of India's requests on mode 4 would not only exceed existing commitments under other trade agreements, it would also require the widening of EU competences to negotiate immigration commitments which hitherto still reside with the member states.

So far, India has concluded four FTAs covering trade in services, with Singapore (2005), Korea (2010), Malaysia and Japan (2011). These FTAs include the largest number of sub-categories of service suppliers[[23]](#footnote-23) de-linked from commercial presence: CSSs and IPs, categories that appear in almost all agreements (see Figure 1). There is no mention of ENTs or 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. Actually, to our knowledge, India is the only country that included this type of “family rights” provisions in its FTAs. India’s trading partners have offered similar commitments, in some cases even a better outcome. For example, in the FTA with Japan, the duration of stay for IPs and CSSs coming from India is initially agreed for one or three years, with the possibility of renewal, while India offered to the Japanese IPs and CSSs a maximum period of one year.

**The trade-migration nexus in regional integration agreements**

Migration provisions have also entered the trade agenda of broader regional integration frameworks. While in some regions, such as, most comprehensively, the EU, but also the East African Community EAC or the Mercosur in Latin America, labour mobility has been embraced as a basic freedom, in other regions, labour mobility has been addressed mainly in conjuncture with the liberalization of service trade. This is the case notably for the free trade area established by the North American Free Trade Agreement NAFTA and for economic integration within ASEAN in Southeast Asia.

NAFTA was signed in 1994 by Mexico, Canada and the US. Chapter 16 of the Agreement establishes procedures for the temporary entry of business people, covering similar to the categories provided for by the GATS. These include business visitors (admitted for up to 6 months in the US and Canada; 1 year in Mexico); traders and investors carrying out trade in goods or services, and providing advice for investment (duration of stay 2 years, renewable indefinitely if they maintain their status within the enterprise in the US; 1 up to additional 2 years in Canada; 1 up to additional 4 years in Mexico); ICTs (with a duration of stay of 3/7 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 professionals with minimum baccalaureate degree working in specific sectors.[[24]](#footnote-24) Contrary to the GATS, however, these business people 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. Consecutively, a special Treaty NAFTA (TN) non-immigrant visa category has been created for all professionals who possess certification of employment, which 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 TN visa holders can receive a derivative visa. This does not grant working rights, but allows studying.

There are also provisions on certification and recognition of licensing. Specifically for professionals, the parties have agreed upon MRAs for accountancy, architecture and engineering. The MRA for architects is an example where the Mexican Federation of Architects has managed to facilitate recognition procedures: licensing from the so-called “Tri-national Council” for architects is done based on a dossier/portfolio of the applicant and possibly an interview, but without additional examinations, requirements that still apply for other professions (Interview 10).

Overall, NAFTA provisions for temporary entry eliminated or reduced some of the hurdles related to labour certifications, work permit, or numerical restrictions. While the system has introduced elements of harmonization for business mobility, transparency and faster processing of applications, it is also sometimes considered rigid, and especially difficult to expand its coverage to other categories of people, particularly lower-skilled workers.

A second region in which labour mobility has been addressed exclusively from the trade angle is Southeast Asia. Mobility of service providers was not part of the original Declaration establishing ASEAN, however it has become an important topic with the adoption of the 1995 ASEAN Framework Agreement on Services (AFAS), developments evolving relatively at the same time with the WTO/GATS mobility agenda. Members agreed that “there shall be a freer flow of capital, skilled labor and professionals among Member States” (AFAS art.4). In 2012 Members have signed the Agreement on Movement of Natural Persons (MNP) that basically incorporates all mode 4 commitments initially included in the AFAS.

The commitments on mobility inscribed in AFAS/MNP[[25]](#footnote-25) remain nevertheless limited, similar to the ones agreed by the ASEAN Members in GATS. Mobility is linked to investment and business flows, facilitating mostly the movement of professionals, managers, and qualified staff under the ICT category. Horizontal commitments have been made for ICTs (duration of stay varying between 2 up to 8 years) and BVs (allowed for 30 up to 90 days, exception Indonesia that permits 120 days). Initially, only Vietnam took commitments on CSSs (limited stay of 90 days and subject to education and experience requirements) and recently Cambodia has introduced this category within the MNP Agreement. In most of the cases, domestic immigration procedures, numerical quotas, ENTs/labour market tests apply, together with pre-employment requirements (health and security clearances, personal and professional references) and technological transfer conditions. Furthermore, the Indonesian government is requesting a so-called ‘compensation fee’ of USD100/month per expatriate employee to offset the costs of training Indonesians (Interview 11).

