

Expanding the Movement of Natural Persons Through Free Trade Agreements? A Review of CETA, TPP and ChAFTA

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Researchers and international institutions have tried to solve a fundamental paradox in the politics of migration. While introducing stricter migration policy stands high on the agenda of many countries, demographic facts suggest that they will need to introduce more extensive labour immigration to avoid labour shortages. Meanwhile, attempts to introduce a legally binding international regime on labour mobility, most ambitiously through Mode 4 of the General Agreement on Trade in Services (GATS) and as requested by developing countries, have had limited success. This article explores one of the political options for resolving this: regulating the movement of natural persons through free trade agreements. It examines three recently concluded free trade agreements (FTAs), the EU–Canada Comprehensive Economic and Trade Agreement (CETA), the China–Australia Free Trade Agreement (ChAFTA) and the Trans-Pacific Partnership (TPP), in an attempt to answer two questions. First, do the signatories commit to more expansive possibilities for labour mobility than through the GATS? Second, what has the political reception of such measures been? While most of the signatories are willing to schedule more far-reaching commitments through FTAs than through the GATS, these commitments typically fall within the realm of existing work permit systems in domestic law. In addition, we find examples of political backlash in countries that have included somewhat more ambitious mobility provisions in FTAs, particularly in Australia. These FTAs may still play a role by improving mutual recognition of skills, and limiting the impact of national reforms to restrict labour migration. However, we conclude that FTAs appear to be neither a manifestly successful instrument for significantly liberalizing labour mobility, nor an evidently desirable one. We call for a more holistic approach that refrains from temporary labour mobility programmes to meet permanent demand for labour, with respect for migrant workers' rights at its core.

1 INTRODUCTION

We live in a paradoxical time in terms of migration. On the one hand, the past few years have seen the rise of political forces and politicians that draw a mandate from

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seeking to limit migration, frequently in a vitriolic and polarizing manner. While migration has been a politically sensitive issue for some time, major political events such as the election of Donald Trump and the British referendum on leaving the EU, have placed it at the centre stage of political debates in many countries.

On the other hand, there is likely to be a sustained need for recruiting labour across borders to those very same countries. One reason is the demographic challenge facing many high-income countries as the result of declining or stagnating birth rates in combination with rising life expectancies.¹ In consequence, the dependency ratio is rising steadily and many countries risk facing shortages of labour, not just in a select few sectors, but across the labour market as a whole.

Another reason is that companies and countries require mobility in order to recruit specialist competences. First, countries are producing strategies for what in the prose of the Organization for Economic Co-operation and Development (OECD) is referred to as 'the global competition for talent'.² High-performing companies as well as many countries recognize the need to be able to recruit from a global labour market in order not only to make up for labour market shortages, but to successfully compete in the global economy and to breed innovation. Second, companies with commercial operations in several countries need to send key staff for longer or shorter periods to countries where they have a commercial presence.

In other words, there is a conflict between immigration policies that seek to restrict migration and a continued and probably expanding need for functioning channels of labour mobility. For some time, scholars and international institutions have been considering how to reconcile this 'liberal paradox'.³ This article explores this topic.

We begin with an overview of some of the attempts to regulate labour mobility internationally. We discuss why the endeavours to create an international regime through the General Agreement on Trade in Services (GATS) and its Annex on the Movements of Natural Persons (MNP) have thus far been unsuccessful, and what policy options have been proposed by the literature. We investigate one of these in depth, namely including provisions for temporary movement of persons in free trade agreements (FTAs).

¹ For an overview of international population data and an analysis of population trends, see e.g. United Nations, *World Population Ageing 2017*, ST/ESA/SER.A/408 (New York: United Nations Department of Economic and Social Affairs 2017).

² OECD, *The Global Competition for Talent: Mobility of the Highly Skilled* (Paris: OECD Publications 2008).

³ T. Cottier & C. Sieber-Gasser, *Labour Migration, Trade and Investment: From Fragmentation to Coherence*, in *The Palgrave Handbook of International Labour Migration: Law and Policy Perspectives*, 41 (M. Panizzon, G. Zürcher & E. Fornalé eds, London: Palgrave Macmillan 2015).

We do this by reviewing three recently negotiated FTAs: the EU–Canada Comprehensive Economic and Trade Agreement (CETA), the China–Australia Free Trade Agreement (ChAFTA), and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP), in an attempt to answer two questions. First, have they successfully expanded the channels for labour mobility compared to the GATS? Second, what has the political reception of such measures been? These case studies serve as the basis for a discussion of the feasibility of using FTAs as a means to increase labour mobility. We conclude that while countries are willing to go further through FTAs than through the GATS, they are typically not willing to go much further than existing national systems for labour migration. Moreover, in contrast with certain predictions made in the literature, we find that FTAs do not serve as a way to expand labour mobility while avoiding political controversy.

2 TRADE IN SERVICES AND ATTEMPTS TO BUILD AN INTERNATIONAL LABOUR MIGRATION REGIME

2.1 THE NORMATIVE FRAMEWORK FOR LABOUR MIGRATION

There are several ways in which physical persons can and do move across borders to perform work. In a report ahead of the International Labour Conference 2017, the International Labour Office examined some of the main changes in these movements and its governance over the past few decades. They noted a number of significant changes in the composition of labour migrants and new migration corridors opening up. They highlighted an increase in temporary labour migration, as well as in bilateral labour migration agreements. In summary they stated that labour migration is evolving into ‘an increasingly complex and dynamic phenomenon’.⁴

Part of the complexity lies in the plethora of programmes and legal forms that exist. In previous work we sought to gain some clarity by developing a typology of cross-border human labour mobility processes, broken down into three main conceptual categories: labour migration of employees; migration of entrepreneurs; and trade in services mobility.⁵

Labour migration entails persons moving from country A (country of origin) to work as an employee for an employer established in country B (country of work)

⁴ International Labour Office, *Report IV Addressing Governance Challenges in a Changing Labour Migration Landscape*, para. 9 (Geneva: International Labour Office 2017).

⁵ S. Engblom, N. Kountouris & Å. Odin Ekman, *Temporary Labour Migration and the Trade in Services: European and Global Perspectives in an Age of Economic Integration*, in *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (J. Howe & R. Owens eds, Oxford and London: Hart 2016).

for a longer or shorter period of time. *Migration of entrepreneurs* can be defined as a person moving from country A to country B to establish a business, either employing others or as self-employed. *Trade in services mobility* designates a third category, where work performed by an individual from country A in country B is constructed as the provision of a service. This classification was established internationally through the WTO's GATS, and is to be reviewed in greater detail in this section. These various forms of mobility can exist in several different combinations and frequently overlap. Different terms and conditions may apply depending on whether the individual performs work through labour migration or through trade in services mobility, compounding the regulatory complexity.

Given the inherent cross-border element of labour migration, it should, in theory, lend itself rather well to international governance. Over time, international standards on labour migration have emerged through the International Labour Organization (ILO) and the United Nations (UN). Additionally, the general instruments of these organizations apply to all workers, including those who migrate. The ILO has four up-to-date instruments: the Migration for Employment Convention No. 97 (Revised), 1949; the Migration for Employment Recommendation (Revised), 1949 (No. 86); the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143); and the Migrant Workers Recommendation, 1975 (No. 151). The UN has one main instrument, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. These have established a rights-based approach for labour migration.

