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Interfacing the temporary movement of workers in “mode 4 of GATS” with bilateral migration agreements

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During the last decade, bilateral migration agreements have seen a renaissance as instruments for managing labor migration. This contribution discusses their rise in the context of post-9/11 immigration law reforms in many migrant destination countries in Europe. It considers to what extent these bilateral agreements correct the multilateral liberalization of the temporary movement of persons in the so-called “mode 4” of the WTO General Agreement on Trade in Services (GATS) and its high-skill bias. We observe a fragmentation of international migration law into different types of agreements dealing with migration. Underlying this fragmentation is the desire to maintain the flexibility to choose a type of agreement depending on whether the movement of persons shall be fast-tracked and facilitated or restricted and contained. This selectivity, however, may exacerbate an unjustified discrimination between migrant worker categories in terms of nationality-, skill- or age levels. When drawing conclusions for the development of an international law of economic migration, it may be advisable to identify legal principles, which may reduce the discriminatory effects such selectivity may have. Human rights guarantees and the most-favored nation clause of the WTO/GATS are advanced as such catalysts for building coherence among migration-related agreements.

Interfacing the temporary movement of workers in “mode 4” of GATS with bilateral migration agreements

by Marion Panizzon¹

Abstract

During the last decade, bilateral migration agreements have seen a renaissance as instruments for managing labor migration. This contribution discusses their rise in the context of post-9/11 immigration law reforms in many migrant destination countries in Europe. It considers to what extent these bilateral agreements correct the multilateral liberalization of the temporary movement of persons in the so-called “mode 4” of the WTO General Agreement on Trade in Services (GATS) and its high-skill bias. We observe a fragmentation of international migration law into different types of agreements dealing with migration. Underlying this fragmentation is the desire to maintain the flexibility to choose a type of agreement depending on whether the movement of persons shall be fast-tracked and facilitated or restricted and contained. This selectivity, however, may exacerbate an unjustified discrimination between migrant worker categories in terms of nationality-, skill- or age levels. When drawing conclusions for the development of an international law of economic migration, it may be advisable to identify legal principles, which may reduce the discriminatory effects such selectivity may have. Human rights guarantees and the most-favored nation clause of the WTO/GATS are advanced as such catalysts for building coherence among migration-related agreements.

Keywords: international migration, General Agreement on Trade in Services (GATS), World Trade Organization (WTO), bilateral migration agreements, human rights, discrimination, temporary movement of persons

INTRODUCTION

Within knowledge economies an increasing skill divide splits services occupations, deepens the gulf between the services and manufacturing sectors and reverberates upon migration patterns. The result is an escalating face-off between a “global hunt for talent” and the recruitment of seasonal agricultural and manufacturing workers. It determines international legal responses to economic migration.² With the turn of the millennium, countries in Southern Europe, such as France,³ Spain⁴ and Italy have undertaken to curtail family reunification migration through wide-scale immigration law reforms. Yet, in order to contain the rising flows of irregular migration, outlets for low-skill migration had to be found. A new generation bilateral migration agreements were designed, which had the dual functions of correcting the selective immigration schemes and to replace the old guestworker agreements of the 1950s-1960s.⁵ The agreements often empower the executive branch in destination countries to thus correct, circumvent or deviate from immigration laws, which mostly respond to legislated domestic

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² Kapur, Devesh, and McHale, John, Give us Your Best and Your Brightest, The Global Hunt for Talent and Its Impact on the Developing World, Center for Global Development (2005). Martin, Philipp, ‘Managing Labor Migration: Temporary Worker Programs for the 21st Century’, International Institute for Labor Studies, Geneva (2003).

³ France’s new pacts are a poster-child of the newly created Ministry of Immigration, Integration, National Identity and Development Partnership. They were designed mostly to dissipate tensions with former colonies in West Africa, which had been disproportionately affected by the high skill-orientation of France’s new point-based recruitment scheme. France has signed 9 such pacts, but so far only the one with Gabon, an atypical migrant source country has entered into force on 5 July 2007. Undergoing ratification are those with Congo (25 October 2007 in Brazzaville), Benin (28 November 2007 in Cotonou), Senegal (23 September 2006 in Dakar and expanded by the covenant-agreement of 2008 signed on 25 February 2008 in Dakar), Burkina Faso (10 January 2008 Ouagadougou), Tunisia (28 April 2008 in Tunis) and Mauritius (23 September 2008 in Paris), Cap Verde (25 November 2008 in Paris), Cameroon (21 May 2009 Yaoundé). Under negotiation are further pacts with Algeria and Morocco and the Western Balkans. No agreement could be reached with Mali due to a clash over the number of Malians to be repatriated from France.