In 2006 ASEAN citizens received the right to enter and travel within the region for a two-week visa-free. Intra-regional mobility is also promoted via Mutual Recognition Arrangements for professional services, currently covering engineering, accountancy, architecture, surveying, nursing, dental and medical practitioners, and tourism. Implementation is nevertheless pending for most professions, an MRA not equating automatic recognition among members (Interviews 12, 13, 14). Moreover, there seems to be a lack of political will and commitment to further open up services, despite bold statements made by ASEAN leaders on realizing the ASEAN Economic Community by 2015 that envisages “free flow of skilled labour” (AEC Blueprint 2008). Domestic legal restrictions and sometimes institutional limitations, together with cultural and language differences across the region raise additional constraints (Interviews 15, 16).

Wider mobility commitments have been achieved in extra-regional FTAs, or bilaterally, in individual FTAs concluded by ASEAN members. A prominent example is the ASEAN-Australia-New Zealand FTA. The agreement delineates several categories of service suppliers, including CSSs and IPs, natural persons de-linked from commercial presence. Australia even grants full working rights to family members for those service suppliers staying abroad from more than 12 months. 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, the EU, New Zealand, Korea, Japan, but also with developing economies among which India and China. The far-reaching US-Singapore FTA has even made visa concessions, allowing Singaporean professionals to enter the US under a specific visa (H1-B1) without any labour market tests (see also above section on US FTAs). CSSs and a number of professional service providers were liberalized in the FTAs with Korea and Japan. Similarly, these categories de-linked from commercial presence were included in the agreements signed by Singapore with India and China. Other bilateral agreements covering CSSs and specific independent professions (e.g. cooks, instructors, care-workers, etc.) are for instance the ones concluded by Philippine, Thailand, Malaysia with Japan (also Malaysia with New Zealand, Australia, Korea, India, China). More bilateral FTAs are currently under negotiations, including some launched by the EU with Vietnam, Malaysia, and Thailand (Interview 17).

In sum, intra-ASEAN movement of natural persons has sought to deepen regional economic integration and a series of steps have been completed to achieving this goal, notably the developments within AFAS/MNP and conclusion of various MRAs. There are also considerable obstacles that still need to be overcome in order to achieve greater regional mobility. Commitments undertaken by members so far have been mostly attached to investment and commercial establishment. In various instances ENTs or numerical quotas restrict mobility of professionals and domestic regulations prevail when it comes to accreditation. Reasons for this are often associated with regulatory heterogeneity across countries in the region, problematic institutional capacity, and lack of enforcement mechanism, to which adds an overall mistrust and apprehension of member states in taking comprehensive binding commitments (Interviews 7, 16). In contrast, much more has been achieved extra-regionally. Various bilateral FTAs have broader and deeper chapters on mobility of natural people, facilitating the movement of labour at different skill levels and also detached from investment/commercial establishment.

**Conclusion**

At the same time as Western countries have restricted their immigration policies, fiercely safeguarding their prerogatives over this "last bastion of state sovereignty" (Dauvergne 2014: 92), they have engaged in a hitherto little investigated liberalisation of trade-related mobility flows. Originally limited to highly skilled professional working within multinational enterprises, this liberalisation has gradually moved beyond flows linked to commercial presence and has reached out to other professions. While multilateral progress on liberalization has been halted due to the general stalemate in the WTO but also due to the strong contention between developed and developing countries over this agenda, the review of plurilateral and bilateral free trade agreements as well as regional integration frameworks has illustrated an incremental widening of agreed commitments.

Even though the trade-migration nexus continues to show a propensity for skilled flows, it is not to deny the liberalization achieved for independent professionals, contractual service providers, as well as the commitments taken towards social rights, visa facilitations and working entitlements in some agreements promoted by developing countries that would have otherwise probably not entered the trade venue. The growing importance of the service sector in the global economy is likely to sustain this nexus between trade and migration policies. At the same time, however, the intervention by Congress in the US and the difficulties encountered by the EU to engage in international negotiations touching on migration also indicate the political sensitivity of this linkage. While a functional economic pressure for tackling also the factor "labour" in trade liberalization is thus likely to persist, it is questionable how far - under the impression of deeply politicized publics in western countries - immigration ministers will tolerate a further use of the trade venue for facilitating migration flows.

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**Annex**

**List of Interviews**

Interview 1: Permanent Mission of Indian to the WTO, Geneva, February 2013.

Interview 2: Permanent Mission of Mexico to the WTO, Geneva, February 2013.

Interview 3: Federation of Indian Chambers of Commerce and Industry (FICCI), New Delhi, India, January 2014.

Interview 4: Federation of Indian Chambers of Commerce and Industry (FICCI), Secretariat, New Delhi, India, January 2014.

Interview 5: Ministry of Commerce and Industry, Department of Commerce, New Delhi, India, January 2014.

Interview 6: Indian Institute of Management, Bangalore, February 2014.

Interview 7: EU Commission, DG Home Affairs, Brussels, September 2013.

Interview 8: EU Commission, DG Trade, Services Division, Brussels, September 2013.

Interview 9: European Commission, DG Trade, Directorate B **“Services and Investment, Intellectual Property and Public Procurement”, Februrary 2013.**

Interview 10: National Academy of Architects Mexico, NAFTA, Mexico City, April 2014.