It might be argued that the 'proliferation of instruments ... and a multiplication of supervisory mechanisms' carries the 'potential danger of an overlap of standards'.⁶ It is also possible to take the view that each instrument reflects the particular governance challenge of a given time. Hence, ILO Convention 97 for example includes separate Annexes with provisions on government-sponsored and non-government-sponsored arrangements for group transfer, and is testament to the greater frequency of state-organized migration programmes of that period. On the other hand, ILO Convention 143 deals with the issue of irregular migration, a sensitive issue for many states at the time.⁷ The UN Convention 1990 is more comprehensive and sets standards for various groups of migrant workers, but was also a way for states to circumvent the ILO, not least its independent trade unions.⁸

⁶ M. Hasenau, *Setting Norms in the United Nations System: The Draft Convention on the Protection of the Rights of All Migrant Workers and Their Families in Relation to ILO in Standards on Migrant Workers*, 28(2) Int'l Migration 133 (1990).

⁷ R. Böhning, *The ILO and the New UN Convention on Migrant Workers: The Past and Future*, 25(4) Int'l Migration Rev. (1991).

⁸ *Ibid.* However, the ILO ended up taking an active role in the drafting process.

Given the changes occurring in mobility patterns, this begs the questions as to whether these instruments and hence the international normative framework for labour migration have become obsolete. The ILO General Survey of 2016 found that while ‘certain details in the provisions appear somewhat outdated’,⁹ ‘the instruments retain their relevance’.¹⁰ In order to meet the new regulatory challenges of labour migration, such as exploitative recruitment practices by private agencies, new initiatives are being taken, including the ILO General Principles and Operational Guidelines for Fair Recruitment.¹¹

The efficacy of the legally binding instruments is impaired by low ratification rates, however. As of December 2018, twenty-three states have ratified ILO C143, whereas forty-nine states have ratified ILO C97. In submissions to the ILO, countries report a range of legal, administrative and other obstacles to ratification,¹² which admittedly do not always appear insurmountable assuming the political will exists. To the list of obstacles listed by governments, and difficulties identified by employers and trade unions, the ILO Committee of Experts adds, with a hint of frustration, that the ‘great flexibility’ of the instruments is ‘not always fully appreciated’.¹³

Similarly, the UN Convention 1990 has been ratified only by fifty-four states, few of which are receiving countries (none of them Western). The low ratification rate is noteworthy not least because of the arduous decade of negotiation that lay behind the Convention and the central role played by six European countries.¹⁴ Pécoud has pointed out that the provisions of the Convention generally fall within existing legislation of Western countries.¹⁵ Despite the fact that ratification would not in practice entail the establishment of new rights, countries who typically strongly promote human rights have chosen not to ratify. Pécoud considers a range of possible explanations, including the stated difficulties in combining ratification

⁹ International Labour Conference, 105th Session, *Promoting Fair Migration: General Survey Concerning the Migrant Workers’ Instruments. Report of the Committee of Experts on the Application of Conventions and Recommendations (Arts 19, 22 and 35 of the Constitution)*, para. 652 (Geneva: International Labour Office 2016).

¹⁰ *Ibid.*, para. 654.

¹¹ Fair recruitment is thus not (yet) the subject of a new ILO instrument. However, the International Labour Conference of 2017 decided to support and promote constituents’ efforts with the fair recruitment principles and operational guidelines, ruling that the Governing Body should assess whether further action is needed in five years’ time. International Labour Conference, 106th Session, *Resolution Concerning Fair and Effective Labour Migration Governance*, point 17 (c) (adopted on 16 June 2017).

¹² ILC *supra* n.9, part II.

¹³ *Ibid.*, para. 521.

¹⁴ J. Lönnroth, *The International Convention on the Rights of All Migrant Workers and Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation*, 25(4) Int’l Migration Rev. (1991).

¹⁵ A. Pécoud, *The Politics of the UN Convention on Migrant Workers’ Rights*, 5(1) Groningen J. Int’l L. (2017).

with accession to the EU for which he finds no evidence.¹⁶ Instead he concludes that the explanation lies in the fact that migration and in particular the rights of migrants remain highly politicized issues, thus rendering it ‘one of the most neglected treaties in international human rights law’.¹⁷

Perhaps it is in this light that we should view the another recent initiative, the Global Compact for Safe, Orderly and Regular Migration, which was developed following the New York Declaration for Refugees and Migrants of 2016 and responding to the major movements of people of the time. Its adoption at an intergovernmental conference in Morocco on 10 December 2018 was somewhat tainted by the fact that a number of countries vocally declared they would not sign the accord, including a number of EU Member States and Australia. Among other justifications, it was claimed that the Global Compact would encourage irregular migration.¹⁸ The United States withdrew during the drafting process stating that ‘We will decide how best to control our borders and who will be allowed to enter our country. The global approach in the New York Declaration is simply not compatible with U.S. sovereignty’.¹⁹

On the one hand, it could be argued that these states are articulating an opposition to global governance on migration that may always have been there to a greater or lesser degree, though unstated. The UN Secretary-General’s attempts to dispel ‘myths’ and his insistence that the accord is ‘not legally binding’²⁰ have not succeeded in convincing these countries. On the other hand, despite these withdrawals and the countries that remain undecided, 164 signatories (so far) from both sending, receiving and transit countries is no small achievement for an accord on migration, especially one that acknowledges and builds on a rights-based approach to migration.

Nonetheless, besides the challenges involved in ratification, even the aforementioned legally binding instruments do not regulate the actual admission of labour migrants. Nor are they associated with organizations that have the ‘teeth’ of the institutions for example associated with the international regulation of trade

¹⁶ See also H. Oger, *The French Political Refusal on Europe’s Behalf* and E. Macdonald & R. Cholewinski, *The ICRMW and the European Union*, in *Migration and Human Rights: The United Nations Convention on Migrant Workers’ Rights* (R. Cholewinski, P. de Guchteneire & A. Pécoud eds, Cambridge: Cambridge University Press 2010).

¹⁷ *Ibid.*, at 57.

¹⁸ See e.g. the Australian statement, by the Hon Scott Morrison MP, Prime Minister, the Hon Peter Dutton MP, Minister for Home Affairs and Senator the Hon Marise Payne, Minister for Foreign Affairs *Global Compact for Migration*, Joint media release (21 Nov. 2018), https://foreignminister.gov.au/releases/Pages/2018/mp_mr_181121a.aspx?w=E6pq%2FUhzOs%2BE7V9FFYi1xQ%3D%3D. (accessed 29 Dec. 2018).

¹⁹ The United States Mission to the United Nations, *United States Ends Participation in Global Compact on Migration*, release (2 Dec. 2017), <https://usun.state.gov/remarks/8197>. (accessed 29 Dec. 2018).