⁴ Spain has concluded bilateral migration agreements as part of its “migratory diplomacy” with countries in Latin America and Western Africa, the citizens of which account for the highest number of migrants into Spain: in 2006, 800,000 foreigners moved to Spain, an increase of 17% over the previous year, of which 110,000 were from Romania followed by 69,000 from Bolivia and 60,000 from Morocco (OECD, *International Migration Outlook 2008*, Country Report, Spain). Spain’s “cooperation agreements on migration” form part of the Ministry of the Exterior’s, Action Plan for sub-Saharan Africa 2006–2008 (Plan África). Spain concluded agreements with Guinea Bissau and the Gambia on 9 October 2006, followed by one with Senegal on 10 October 2006, with Mali on 23 January 2007, with Cape Verde on 20 March 2007 and with Niger on 10 June 2008. Further agreements are anticipated with priority countries such as Ghana, Cameroon, Côte d’Ivoire and Guinea-Conakry.

⁵ Castles, Stephen, ‘Guestworkers in Europe: A Resurrection?’ 40(4) *International Migration Review* (2006) 741-766.

constituent's ethnocentrism which becomes most virulent when low-skill migration is at stake.⁶ The WTO General Agreement on Trade in Services (GATS), free trade and economic partnership agreements, for their part, liberalize the temporary movement of natural persons as service suppliers with a bias towards the highly-skilled. Consequently, the treaty-based foundations of international law of economic migration are increasingly split along the skill divide, which has led to a stand-off between trade agreements, including GATS, the exemplificative EC-CARIFORUM EPA of 15 October 2008⁷ and the Japan-Philippines EPA of 8 September 2006⁸ on the one hand and non-trade bilateral migration agreements on the other hand.

POTENTIAL AND SHORTCOMINGS OF GATS IN MANAGING LABOR MIGRATION

At the core of international legal responses to labor migration lies the GATS, which liberalizes the "supply of a service of one Member through presence of natural persons of a Member in the territory of any other Member" (Article 1:2(d) GATS). With the exception the *non-refoulement* principle in refugee law, WTO Members' commitments in what is commonly known as "mode 4" are the only binding international obligation in place to limit national sovereignty over the admission of foreigners.⁹ The fact that WTO multilateral trading system includes the temporary migration albeit limited to services occupations is the concession made by industrialized countries to developing countries, which signed onto TRIPS in the Uruguay Round. However, destination countries of migrants have so far "lacked the comfort" to use Mode 4 to liberalize the movement of service suppliers on a broader scale and have been particularly hesitant with regards to low-skills. When it comes to steering temporary labor migration, mode 4 remains of limited value. Uruguay Round negotiators took care to remove any resemblance between the temporary movement of natural persons (TMNP) and "immigration". Firstly, Article 1:2(d) GATS terminologically reduces the temporary movement of natural persons to a "mode" of service supply. Secondly the GATS makes an "artificial" distinction between "foreign" and "domestic" employment, which leaves unresolved the sensitive issue of whether WTO Members intended to liberalize the entry into a host country's labor market.¹⁰ The Annex on the Temporary Movement of Natural Persons (Annex MONP) of GATS seems to include foreign employees of a natural or juridical person of the host country (thus a domestic or local employer) and thus respond to developing country interests,¹¹ while the narrower Art. 1:2(d) seems only consider foreign employment as forming part of "trade" in services under GATS, at least in the viewpoint of industrialized countries¹² and the WTO Secretariat.¹³ Thirdly, the Annex MONP exempts GATS from any responsibility in terms of regulating cross-border movement. This so-called "immigration law caveat"

⁶ Hainmüller, Jens and Hiscox, Michael, J., Attitudes toward Highly-Skilled and Low-skilled Immigration: Evidence from a Survey Experiment, in: 104(1) American Political Science Review, 2010, pp.61-84, p. 61.