Interview 11: Ministry of Trade Indonesia, Services division, Jakarta, June 2014.

Interview 12: Ministry of Manpower and Transmigration Indonesia, Jakarta, June 2014.

Interview 13: ASEAN Secretariat, ASEAN-Australia Development Cooperation Program Phase II, Jakarta, Indonesia, June 2014.

Interview 14: ASEAN Secretariat, AEC Department, Jakarta, June 2014.

Interview 15: University of Indonesia, Jakarta, June 2014.

Interview 16: Center for Strategic and International Studies, Jakarta, June 2014.

Interview 17: Delegation of the European Union to Indonesia, Jakarta, June 2014.

1. Data available on NASSCOM’s Resource Center website: <http://www.nasscom.in/indian-itbpo-industry> (last accessed on 22 October 2014). [↑](#footnote-ref-1)
2. Communication from Argentina, Columbia, Cuba, Egypt, India, Mexico, Pakistan, and Peru: Annex on Temporary Movement of Services Personnel, GATT Document MTN.GNS/W/106 of 18.6.1990. [↑](#footnote-ref-2)
3. Para.3 Annex on Movement of Natural Persons Supplying Services under the GATS. [↑](#footnote-ref-3)
4. For the complete list of interviews, please refer to the Annex-List of Interviews. [↑](#footnote-ref-4)
5. Requesting Members were Argentina, Brazil, Chile, China, Colombia, Dominican Republic, Egypt, Guatemala, India, Mexico, Morocco, Pakistan, Peru, Thailand and Uruguay, target Members were Australia, Canada, EC, Iceland, Japan, New Zealand, Norway, Switzerland and United States. [↑](#footnote-ref-5)
6. Economic needs test mean that those entering the country must provide evidence that there is ‘economic need’ for their service, which is not being met from domestic suppliers. [↑](#footnote-ref-6)
7. Meaning that only those sectors and categories of service providers are actually committed for whom the countries have made concrete entries. [↑](#footnote-ref-7)
8. It doesn’t “apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis..." [↑](#footnote-ref-8)
9. WTO GATS EU’s Schedule of Specific Commitments GATS/SC/31, April 1994. [↑](#footnote-ref-9)
10. An "intra-corporate transferee" is defined as a natural person working within a juridical person, other than a non-profit making organisation, established in the territory of an WTO Member, and being temporarily transferred in the context of the provision of a service through commercial presence in the territory of a Member State. [↑](#footnote-ref-10)
11. These requirements relate to education (university degree or technical qualifications requirements and professional experience for several years) and numerical ceilings (EC Communication S/C/W/273, October 2006, available at: <http://trade.ec.europa.eu/doclib/docs/2012/november/tradoc_150087.pdf>, last accessed 21 October 2014). [↑](#footnote-ref-11)
12. WTO GATS, US Schedule of Specific Commitments, GATS/SC/90, April 1994 [↑](#footnote-ref-12)
13. Persons engaged in activities related to representing a services supplier for the purpose of negotiating for the sale of the services of that supplier. [↑](#footnote-ref-13)
14. WTO GATS India’s Schedule of Specific Commitments, GATS/SC/42, April 1994. [↑](#footnote-ref-14)
15. India’s Revised Conditional Offer TN/S/O/IND/Rev.1, August 2005 (available at: <http://commerce.nic.in/trade/revised_offer1.pdf>, last accessed on 21 October 2014). [↑](#footnote-ref-15)
16. These are: engineering, architectural services, urban planning and landscape, computer and related services, R&D, management consulting, but excluding legal consultancy, tourist guides, etc. [↑](#footnote-ref-16)
17. Other associations include the American Chamber of Commerce To the European Union, Businesseurope, the Computer and Communications Industry Association CCIA, the European-American Business Council, and Techamerica. [↑](#footnote-ref-17)
18. Although, China has recently shown interest in joining the negotiations. [↑](#footnote-ref-18)
19. All primary data has been coded by the authors of this study (for details see Jurje and Lavenex 2014). [↑](#footnote-ref-19)
20. Measured as percentage of respective commitments out of the total number of FTAs covering services in each country. [↑](#footnote-ref-20)
21. 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. [↑](#footnote-ref-21)
22. Twenty-nine sectors have been opened to service suppliers that are not already established in Europe for up to 6 months and eleven sectors for self-employed service providers (CRNM, 2009: 25). [↑](#footnote-ref-22)
23. Besides ICTs, BVs, CSSs, IPs, India has also defined sub-categories of service seller, goods seller, investor, trader, installer, servicer of machinery. [↑](#footnote-ref-23)
24. NAFTA Treaty, Appendix 1603.D.1. [↑](#footnote-ref-24)
25. Indonesia, Philippines and Lao are still to ratify the MNP agreement (Interview 11). [↑](#footnote-ref-25)