²⁰ United Nations Secretary-General *Secretary-General’s Remarks at Intergovernmental Conference to Adopt the Global Compact for Migration* (10 Dec. 2018).

and foreign investments. Many authors have therefore pointed to the absence of an international regime that can parallel the strength of international institutions in other areas such as the World Bank and the International Monetary Fund (IMF).²¹ Nonetheless, the ‘seeds of a regime’²² exist in what we in our typology referred to as *trade in services mobility*, which we shall now explore in greater depth.

2.2 TRADE IN SERVICES MOBILITY THROUGH THE GATS

As argued in previous work, in line with an increasingly common position, the distinction between trade in services and trade in goods is becoming less clear-cut and increasingly obsolete.²³ However, ahead of the negotiations that led to the GATS, known as the Uruguay Round, negotiating trade in services was not an uncontroversial concept. For example, developing countries were, on the one hand, reluctant to open up their rather vulnerable service sectors to foreign competition, and, on the other, concerned that their desire to include labour mobility would not be met.²⁴

The final agreement covered any service in any sector except services supplied ‘in the exercise of governmental authority’. The definition in Article I of the GATS categorises the provision of services into four different ‘modes’:

- *Mode 1: Cross-border supply* is the supply of a service from the territory of one member into the territory of any other member, e.g. services rendered over a telephone line or the internet.
- *Mode 2: Consumption abroad* is the supply of a service in the territory of one member to the service consumer of any other member, e.g. tourism.
- *Mode 3: Commercial presence* is the supply of a service by a service supplier of one member, through commercial presence in the territory of any other member, e.g. the setting up of a branch of a company in another country.
- *Mode 4: Presence of natural persons* is the supply of a service by a service supplier of one member, through the presence of natural persons of a member in the territory of any other member, e.g. non-nationals on consultancy or construction tasks.

²¹ Cottier & Sieber-Gasser, *supra* n. 3.

²² L. Cerna, J. Hollifield & W. Hynes, *Trade, Migration and the Crisis of Globalization*, in *The Palgrave Handbook of International Labour Migration* 18 (M. Panizzon, G. Zürcher & E. Fornalé eds, Basingstoke and New York: Palgrave Macmillan 2015).

²³ Engblom, Kontouris & Odin Ekman, *supra* n. 5.

²⁴ R. J. Self & B. K. Zutshi, *Mode 4: Negotiating Challenges and Opportunities*, in *Moving People to Deliver Services* (A. Mattoo & A. Carzaniga eds, Washington, DC and Oxford: The World Bank and Oxford University Press 2003); J. Jacobsson, *GATS Mode 4 and Labour Mobility: The Significance of Employment Market Access*, in *The Palgrave Handbook of International Labour Migration: Law and Policy Perspectives* (M. Panizzon, G. Zürcher & E. Fornalé eds, London: Palgrave Macmillan 2015).

The definitions applied in the GATS and the modal approach constituted ‘an attempt to address and reconcile, through a single framework, the diverse and sometimes conflicting interests of participants at different levels of development in an area of great regulatory diversity and complexity’.²⁵

Conflicting interests carried over to the negotiations on the specific issue of labour mobility. Developed countries were above all interested in mobility associated with Mode 3, commercial presence. This would enable companies with operations in several countries to move management, specialists and other key personnel between their units, and to carry on business. For example, the US called for Mode 4 to be limited to certain categories of senior managerial staff. Developing countries, with considerably fewer examples of companies with a commercial presence in other countries, had other priority interests at stake. Through a counter-proposal, led by India, they called for the inclusion of all categories of personnel, for the purpose of achieving labour mobility at all skill levels.²⁶

A fine balance between these competing interests can be found in the construction of the Annex on Movement of Natural Persons Supplying Services Under the Agreement (henceforth ‘MNP Annex’), which stipulates the terms of cross-border mobility. Four succinct paragraphs and a footnote outline the terms under which Members may schedule commitments. Paragraphs (1) and (3) open up for MNP in all sectors covered by the Agreement, and for ‘all categories of natural persons’,²⁷ provided Members schedule such commitments. In other words, Members are not limited to any particular service sector or skills level when scheduling their commitments.

However, paragraph (2) clarifies that ‘The Agreement shall not 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’. This paragraph establishes that the GATS covers temporary movement only, the duration of which is specified with great variation in Members’ schedules of commitments rather than defined in the Annex. Crucially, it excludes access to the labour market which is often a feature of regular labour migration. Indeed, Jacobsson has argued that what distinguishes Mode 4

²⁵ Self & Zutshi, *supra* n. 24, at 56–57.

²⁶ J. Schmitz, *The Temporary Movement of Natural Persons in the Context of Trade in Services: EU Trade Policy under Mode 4 (WTO/GATS)*, in *The Palgrave Handbook of International Labour Migration: Law and Policy Perspectives* (M. Panizzon, G. Zürcher & E. Fornalé eds, London: Palgrave Macmillan 2015).

²⁷ Para. 3, Annex to GATS on Movement of Natural Persons Supplying Services Under the Agreement (henceforth GATS MNP Annex).

from labour migration is that it ‘carve[s] out employment access from the agreement’s scope’.²⁸

Finally, paragraph (4) safeguards Members rights to apply ‘measures to regulate the entry of natural persons into, or their temporary stay in, its territory ... 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’. A footnote clarifies that requiring a visa ‘for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment’. In other words, Members in practice retain ample room to apply immigration controls, as well as limitations on market access such as economic needs tests,²⁹ provided these are listed in the schedule of commitments.³⁰

The Annex thus enables commitments for the movement of natural persons within all service sectors but curtails them through establishing their temporary nature and through the possibility for Members to impose upon them the limitations contained within domestic immigration policy. The provisions may be seen as ‘a carefully elaborated compromise’ to balance the interests of developed and developing WTO Members.³¹ The structure of the GATS, in principle at least, therefore represents a compromise between the interests of developed and developing countries.

²⁸ Jacobsson, *supra* n. 24, at 62. The term ‘employment on a permanent basis’ has however begged the question whether the Annex does in fact open up for access to the labour market in a manner equivalent to labour migration, albeit on a temporary basis. The ‘prevailing legal view’, interprets it as applying more or less specifically to categories corresponding to intra-corporate transferees, who may formally be employed by an entity in the host country, but whose right to stay is temporary and limited to that specific employer (Schmitz, *supra* n. 26, at 389). Clearly, however, a number of Members do in fact include other forms of temporary entry in their schedules, providing at least temporary labour market access (as acknowledged also by Jacobsson, *supra* n. 24). For example, the US included among its schedule of commitments 65,000 H1-B visas, allowing temporary employment through the existing regular channels for labour migration. Similarly, Brazil includes among its commitments temporary entry for foreign specialized technicians and highly qualified professionals. As noted by Nielsen and Cattaneo, the view of the WTO secretariat has been that foreigners can work on a contractual basis for host country companies but not as employees, although crucially the WTO is not the legal interpreter of the GATS. See J. Nielsen & O. Cattaneo, *Current Regimes for the Temporary Movement of Service Providers: Case Studies of Australia and the United States*, in *Moving People to Deliver Services*, n. 2 (A. Mattoo & A. Carzaniga eds, Washington, DC: World Bank 2003).