⁷ Sauv , Pierre and Ward, Natasha, 'The EC-CARIFORUM Economic Partnership Agreement: Assessing the Outcome on Services and Investment', ECIPE Working Paper (January 2009) 17-19

⁸ Agreement Between Japan and the Republic of the Philippines for an Economic Partnership, 28 August 2008, <http://www.mofa.go.jp/region/asia-paci/philippine/epa0609/index.html>.

⁹ Chetail, Vincent, 'Freedom of Movement and Transnational Migrations: A Human Rights Perspective', in: Alexander Aleinikoff and Vincent Chetail (eds.) *Migration and International Legal Norms* (2003) 48-60; *non-refoulement* is a customary international law obligation, which describes the duty to admit those whose life and health are threatened in their home country. It has been codified amongst others in Art. 33:1 of the Geneva Convention relating to the Status of Refugees of 28 July 1951, 189 U.N.T.S. 150; in the Protocol Relating to the Status of Refugees of 4 October 1967, 606 U.N.T.S. 267 and in Art. 3:1 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, 1465 U.N.T.S. 85.

¹⁰ Carzaniga, Antonia, 'A warmer welcome? Access for natural persons under preferential trade agreement', in: J. A. Marchetti and M. Roy (eds.), *Opening Markets for Trade in Services Countries and Sectors in Bilateral and WTO Negotiations*, Cambridge University Press (2009) 475-502, p. 476.

¹¹ Chanda, Rupa, 'Movement and Presence of Natural Persons and Developing Countries: Issues and Proposals for the GATS Negotiations', South Centre, Working Paper 19, Geneva (2004), p. 26; Varma, Sabrina, 'Facilitating temporary labor mobility in African LDCs' ICTSD Programme on Trade and Services and Sustainable Development Series, Issue Paper 10 (2009); developing and least developed countries, facing (unemployed) surplus labour contest the narrow view, while labor receiving countries have an interest to keep the scope of GATS mode 4 as limited as possible, so as to retain the widest possible policy space over labor migration. Only if there is a category of workers remaining outside the scope of GATS, is it possible for labor receiving countries to give preference in terms of market access quotas to those migrant source countries willing to cooperate on border management, readmissions and combating irregular migration. However, if a country has to generalize such an opening under "immediately" and "unconditionally" as the MFN obligation of Art. II GATS requires, it is no longer possible for it to conditionally link labor market openings to enlisting the source country cooperation via bilateral migration agreements.

¹² Chamovitz, Steve, 'Trade Law Norms on International Migration', in: Alexander Aleinikoff and Vincent Chetail (eds.) *Migration and International Legal Norms* (2003) 252, "at present, the movement of natural persons is discussed in the WTO mainly as a services modality, rather than in the broader context of allowing workers to gain new skills and career opportunities;" see also Bast, J rgen, 'Annex on the Movement of Natural Persons', in R diger Wolfrum, Peter-Tobias Stoll and Clemens Fein ugle (eds.) *WTO-Trade in Services: Max-Planck Commentaries on World Trade Law* (2008) 580-582.

¹³ WTO Document S/C/W/301 4: As the WTO Secretariat maintains, it would be illogical if host country firms could bring a claim against their own government requiring GATS treatment for foreign nationals they desire to employ.

excludes measures relating to residency, permanent migration, citizenship, border securitization, visa policy from the scope of GATS. Unlike the new bilateral migration agreements, GATS lacks a regulatory mandate to address the difficult issues associated with labor migration, such as overstays, brain drain and waste or exploitation. To some extent, select free trade agreements have made advances over GATS in the sense of facilitating temporary worker migration through pro-mobility visas or by fast-tracking entry procedures for certain categories of workers. For example, the North American Free Trade Agreement (NAFTA) has a one-year and renewable “Trade-NAFTA” or “TN” visa for professionals (uncapped in 1994 for Canadians and in 2004 for Mexicans)¹⁴ the Asia-Pacific Economic Cooperation (APEC) operates a Business Travel Card for temporary business visitors, and in the FTAs with Singapore and Chile, the US has fast-tracked entry of professionals occupied in listed specialty jobs by offering the tailor-made H1-B1, capped at 5,400 professionals for Singapore and at 1,800 professionals for Chile, even though the agreement liberalizes market access for a much wider range of persons.¹⁵ These FTAs thus come closer to fulfilling the far-reaching mandate to regulate migration, some Uruguay Round negotiators had wanted to equip the GATS with,¹⁶ and bridge the gap between the liberalization-biased GATS mode 4 and the securitization-oriented bilateral migration agreements. While there is an absence in GATS of multilateral regulations for temporary migration, it does however, allow the regulatory flexibility for WTO Members to protect their own, domestic workers from facing foreign competition: wage downward pressure, job displacement or lay-offs. Consequently, the “regulatory” mandate of GATS to address risks relating to migration is asymmetrically allocated. For instance, WTO Members are free to introduce wage parity and working conditions requirements into the national treatment section of their commitments. However, to require a migrant sending country to take on an obligation to ensure the timely and orderly return of their workers at the end of their stay is one of those risk management issues which cannot be accommodated in what is a liberalization-biased, market opening driven scheduling structure of GATS commitments.¹⁷