²⁹ While there is no definition of economic needs tests in the GATS, according to the WTO they are quantitative restrictions in one of the categories listed in subparagraphs (a)–(f) of Art. XVI.2 on market access, such as quotas or other numerical restrictions on the volume of services traded. See *WTO Council for Trade in Services, Economic Needs Tests. Note by the Secretariat. S/CSS/W/118* (30 Nov. 2001). Economic needs tests are distinct from labour market tests, which are not at all mentioned in the GATS but which appear frequently in Members’ schedules. Labour market tests are procedures, led by an employer or a government agency, for determining whether a position can be filled by a local candidate before recruiting labour from abroad.

³⁰ Art. XVI GATS.

³¹ Schmitz, *supra* n. 26, at 391.

2.3 LIMITED OUTCOMES AND PROPOSALS FOR CHANGE

When the scheduled commitments are more closely inspected, however, a particular pattern emerges. Three observations can be made. The first is that of the four modes of delivery, Mode 4 is the one where WTO members have opened up the least. Indeed, it has been described as an ‘extremely modest level of liberalization’.³²

A second conclusion can be drawn from reviewing the categories of workers included in Members’ commitments in Mode 4. The dominating categories include³³

- Independent professionals: self-employed persons from country A providing a service in country B
- Contractual service suppliers: employees of a service supplier from country A without a local or commercial presence in country B, delivering a service to a client in country B
- Intra-corporate transferees: employees sent by their employer in country A to work temporarily in country B where their employer has a commercial presence, usually limited to senior management, executives and specialists
- Business visitors: employees of a service supplier in country A who enter country B, for example, to set up a commercial presence or negotiate the sale of a service

Rupa Chanda has found that only 17% of horizontal commitments cover low-skilled personnel.³⁴ Moreover, according to Hamid Mamdouh horizontal commitments are divided as follows: intra-corporate transferees 43%; business visitors 24%; executives, managers and specialists 25%, contractual service suppliers 4%; other 4%.³⁵ In other words, there is a clear dominance of high-skilled workers. It could be argued that *actual* commitments in Mode 4 rather closely align with the types of mobility provisions requested by developed countries when the GATS was being negotiated, as there is typically a link to commercial presence, i.e. Mode 3.

³² Jacobsson, *supra* n. 24, at 65.

³³ H. Mamdouh, *Mode 4 – Definition, Commitments, State of Play in the Negotiations*, presentation at the WTO Symposium ‘Mode 4 of the GATS – Taking stock and moving forward’ (22 Sept. 2008 Geneva).

³⁴ R. Chanda, *Movement of Natural Persons and Trade in Services: Liberalising Temporary Movement of Labour Under the GATS*, Working paper no. 51, 32 (New Delhi: Indian Council for Research on International Economic Relations 1999).

³⁵ Mamdouh, *supra* n. 33.

Finally, a third observation is that the GATS commitments have rarely expanded beyond existing channels for movement of natural persons.³⁶ Members have generally scheduled commitments that are more moderate than provisions for temporary labour mobility already in place in their respective national legislation. Or in the rather glum words in a report co-published by the World Bank, the GATS risks playing the role of ‘harvester of autonomous liberalization in services rather than act as a catalyst for further liberalization’.³⁷

Despite the somewhat limited success of Mode 4 in the Uruguay Round, there were hopes that the negotiations launched in November 2001, known as the Doha Round, would deliver further liberalization in the field of movement of natural persons. These expectations were gradually shattered as agreement between Members stalled over numerous negotiation sessions spanning many years. The Doha Round was finally declared dead in the WTO meeting of December 2015, although it had in practice already failed long before then. MNP was not the primary stumbling block in the negotiations, but there was a similar dynamic of competing interests as played out in the Uruguay Round.³⁸

One reason for this limited success may be found in the characteristics of the GATS as a multilateral trade treaty. Two principles are particularly important to highlight. First, the GATS contains rules on market access.³⁹ The GATS does not grant market access to all services as a general right. Instead, members can choose to open specific service sectors through specific commitments within the four modes of service delivery. Once opened up, GATS members must grant access as specified to service suppliers and services for all members, unless otherwise specified in their schedule of commitments. If a WTO member decides to modify their schedule, e.g. by retracting a commitment or reintroducing a barrier to market access, and the modification has an adverse effect on trade, it is required to compensate all other WTO members by offering commitments in another sector or mode of supply.⁴⁰

Second, according to the most-favoured nation principle (MFN),⁴¹ members are obliged to ‘accord immediately and unconditionally to services and service

³⁶ Self & Zutshi, *supra* n. 24.

³⁷ A. Mattoo, *Introduction and Overview*, in *Moving People to Deliver Services*, 2 (A. Mattoo & A. Carzaniga eds, Washington, D.C and Oxford: The World Bank and Oxford University Press 2003).

³⁸ For an account, see e.g. M. Panizzon, *Trade and Labor Migration: GATS Mode 4 and Migration Agreements*, Occasional Papers No 47 (Geneva: Friedrich Ebert Stiftung 2010); S. Lavenex & F. Jurje, *The Migration-Trade Nexus: Migration Provisions in Trade Agreements*, in *Handbook of the International Political Economy of Migration* (L. S. Talani & S. McMahon eds, Northampton, MA: Edward Elgar 2015).

³⁹ Art. XVI GATS.

⁴⁰ Art. XXI GATS.

⁴¹ Art. II GATS.

suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country', unless exemptions are noted in the schedule of commitments. Crucially, Members may also grant more favourable treatment by entering into economic integration agreements,⁴² or may establish full integration of the labour market,⁴³ provided certain conditions are met.

These principles may make sense from the perspective of trade law, but they create a strong incentive for Members to schedule few commitments if they wish to retain the possibility to flexibly adapt and adjust national immigration policy over time.

An extensive literature on how to make progress with the movement of natural persons accompanied the Doha Round, pointing out major and minor obstacles, and possible ways out of the political stalemate. An important point of departure consisted of the considerable economic gains to be made from increased labour mobility.⁴⁴ In a frequently cited estimate, Walmsley and Winters calculate that if labour migration increased to equal 3% of the labour force, this would entail economic gains of USD 156 billion.⁴⁵ They conclude that the largest gains are to be made by developing countries and by relaxing restrictions on low-skilled labour. Others have drawn similar conclusions, noting the absence of Mode 4 commitments where the developmental benefits would be the greatest.⁴⁶

Some contributions have engaged in a discussion of the barriers that have restrained the success of existing Mode 4 commitments, such as strict visa regimes, economic needs tests and failure to recognize skills and qualifications of foreign workers.⁴⁷ However, despite the stated economic benefits of expanded labour mobility, authors have acknowledged a need to find a regulatory path that balances the political difficulties and stated costs associated with more extensive labour migration. In our reading of the literature, a couple of recurring propositions for regulatory pathways out of the limited results of the original GATS stand out.

⁴² Art. V GATS.

⁴³ Art. V bis GATS.

⁴⁴ For a review of various calculations on the economic benefits, see e.g. S. Stephenson & G. Hufbauer, *Increasing Labor Mobility: Options for Developing Countries*, in *International Trade in Services: New Trends and Opportunities for Developing Countries* (O. Cattaneo, M. Engman, S. Sáez & R. M. Stern eds, Washington, DC: The World Bank 2010).

⁴⁵ T. L. Walmsley & L. A. Winters, *Relaxing the Restrictions on the Temporary Movement of Natural Persons: A Simulation Analysis*, 20(4) *J. Econ. Integration* (2005).

⁴⁶ Panizzon, *supra* n. 38.

⁴⁷ Mattoo, *supra* n. 37; A. Grover Goswami, & S. Sáez, *How Well Have Trade Agreements Facilitated Temporary Mobility? in Let Workers Move: Using Bilateral Agreements to Increase Trade in Services* (S. Sáez ed., Washington, DC: The World Bank 2013).

One of these is to promote schemes for temporary labour migration as ‘the political difficulties would be alleviated, though not eliminated, if it could be ensured that movement will be temporary, not permanent’.⁴⁸ In a summary of an edited volume published by the World Bank, Sebastián Sáez argues that while an international migration regime would be necessary, in the short term it is unrealistic and complementary solutions in the form of temporary labour migration programmes are necessary.⁴⁹ Winters argues that while there are overall economic gains to be made from labour migration, there are also a number of political concerns, whether economic, cultural or otherwise. Many of these concerns, he maintains, do not apply for temporary labour migration programmes.⁵⁰

A second policy alternative, often proposed in conjunction with the first,⁵¹ is to enter into bilateral labour migration agreements. Such agreements played an important role in the regulation of labour migration in the 1950s and 1960s, and have seen a revival since the mid-1990s. Unlike the GATS, the signatories may choose to withdraw from such agreements and therefore retain the flexibility prohibited by the GATS. Bilateral agreements thus constitute an attractive option for filling particular shortages. In fact a pattern has emerged: while low-skilled workers are typically excluded from GATS commitments, they are admitted instead through bilateral labour migration agreements.⁵² These bilateral labour migration agreements assume a plethora of functions and legal constructions, as shown by Piyasiri Wickramasekara in a study carried out for the ILO in 2015. Some are just Memoranda of Understanding expressing political goodwill, while others are in-depth agreements with model employment contracts attached. In some cases they are used to fill specific labour market shortages, and in other cases they are part of a deal where opportunities for regular labour migration are exchanged for cooperation on returns and reducing irregular migration, as in the case in a number of European bilateral agreements. Labour rights are included in few of the reviewed agreements, and none of them refer or commit to social dialogue and consultation with stakeholders.⁵³

⁴⁸ Mattoo, *supra* n. 37, at 12.

⁴⁹ S. Sáez, *Trade in Services and Bilateral Labor Agreements: Overview*, in *Let Workers Move: Using Bilateral Labor Agreements to Increase Trade in Services* (S. Sáez ed., Washington, DC: The World Bank 2013).

⁵⁰ L. A. Winters, *The Economic Implications of Liberalizing Mode 4 Trade*, in *Moving People to Deliver Services* (A. Mattoo & A. Carzaniga eds, Washington, DC: The World Bank 2003).

⁵¹ As in Sáez, *supra* n. 49.

⁵² Panizzon, *supra* n. 38.

⁵³ P. Wickramasekara, *Bilateral Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review* (Geneva: International Labour Organization 2015).

Third, a number of authors point to the advantages of regulating mobility through FTAs, either bilateral or multilateral. It is argued that progress is more likely in the politically sensitive area of movement of natural persons if such commitments are exchanged for concessions in other areas covered by the agreement.⁵⁴ Others have noted the greater enforceability ensuing from the strength of the international institutions of global trade, compared to the considerably weaker international organizations dealing with migration.⁵⁵ A justification that is more to the point is that FTAs ‘can be an easier instrument to use politically than an agreement liberalizing immigration outright’.⁵⁶

In the next section we will be exploring the third policy option. We will examine three recently concluded FTAs and analyse their content whilst exploring two questions. First, are the FTAs achieving more far-reaching commitments for mobility than the GATS? We will summarize the commitments made by the signatory countries in the GATS and the relevant FTA, respectively, with notes on some key aspects of the provisions. Second, are such arrangements able to avoid attracting political controversy, as suggested in the existing literature? Due to language limitations we are unable to carry out an all-encompassing review of the political reception, but include some in-depth examples from the relevant FTAs which we would argue are indicative.

It is, of course, not possible to draw universal conclusions on the basis of a limited number of agreements, but by focusing on three recently concluded FTAs we believe we are able to identify a number of characteristics that do not fully emerge in some of the existing, and somewhat broader, reviews of FTAs.⁵⁷

3 CASE STUDIES

3.1 COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT

The CETA between Canada and the EU entered into force provisionally on 21 September 2017. As of December 2018 it has not yet been ratified by all the EU Member States.

⁵⁴ Panizzon, *supra* n. 38.

⁵⁵ Cottier & Sieber-Gasser, *supra* n. 3.

⁵⁶ Jacobsson, *supra* n. 24, at 66.

⁵⁷ See e.g. Stephenson & Hufbauer *supra* n. 44.

CETA does not apply the modal approach of the GATS. The chapter on cross-border trade in services, Chapter 9, limits the provisions to the supply of a service from the territory of a Party into the territory of the other Party (equivalent to Mode 1), and the supply of a service in the territory of a Party to the service consumer of the other Party (equivalent to Mode 2).⁵⁸ Mobility provisions are nonetheless covered by the agreement and can be found in Chapter 10 – Temporary Entry and Stay of Natural Persons for Business Purposes.

Chapter 10 draws a considerable amount from the GATS MNP Annex. Hence, the chapter ‘shall not apply to measures affecting natural persons seeking access to the employment market of a Party, nor shall it apply to measures regarding citizenship, residence, or employment on a permanent basis’.⁵⁹ The Parties are not prevented from ‘applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory’ as long as those measures do not ‘nullify or impair the benefits’ of the Chapter.⁶⁰ The same Article additionally stipulates that ‘requiring a visa for natural persons of a certain country and not for those of others shall not be regarded as nullifying or impairing benefits’.⁶¹

In practice, therefore, a great deal of the substance of the GATS remains intact, even if the modal approach is not applied. However, while the GATS Annex only covers measures for the presence of natural persons that can be defined as ‘the supply of a service’, in CETA temporary entry has a slightly broader objective, to ‘facilitate trade in services and investment’.⁶²

Chapter 10 defines which categories of workers are covered by the agreement, and which terms and conditions apply. Commitments are scheduled in a number of Annexes, and these include reservations against some of the terms provided in the chapter. The temporary entry chapter also contains a clause on labour rights, determining that ‘all requirements of the Parties’ laws regarding employment and social security measures shall continue to apply, including regulations concerning minimum wages as well as collective wage agreements’.⁶³

⁵⁸ Art. 9.1 CETA.

⁵⁹ Art. 10.2(2) CETA; cf. para. 2 GATS MNP Annex.

⁶⁰ Art. 10.2(3) CETA; cf. para. 4 GATS MNP Annex.

⁶¹ Art. 10.2(3) CETA; cf. fn. 1 GATS MNP Annex.