BILATERAL MIGRATION AGREEMENTS AS STEERING TOOLS FOR INTERNATIONAL LABOR MIGRATION

In light of these substantial architectural and definitional limitations, destination countries of migrants have chosen to liberalize low-skilled labor migration through non-trade migration agreements. These have evolved from the friendship, commerce and navigation acts (FCN) of the late 18th and 19th century,¹⁸ the “old guestworker” agreements of 1950s-1970 which contributed to rebuilding post-World War II Europe, to schemes like Canada Caribbean Mexico Seasonal Agricultural Worker Program (CCMSWAP),¹⁹ which are put in place to delay technological innovation in sunset industries for reasons of domestic political economy.²⁰ Since the late 1990s, a new set of agreements, pioneered by countries in Europe bordering the Mediterranean, like France and Spain, and Italy, aggregate the pre-existing labor market openings scattered among the various precursor agreements on technology transfer, exchange of graduate trainees, young professionals, seasonal agricultural and fishery workers into a single framework agreement.²¹

¹⁴ Hufbauer, Gary and Stephenson, Shiry, *Increasing Labor Mobility: Options for Developing Countries*, World Bank, forthcoming (2010) 9.

¹⁵ Matsuzawa, Kotaro, ‘Movement of Natural Person and the United States: Probability of the Mode 4 Offer Improvement by the United States’, 42(4) *Journal of World Trade* (2008) pp. 653-670, p. 665.

¹⁶ Originally, the GATS should have an obligation to fast-track entry for these service supplying persons falling under GATS mode 4 as opposed to other types of labor migration according to the GNS - Group of Negotiations on Services, [Uruguay Round – Group of Negotiations on Services – Communication from Argentina, Colombia, Cuba, Egypt, India, Mexico, Pakistan and Peru – Annex on Temporary Movement of Services Personnel](http://www.tradelawguide.com/index.asp?toc=negHistoryList&id=156#pdfanc_dspNegHis1), MTN.GNS/W/106, Document of 18 June 1990, available at: http://www.tradelawguide.com/index.asp?toc=negHistoryList&id=156#pdfanc_dspNegHis1: “expeditious procedures for entry for temporary stay” which stated that “the procedures for entry for temporary stay shall be accomplished expeditiously so as to avoid unduly impairing or delaying the conduct of trade in services and obliged the parties to ensure that “their embassies and immigration offices abroad, and immigration authorities at ports of entry are familiar with the visas issued pursuant to this Annex.”

¹⁷ Delimatsis, Panagiotis, Diebold, Nicolas F., Molinuevo, Martin, Panizzon, Marion and Sauvé, Pierre, *Developing Trade Rules for Services: A Case of Fragmented Coherence?* (September 1, 2009). NCCR Trade Regulation Working Paper No. 38. Available at SSRN: <http://ssrn.com/abstract=1472053>.

¹⁸ IOM, *Illustration of Multilateral, Regional and Bilateral Cooperative Arrangements in the Management of Migration*, in: A. Aleinikoff, and V. Chetail (eds.) *Migration and International Legal Norms*, Cambridge University Press (2003), p. 306.

¹⁹ Andre, Irving, *The Genesis and Persistence of the Commonwealth Caribbean Seasonal Agricultural Workers Program in Canada*, 28 *Osgoode Hall L. J.* 243 (1990); Basok, Tanya, *Migration of Mexican Seasonal Farmworkers to Canada and Development, Obstacles to Productive Investment*, 34(1) *IMR* 2000, pp. 79-97.

²⁰ Trachtman, Joel, P., *The International Law of Economic Migration: Toward the Fourth Freedom*, W.E. Upjohn Institute for Employment Research (2009), pp. 152-162.

²¹ Panizzon, Marion, *International Law of Economic Migration—a Ménage à Trois? GATS Mode 4, EPAs and Bilateral Migration Agreements*, 44:6 *Journal of World Trade*, forthcoming December 2010.

Organization-wise, the agreements of France, Spain, but also Switzerland are structured around three chapters, being labor migration, border securitization and readmissions and development aid.²² If one were to compare these agreements to the three functions Aleinikoff ascribes to an ideal international migration law, they would only address two, being state authority and shared responsibility over borders and readmission, as well as liberalizing labor migration, but lack human rights protection.²³ Despite aspiring to implementing a “partnership approach” to migration, as is propagated by the Global Commission on International Migration’s Final Report of 2005²⁴ or the UN High Level Dialogue on Migration and Development of 2006,²⁵ the agreements remain asymmetrically tilted in favor of destination country interests. Typically, labor market access is being bargained off against obtaining source country cooperation on readmissions. A race-to-the-top on market access and race-to-the-bottom on readmission quotas among European countries facing the pressure of forum shopping by informed source country governments has been the result. Only a European-wide solution with a single market access quota paired with a single readmission quota for all EU countries can remedy the situation. A first step towards such a “communitarized” approach, have been the plurilateral EU mobility partnership agreements, which “interested”, as opposed to all EU Member States conclude with third countries at the Southern and Eastern Borders of Europe.²⁶

Institutionally, the new agreements break new ground by re-packaging all policies relevant to migration within a single, but comprehensive framework agreement. For the most part, the new templates seek to overcome what Sassen has described the “Achilles heel” of immigration policy, which denotes the tendency of governments to treat immigration as process distinct and separate from other international processes.²⁷ Insofar, the agreements of France, Spain, but also the new migration partnerships of Switzerland, are a testing ground for this reformed migration policy formulation which seeks to mainstream by way of a “whole-of-government”²⁸ or “cross-government” approach,²⁹ the formerly self-standing and disparate strands of foreign policies, such as development cooperation, homeland security, diplomatic relations, visa policy into an integrated framework, known for EU migration policy as the “Global Approach to Migration” (GAM).³⁰

To the extent to which these bilateral migration agreements have become more comprehensive in terms of substance, their “vision” of a partnership approach has suffered.³¹ Nonetheless, France’s new pacts, seek to formalize transnational private initiatives such as Diaspora-led source country development. For instance, migrants with a valid permit of stay in France, who happen to be citizens from the countries with whom France has signed one of its new pacts on concerted migration management, obtain a savings bonus under the new co-development bank booklet established by Article R 221-117 of the Monetary and Financial Code France of the Economy, the Ministry of Immigration and the Ministry of the Budget on 28 June 2008.³² Any migrant residing in France,

²² IOM, Illustration of Multilateral, Regional and Bilateral Cooperative Arrangements in the Management of Migration, in: A. Aleinikoff, and V. Chetail (eds.) *Migration and International Legal Norms*, Cambridge University Press (2003), p. 305.

²³ Aleinikoff, Alexander, T. ‘International Legal Norms and Migration, A Report’, in: A. Aleinikoff, and V. Chetail (eds.) *Migration and International Legal Norms*, Cambridge University Press (2003), pp. 2-3.

²⁴ Global Commission on International Migration, *Final Report*, Geneva (2005).

²⁵ UN Resolution 61/208 International Migration and Development, adopted by the 61. UN General Assembly on 20 December 2006, UN Doc. A/RES/61/208 of 6 March 2007.

²⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on circular migration and mobility partnerships between the European Union and third countries, COM/2007/0248 final, 16 May 2007 OJ C/2007/191/17, 17.8.2007 [hereinafter Migration and mobility partnerships between the European Union and third countries, OJ C/2007/191/17, 17.8.2007] ; see also Council of the European Union Joint Declaration on a Mobility Partnership between the European Union and the Republic of Cape Verde Brussels, 21 May 2008, http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/101346.pdf (last accessed 10 January 2010).

²⁷ Sassen, Saskia, *Globalization and its Discontents, Essays on the New Mobility of People and Money*, The New Press, New York, 1998, p. 49.

²⁸ The term “whole-of-government approach” is also used for other areas of global governance and international cooperation, such as relating to fragile states: OECD, *Whole of Government Approaches to Fragile States*, 2006.