⁶² Art. 10.2(1) CETA.

⁶³ Art. 10.2(5) CETA.

Table 1 GATS and CETA Temporary Entry Commitments of Canada and the EC/EU

Categories	Canada GATS Commitments		EC GATS commitments (Canada and EU)		CETA commitments (Canada and EU)	
	Max duration	Notes	Max duration	Notes	Max duration	Notes
Business visitors	90 days		90 days		90 days	"short-term business visitors"
Business visitors: investors						
Persons responsible for setting up commercial presence			Duration determined by member states			
Contract service suppliers			3 months	Listed sectors	12 months	University degree or equiv; listed sectors
Intra-corporate transferees	3 years	Executives, Managers, Specialists	Duration determined by member states	Senior management and specialist positions	3 years + 18 months; 1 year for graduate trainees	Senior personnel; Specialists; graduate trainees
Investors					1 year	
Independent professionals					12 months	University degree or equiv; listed sectors
Professionals	90 days	Service contracts in listed professions				
Spouses and dependants						
Service sellers, sales persons			Duration determined by member states			ICT (except DK and UK)

GATS horizontal commitments only. Blank box indicates lack of commitment in a given category. The commitments are subject to numerous additional reservations by the individual parties.

CETA is restricted to four categories only: key personnel, contractual service suppliers, independent professionals and short-term business visitors.⁶⁴ However, as demonstrated in Table 1, these commitments are more extensive than existing commitments through the WTO. The overarching category of key personnel is subdivided into: business visitors for investment purposes, investors and intra-corporate transferees (further subdivided into senior personnel, specialists and graduate trainees). With the exemption of graduate trainees, the definitions effectively encompass senior personnel in managerial positions or with special expertise and uncommon knowledge. Both Canada and the EU already permit the entry of intra-corporate transferees without a prior labour market assessment. While the EU also already admits graduate trainees as intra-corporate transferees,⁶⁵ Canada does not, and CETA hence extends Canadian commitments past existing legislation in this case. There is also an understanding on spouses and dependants.⁶⁶

Accepted activities for 'short-term business visitors' are listed in Annex 10-D. In Annex 10-B, EU Member States have included reservations concerning key personnel and business visitors. There is a great diversity in reservations, with some countries such as Austria and the Netherlands retaining the right to apply, for example, economic needs tests for virtually all categories of short-term business visitors. A number of countries choose not to recognize the category of investors. While the chapter stipulates that each party should allow the entry of short-term business visitors without the requirement of a work permit or other prior approval procedures,⁶⁷ a number of EU Member States have reserved the right to do just that through reservations in Annex 10-B.

Temporary entry of contractual service suppliers is quite strictly limited to natural persons who hold a university degree or knowledge of equivalent level, have at least three years' professional experience in the sector and have been an employee of the enterprise supplying the service for at least the preceding year.⁶⁸ The length of stay should be no longer than twelve months. This means that the entry is much more restricted than that made possible within the EU under the Posting of Workers' Directive.⁶⁹ The Posting of Workers' Directive does not contain any requirements regarding the educational level of

⁶⁴ Definitions provided in Art. 10.1 CETA.

⁶⁵ Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

⁶⁶ Annex 10-F to CETA.

⁶⁷ Art. 10.9(2) CETA.

⁶⁸ Art. 10.8(1)(b) CETA.

⁶⁹ Directive 96/71/EC of the European Parliament and of the Council of 16 Dec. 1996 concerning the posting of workers in the framework of the provision of services.

the posted worker, and there is no fixed time requirement for how long a worker must have been employed before he or she can be posted. Independent professionals must have six years' professional experience in the sector and a university degree or equivalent.⁷⁰ In either case, CETA only applies to service contracts of twelve months or less.

Contractual service suppliers and independent professionals have their own annex.⁷¹ The Annex specifies which sectors, predominantly in the area of services, in which the parties shall allow the supply of services through the presence of natural persons – thirty-seven sectors for contractual service suppliers, seventeen sectors for independent professionals. Reservations are subsequently listed per sector. For example, some EU Member States choose to limit the maximum stay of all contractual service suppliers to six months in a twelve-month period. EU Member States frequently list the right to apply economic needs tests among their reservations, but a number of Member States also impose reservations against certain activities in certain service sectors. Canada applies reservations to relatively few service sectors, and in those instances typically leaves the sector unbound, or specifically excludes managers within a particular sector. Sweden stands out as the one country with no reservations for contractual service suppliers, except for restrictions in the higher education sector.⁷²

When it comes to independent professionals, the most recurring reservation is to leave the sector unbound. Again, Sweden stands out by a complete absence of reservations, with the sole exception of higher education services.⁷³ This is a sector which, it may be noted, is left unbound for both independent professionals and contractual service suppliers by all other EU Member States as well as Canada, apart from Luxembourg, which makes a specific commitment for university professors. Sweden's decision not to include reservations is not an indication of liberalization through CETA, however. Rather it reflects the existing system which offers work permits in all occupations, which has been described as 'the most open labour migration system among OECD countries'.⁷⁴

In other words, while the chapter prevents numerical restrictions and economic needs tests for key personnel, contractual service suppliers and independent professionals, the actual commitments frequently include such measures. The signatories are able to deviate from the general rules as long as

⁷⁰ Art. 10.8(2) CETA.

⁷¹ Annex 10-E to CETA.

⁷² Sweden's reservation for contractual services suppliers and independent professionals reads as follows: 'None, except for publicly funded and privately funded educational services suppliers with some form of State support, where: Unbound'. Annex 10-E to CETA.

⁷³ See *ibid.*

⁷⁴ OECD, *Recruiting Immigrant Workers: Sweden 2011*, 11 (Paris: OECD Publishing 2011).

they list these derogations among their reservations.⁷⁵ Based on the categories covered by the agreement and the schedules of the signatories, it would therefore seem that with a few exceptions, such as expanding the intra-corporate transfer category to graduate trainees, CETA does not substantially expand the opportunities for the movement of natural persons. Commitments of the parties are for the most part safely scheduled within the realm of existing labour migration schemes, sometimes erring on the side of caution even in terms of existing legislation.

It is, however, possible that CETA will nonetheless facilitate the movement of natural persons in a significant way. This possibility is contained within Chapter 11 – Mutual Recognition of Professional Qualifications. The chapter sets up a framework for relevant authorities in the EU and Canada to enter into Mutual Recognition Agreements on professional qualifications (MRAs). As stated in the introduction to the chapter, the purpose is to create a framework for the recognition of qualifications that would make it possible for ‘professionals on both sides of the Atlantic [to] practise in each other’s territory’.

Annex 11-A sets out non-binding guidelines with respect to the negotiation and conclusion of MRAs. A four-step process is outlined in order to compile relevant information on the requirements for the exercise of regulated professions; to identify substantial differences between these in the jurisdictions of the negotiating parties; to determine compensatory measures in the case that substantial differences do exist; and settle the conditions for recognition.

The MRA should also specify the mechanisms for implementation, ranging from the rules and procedures to monitor and enforce the provisions of the agreement to commitments to offer exams or tests with reasonable frequency.