²⁹ *Managing the Impacts of Migration: A Cross-Government Approach*, UK Department for Communities and Local Government: London, June 2008; see also Swiss Federal Office for Migration and Directorate of Political Affairs, Brochure “Migration partnerships”, http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/migr/migpa.Par.0004.File.tmp/Broschuere_Migrationspartnerschaften_08_en.pdf

³⁰ Communication from the Commission to the Council and the European Parliament, *The Global Approach to Migration one year on: Towards a comprehensive European migration policy* Brussels, 30.11.2006, COM(2006) 735 final, OJ C/2007/181/17 3.8.2007.

³¹ Nellen-Stucky, Rachel and Lavenex, Sandra, „Partnering“ for Migration in EU external relations, in: Kunz, Rahel, Lavenex, Sandra and Panizzon, Marion, *Migration and Mobility Partnerships, Unveiling the Promise*, Routledge, forthcoming 2011.

³² France, Decree n° 2008-613 of 27 June 2008 relating to the bank booklet for co-development, Article R221-117.

regardless of his or her employment status is eligible. However, these must be citizens, from countries which have signed onto a pact on concerted migration management with France. After a minimal savings period of three years, the holder of the bank booklet who applies for a credit to finance investments in his or her country of origin will obtain the bonus.³³ The type of investments which trigger the premium will be listed in the pacts. From a WTO law point of view, this tax benefit treating foreign service providers from countries with whom France has signed a pact on migration management more favorably than those foreign service providers from countries without such a pact infringes upon the MFN of Art. II GATS. According to a majority in case law and literature however, non-product-related direct taxation does not fall within the scope of WTO law.³⁴ Neither does the tax benefit seem to infringe on national treatment, since it inversely discriminates against French nationals, a situation not covered by GATS Art. III:2.

HUMAN RIGHTS IMPLICATIONS OF FREE TRADE AND NON-TRADE MIGRATION AGREEMENTS

Non-trade migration agreements subscribe to the principle of partnership in migration management, which calls on the source country of migrants to share some part of responsibility for irregular migration and its negative effects on the destination country.³⁵ In particular, the migrant sending country must sign onto readmission obligations for its citizens, and at times also for third country nationals from surrounding countries and stateless persons. It is in the readmission context, where human rights protection becomes key, as the customary international principle of *non-refoulement* prohibits sending migrants back to their country of origin or any third country where their life and health are threatened.³⁶ According to scholarship a simple blanket reference to human rights being assured is not sufficient to ensure that the *non-refoulement* principle, but also other substantive and procedural rights of unauthorized migrants who are being repatriated by force will be ensured.³⁷ Instead any type of migration agreement containing readmission obligations must expressly list the relevant human rights treaties to which the contracting parties have adhered to, so as to provide a sufficiently clear and precise legal basis for an individual migrant to avail itself of his/her human rights being violated. France's new pacts showcase a poor human rights record in this regard: Out of France's new pacts, only the Senegal-France pact (2006) so far, expressly lists in Art. 4 human rights instruments, namely for France to the Geneva Convention on the Status of Refugees of 28 July 1951; the New York Convention of 31 January 1967 on the status of stateless persons; for France to the European Convention on Human Rights of 4 November 1950 and for Senegal to the African Charter of Human Rights of 27 June 1981.³⁸

Far more contested in terms of human rights, is the reference in France's new pacts on concerted migration management to Art. 13 of the EU-ACP Cotonou Partnership Agreement (CPA). What appears on its face to enhance the mutual supportiveness between an economic partnership agreement, the CPA, and France's new pacts, seems to constitute a potential human rights violation in and of itself. Art. 13 CPA calls on ACP countries (most of which happen to be migrant sending countries) to join France in border patrol operations to securitize EU borders, such as FRONTEX. In essence France's new pacts operationalize Art. 13 CPA to the effect that the migrant sending country is required to close off its borders to its own citizens desiring to leave for Europe, in what amounts to a violation of the human right of any person to leave any country including one's own according to Art. 13 of the Universal Declaration on Human Rights.

³³ Melde, Susanne and Ndiaye-Coïc, The MIDA Experience and Beyond, Operationalizing Migration for Development Across Regions, IOM, Geneva, pp. 92-97; see also Panizzon, Marion, Does Co-development contribute to more Diaspora Entrepreneurship, Presentation, World Bank conference on Diaspora for Development, 17 July 2009, Washington, DC, available at: <http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1110315015165/Panizzon.pdf>.

³⁴ Ecker, Thomas and Koppensteiner Franz, Applicability of WTO Treaties to Direct and Indirect Taxation, (2009) Tax and Business Review, pp. 142 ff; see also Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, Report of the Panel.

³⁵ Global Commission on International Migration, *Final Report*, Geneva (2005) p. 20.

³⁶ ECHR (Grand Chamber), *Chahal v. The United Kingdom*, Reports 1996-V, No. 80, und *Saadi v. Italy*, 37201/06 (2008), No. 138; *Rudolf, Beate Chahal v. United Kingdom*. No. 70/1995/576/662 92 (1) AJIL (1998) pp. 70-74.

³⁷ Abell, N.A., "The Compatibility of Readmission Agreements with the 1951 Convention relating to the Status of Refugees", *International Journal of Refugee Law* 11(1), 1999, S. 60-83; Phuong, Catherin, *Asylum and Immigration in the Context of Enlargement*, in Tridimas, Takis und Nebbia, Paolisa (Hrsg.), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order Volume I*, Hart Publishing, 2004, S. 376-397, S. 394; Chetail, Vincent, *Migration, Droits de l'homme et souveraineté: le droit international dans tous ces états*, in Chetail, Vincent (Hrsg.), *Mondialisation, migration et droits de l'homme: le droit international en question, Volume II*, Bruylant, Bruxelles, 2007, pp. 81.

³⁸ Senegal–France pact of 2006 refers to the Geneva Convention on the Status of Refugees of 28 July 1951; the New York Convention of 31 January 1967 on the status of stateless persons; for France to the European Convention on Human Rights of 4 November 1950 and for Senegal to the African Charter of Human Rights of 27 June 1981.

In terms of labor standards, the record for trade agreements is less bleak. Most FTAs with a development dimension, like the CPA of 2008, (Art. 9 and 96), the EC-Chile FTA of 2002 (Art. 44), but not the EC–Mexico and EC–South Africa TDCA³⁹ refer to labor standards and all of the US FTAs require the partner country to sign onto labor standards. Yet, because trade agreements are traditionally conceptualized around state-to-state obligations and even if parties inscribe working conditions parity requirements, the individual foreign service supplier will not have the right to prevail herself of an employer violating her labor standards. Despite the migration process, as Aleinikoff notes, being built around a “triangular relationship among a person, a sending state, and a receiving state,” on human rights protection issue, GATS mode 4, free trade agreements and bilateral migration agreements all are largely deficient.⁴⁰ In neither template are market access rights offered directly to the individual migrant worker.

One advantage of using like GATS mode 4 or FTAs, to liberalize the temporary movement of natural persons, is that the broader bargaining space for trade-offs, which a trade-setting may offer. Trade agreements, at least in their second generation templates since the end of the Uruguay Round (1994) cover a wider range of issues, ranging from market access for agricultural products over IPRs to government procurement than non-trade, migration agreements. The latter, however, are better equipped to manage the risks of overstays, brain drain and clandestine entry and have institutional mechanisms in place to facilitate the market access they liberalize, such as operating, often together with the IOM, programs on worker selection, hiring, pre-employment training. The latter is especially valuable for low-skilled and artisanal professions, where transnational information and communication networks of multinational companies do not exist. In this sense, the dual track of trade and non-trade agreements splitting along a skill divide does have its merits, so long as trade agreements fail to provide for the institutional mechanisms to facilitate the migrant worker hiring process. Insofar, the bi-directional treaty landscape on labor migration reflects the increasing bifurcation within services occupations. Unlike jobs in manufacturing, occupations in services economy, the driving force of knowledge societies within post-industrial economies and flagship of 21st century labor migration, are allocated either on the high-skill or low skill end of the job spectrum, with but few occupations in the middle income range.⁴¹ It is not surprising that the legal responses tends to reflect this phenomenon, with trade agreements being used for highly-skilled and non-trade agreements tailored to facilitate the cross-border movement of low-skilled services and to some extent, migrant workers in the field of agriculture and manufacturing and mining.⁴²