The Parties are required to establish a Joint Committee on Mutual Recognition of Professional Qualifications (MRA Committee), composed by representatives of Canada and the EU.⁷⁶ The MRA Committee has the task of facilitating the exchange of information, as well as reviewing recommendations from the Parties for proposed MRAs and outlining the steps of the negotiation process. The Parties also commit to establishing contact points for the respective administration of the chapter.

⁷⁵ See e.g. Art. 10.8(3) CETA which states that limitations on the number of contractual service suppliers and independent professionals shall not be adopted or maintained, ‘Unless otherwise specified in Annex 10-E’.

⁷⁶ Arts 11.3 and 11.5 CETA.

The extent to which MRAs are actually concluded will, of course, depend on the political will of the signatories. However, they provide a potential mechanism to facilitate the movement of natural persons, and may therefore have a greater impact on the number of natural persons admitted than the categories included among the signatories' commitments.

CETA has attracted a great deal of criticism, primarily over the investor-state dispute settlement mechanism. Italy has stated that it may not ratify the agreement, because of issues relating to agriculture. As opposition to the agreement has not concerned migration, we do not intend to review it in greater detail.

3.2 THE CHINA–AUSTRALIA FREE TRADE AGREEMENT

The ChAFTA entered into force on 20 December 2015, and includes various provisions for temporary mobility:

- Chapter 10 of the treaty text stipulates the general terms, with Australia's commitments scheduled in Annex 10–A and China's commitments scheduled in Annex III
- Memorandum of Understanding on an Investor Facilitation Agreement (MoU on IFA)
- Memorandum of Understanding on a Work and Holiday Visa arrangement (MoU on Work and Holiday visas)
- Side Letter on Skills Assessment and Licensing

We will review these provisions step by step to examine what they mean in practice.

In Chapter 10 the general terms for the movement of natural persons are provided. The parties are prevented from imposing visa caps as well as labour market tests or economic needs testing, unless specified in the schedule of commitments.⁷⁷ However, just like the temporary movement chapter in CETA, paragraphs 2 and 4 from the GATS MNP Annex, as well as the footnote on visa requirements, have been included in the chapter with almost identical wording. That is to say that the chapter does not grant access to the labour market, and so on,⁷⁸ and the Parties retain the freedom to apply both measures to regulate the entry or temporary stay of natural persons,⁷⁹ and

⁷⁷ Art. 10.4(3) ChAFTA.

⁷⁸ Art. 10.1(2) ChAFTA; cf. para. 2 GATS MNP Annex. In addition to measures regarding citizenship, residence or employment on a permanent basis (listed in both ChAFTA and the GATS MNP Annex), Art. 10.1(2) also specifies that Ch. 10 of ChAFTA does not apply to measures regarding nationality.

⁷⁹ Art. 10.1(3) ChAFTA; cf. para. 4 GATS MNP Annex.

impose immigration formalities,⁸⁰ defined as ‘a visa, permit, pass or other document or electronic authority’ granting temporary entry for a natural person.⁸¹

The commitments scheduled by the parties both include previous Mode 4 commitments made through the GATS, as well as some additional categories. Table 2 contains a full comparison between GATS and ChAFTA commitments. Both signatories grant access to business visitors and intra-corporate transferees (managers, executives and specialists). The Australian commitments grant entry to contractual service suppliers, defined as natural persons with ‘trade, technical or professional skills and experience’, for four years, with the possibility of further stay. An annual quota of 1,800 visas is offered for contractual service suppliers in the professions of Chinese chefs, Wushu martial arts coaches, Mandarin language tutors and Traditional Chinese Medicine practitioners.

China grants temporary entry up to one year for contractual service suppliers in ten service sectors. Both parties commit to permitting the entry of installers and maintainers, with Australia granting them entry for a maximum of three months, and China permitting stays for up to 180 days.

While the Australian commitments for the category of contractual service suppliers appear rather far-reaching, in practice they are designed in such a way to be inserted into the existing channels for labour immigration. Applicants belonging to both this and the other categories of workers must apply for a work permit and meet the eligibility criteria for the relevant visa categories, at the time ChAFTA was negotiated, specifically the Temporary Work (skilled) visa (subclass 457), known as the 457 visa. One of the criteria for visa 457 eligibility is that the applicant needs to have an offer of employment in one of the designated occupations. While Australia’s schedule of commitments does not submit any sectoral or occupational limitation for contractual service suppliers, existing provisions in the Australian regulation of labour immigration effectively impose such restrictions. These measures are compatible with ChAFTA owing to the provisions in Article 10.1 discussed above.

The Chinese commitments for contractual service suppliers are more narrow, and restricted to desired sectors. Just like in the Australian implementation, national regulations apply, and these are currently undergoing significant reform. A first major step was the introduction in 2013 of the Exit-Entry Administrations Law,⁸² which among other things included harsher penalties for overstays. The

⁸⁰ Fn. 1 to Art. 10.1(3); cf. fn. to para. 4 GATS MNP Annex, where the term ‘visa’ is used, rather than ‘immigration formality’.

⁸¹ Art. 10.2(b) ChAFTA.

⁸² English translation of China’s Exit-Entry Administration Law, *Translation: Exit-Entry Administration Law*, <http://lawandborder.com/english-translation-of-chinas-new-exit-entry-administration-law/>. (accessed 29 Dec. 2018).

Table 2 GATS and ChAFTA Temporary Entry Commitments of Australia and China

Categories	Australia			China		
	GATS commitments	ChAFTA commitments	GATS commitments	ChAFTA commitments	GATS commitments	ChAFTA commitments
	Max duration	Notes	Max duration	Notes	Max duration	Notes
BV			90 days		180 days	
CSS			4 years	General pro-visions + quota for listed professions	1 year	Listed sectors
ICT	4 years	E, M	4 years	E/senior M, Sp, M	3 years	M, E, Sp**
IE	2 years	E, Senior M	4 years			
I/S/Mr			3 months	I, S	180 days	I, Mr
M/E/Sp					3 years	**
Sp	4 years					
SSP	6 months*	Service sellers as BV	1 year	Service sellers as BV	90 days	
S&D				For stays longer than 12 months		For stays longer than 12 months

Horizontal commitments. In its ChAFTA schedule of specific commitments, China also commits to admitting doctors for 6 months-1 year after obtaining Chinese license. MoU on Work and Holiday visas not included in table. Blank box indicates lack of commitment in a given category. Duration includes both the length of an initial permit and possible extensions when the duration of extensions are specified.

*Revised commitment. In the original commitment the duration was six months with possible extension to a total of twelve months.