Only the MFN of GATS brings some coherence within this dual track of migration agreements. Where the type of labor migration being liberalized bilaterally, falls under the scope of application of GATS, which is the case for all types of service supply, with the exception of domestic employment, that agreement will be inconsistent with the MFN obligation of Art. II GATS. If the destination country however, has entered in 1994, a one-time MFN exemption the preferential admission scheme may be justified under GATS law. France has entered such an MFN exemption towards francophone Africa,⁴³ so that the additional professions France’s new pacts with francophone African countries list as shortage occupations and for which no individual economic necessity tests are required will be consistent in terms of WTO law. Switzerland’s offering special treatment when “granting permits for entry, stay and work to natural persons providing services other than essential persons as defined in the Swiss Schedule of Specific Commitments” towards the EU/EFTA countries and “traditional recruiting areas”⁴⁴ enables Switzerland to preferentially liberalize its labor market access for citizens from those countries. The US has entered an MFN exemption empowering it to automatically issue “treaty trader” or “treaty investor immigrant” visa for all countries with whom it has a treaty of friendship, commerce or navigation, a bilateral investment agreement or for countries described in Sect. 204 of the Immigration Act of 1990.⁴⁵

³⁹ Grynberg, Roman and Qalo, Veniana ‘Labor Standards in US and EU Preferential Trading Agreements’ (2006) 40(4) Journal of World Trade 647ff.

⁴⁰ Aleinikoff, Alexander, T. ‘International Legal Norms and Migration, A Report’, in: A. Aleinikoff, and V. Chetail (eds.) *Migration and International Legal Norms*, Cambridge University Press (2003), p. 2.

⁴¹ Sassen, Saskia, *Globalization and its Discontents, Essays on the New Mobility of People and Money*, The New Press, New York, 1998, p. 47;

⁴² Hufbauer and Stephenson (forthcoming 2010) 19 note that the bilateral labour agreement signed by Greece with Egypt covers only fishery workers, while the bilateral labour agreements signed by South Africa recruit farm and mining workers from Botswana, Lesotho, Malawi, Mozambique and Swaziland.

⁴³ European Communities and their Member States, List of Article II:2 Annex of GATS (MFN exemptions).

⁴⁴ Switzerland, List of List of Article II:2 Annex of GATS (MFN exemptions), WTO Document GATS/EL/83, 15 April 1994.

⁴⁵ The United States of America: List of Article II (MFN) Exemptions, derestricted by the WTO April 11, 1997, WTO Document 97-1462; for other examples of Art. II MFN exemptions facilitating the preferential admission of service supplying persons see Annex, WTO Document S/C/W/301: New Zealand vis-à-vis Kiribati (capped at 20 nationals per year) and Tuvalu (capped at 80 nationals annually); Jordan, waiving annual work permit fees towards nationals of Arab countries, Jamaica towards CARICOM Members, waiving work permits, Italy, guaranteeing work permits to countries of Central and Southern Eastern Europe and of the Mediterranean basin; the UK

The international treatment of labor migration is story of distributional and regulatory asymmetries. It responds and exacerbates rather than minimizes the historic inequality of distribution between labor and capital being increasingly replaced by the deepening wage differentials among countries, a phenomenon being fostered by free trade and economic globalization: In international law of migration, the temporary movement of service providers as liberalized in GATS as part of trade in services showcases a dual asymmetry: risks are asymmetrically allocated with policy space being given only to protect domestic workers from the negative effects of immigration on wages and working conditions, while risks associated with visa overstays but also brain drain and waste to countries of origin have been expressly excluded from the scope of GATS by the immigration law caveat of the Annex.⁴⁶ This fragmentation of the treaty landscape on migration, into trade and non-trade templates offers destination countries the power to pick and choose with which migrant sending country to conclude an FTA and with whom to go for the bilateral route. It further exacerbates the increasing divide within migration for work: high-skilled labor migration being facilitated by special FTA visas, while low-skilled migration if liberalized, serves to uphold the border security of destination countries and is conditioned on readmission.

waiving work permit requirements for Commonwealth member countries, if these persons had a grandparent born in the UK.

⁴⁶ Delimatsis, Panagiotis, Diebold, Nicolas F., Molinuevo, Martin, Panizzon, Marion and Sauvé, Pierre, Developing Trade Rules for Services: A Case of Fragmented Coherence? (September 1, 2009). NCCR Trade Regulation Working Paper No. 38. Available at SSRN: <http://ssrn.com/abstract=1472053>.