**Revised commitment. In the original commitment, the duration was five years

Abbreviations

BV	Business visitors	CSS	Contractual service suppliers	E	Executives
ICT	Intra-corporate transferee	IE	Independent executives	IP	Independent professionals
I/S/ Mr	Installers services/maintainers	Inv	Investors	M	Managers
OP	Other personnel	P	Professionals	Sp	Specialists
SSP	Service Salespersons	S&D	Spouses & Dependents		

State Council is charged with determining the exact visa categories,⁸³ administrative measures⁸⁴ and specifying and adjusting more detailed eligibility criteria for issuing work permits, in accordance with ‘the needs for economic and social development, as well as the supply and demand of human resources’.⁸⁵

However, the system has lacked uniformity and coherency, and instead seen a great deal of variation between different regions within China, resulting in considerable uncertainty regarding the rules also among migrants themselves.⁸⁶ This may be remedied by the on-going reforms. In 2017, China introduced a points-based system, which divides applicants into an A, B and C tier, favouring applicants with high skills, Chinese language proficiency, and so on.⁸⁷ In 2018, China announced the introduction of an immigration bureau which will likely increase the centralization and streamlining of

⁸³ Exit-Entry Administration Law, Art. 16.

⁸⁴ *Ibid.*, Art. 41.

⁸⁵ *Ibid.*, Art. 42.

⁸⁶ P. Leonard & A. Lehmann, *International Migrants in China: Civility, Contradiction and Confusion*, in *Destination China: Immigration to China in the Post-Reform Era* (A. Lehmann & P. Leonard eds, New York: Palgrave Macmillan 2018).

⁸⁷ See e.g. PwC, *China: Recap of New Immigration Scheme and Its Impact on Sponsoring Companies* (19 Oct. 2017) <https://www.pwc.com/gx/en/services/people-organisation/publications/assets/pwc-china-recap-of-new-immigration-scheme-and-its-impact.pdf>. (accessed 29 Dec. 2018).

the issuing of work permits.⁸⁸ It is clear, however, that the entering into force of ChAFTA coincides with a period in which the Chinese labour immigration is becoming more, not less, restrictive, and to a greater extent is favouring high-skilled migration.

Of equal importance to the temporary entry chapter and its Annexes are the commitments made by Australia through the MoUs and the side letter, and it is to these that we now turn. The MoU on IFA stipulates the terms for when an Investment Facilitation Arrangement can be reached between the Australian Department of Immigration and Border Protection and a project company. The company must have a proposed infrastructure development project within one of a number of specified sectors, with an expected capital expenditure of AUD 150 million. When such agreements are reached, the terms of permits for temporary entry are negotiated in four areas: the occupations covered; English language proficiency requirements; qualifications and experience requirements; and the calculation of the terms and conditions of the Temporary Skilled Migration Income Threshold (TSMIT). When these terms and conditions have been agreed, the project company enters into a labour agreement with the Department of Immigration and Border Protection and applications for work permits can be submitted in accordance with the agreed terms. The IFA model builds on the existing Enterprise Migration Agreement, that requires a capital expenditure of two billion Australian dollars (AUD) and a workforce of at least 1,500 persons.

In the MoU on Work and Holiday visas, Australia commits to annually granting 5,000 work and holiday visas to Chinese nationals. The visa grants entry for twelve months and permits for work ‘incidental’ to the holiday, defined as the principal purpose of the stay. The terms and eligibility criteria are stipulated in the MoU.

Finally, on 17 June 2015 the main agreement and the MoUs were supplemented by a Side Letter on Skills Assessment and Licensing, designed to ‘constitute an integral part of the Agreement’.⁸⁹ In the Side Letter, China and Australia ‘undertake to streamline the relevant skills assessment processes for temporary skilled labour visas’, and to reduce the number of occupations for which Chinese applicants are required to undertake a mandatory skills assessment in order to gain a temporary work visa (specifically the 457 visa). Ten occupations

⁸⁸ South China Morning Post, *New Immigration Bureau Set Up to Handle Growing Number of Foreigners in China* (13 Mar. 2018), <https://www.scmp.com/news/china/policies-politics/article/2137058/new-immigration-bureau-set-handle-growing-number>. (accessed 29 Dec. 2018).

⁸⁹ Letter from the Hon Andrew Robb AO MP Minister for Trade and Investment to Mr Gao Hucheng Minister of Commerce (17 June 2015), and letter from Mr Gao Hucheng Minister of Commerce to the Hon Andrew Robb AO MP Minister for Trade and Investment on 17 June 2015, <https://dfat.gov.au/trade/agreements/in-force/chafta/official-documents/Documents/chafta-side-letter-on-skills-assessment-and-licensing.pdf>. (accessed 29 Dec. 2018).

are listed in the Side Letter, such as automotive electricians, electrician (general), motor mechanic (general), and so on. The letter also commits to reviewing remaining occupations with a view to reducing the number submitted to mandatory skills assessment.

The removal of the mandatory skills assessment does not entail the elimination of all requirements on skills and qualifications. It means that China is removed from the list of countries from where work permit applicants are obliged to carry out a specific practical test in an overseas location during which it is assessed whether they have the skills levels required in Australia, according to the standard set by Trades Recognition Australia.⁹⁰ Instead, Chinese qualifications within the list of occupations included in the Side Letter are considered sufficiently reliable to indicate an adequate skills level to carry out work in Australia.

Several of these provisions in both the main treaty text and the MoUs have attracted a considerable amount of concern and controversy in Australia. The Australian Council of Trade Unions (ACTU) appeared widely in the media criticizing the agreement, and in their formal submission to the Senate particularly raised the issue of labour market testing, demanding guarantees that it be introduced.⁹¹ The Construction, Forestry, Maritime, Mining and Energy Union (CFMEU) was even more outspoken in its campaign against the agreement, stating that ‘ChAFTA is the worst trade agreement that an Australian government has ever signed and attempted to impose on the Australian public’.⁹² CFMEU particularly highlighted the mobility provisions, including the question of skills assessments. Another issue highlighted in a trade union commissioned report by Joanna Howe was insufficient provisions for workers’ terms and conditions in the MoU on IFA.⁹³ The Labour Party expressed similar criticisms and eventually presented proposals for amendments for the enacting legislation, to introduce labour market testing, additional criteria for the 457 visa, a higher TSMIT, and other measures.⁹⁴

⁹⁰ Reg 2.26B(2) (1994) of Migration Regulations 1994.

⁹¹ ACTU, *ACTU Submission: Senate Inquiry into the China-Australia Free Trade Agreement* (Melbourne 28 Aug. 2015).

⁹² CFMEU, *Submission to the Joint Standing Committee on Treaties. Treaty Tabled 17 June 2015: The Free Trade Agreement Between the Government of Australia and the Government of the People’s Republic of China [ChAFTA]* 4 (Aug. 2015).

⁹³ J. Howe, *The Impact of the China Australia Free Trade Agreement on Australian Job Opportunities, Wages and Conditions* (Adelaide: University of Adelaide 2015).

⁹⁴ Customs Amendment (China–Australia Free Trade Agreement Implementation) Bill 2015, Exposure Draft (2015). https://d3n8a8pro7vhm.cloudfront.net/australianlaborparty/pages/3108/attachments/original/1444696524/Exposure_Draft_ChAFTA_Amendments.pdf?1444696524; Explanatory Note, Customs Amendment (China–Australia Free Trade Agreement Implementation) Bill 2015 – Amendments (2015) https://d3n8a8pro7vhm.cloudfront.net/australianlaborparty/pages/3108/attachments/original/1444696522/Exposure_Draft_ChAFTA_Amendments_Explanatory_Note.pdf?1444696522. (Both sources accessed 29 Dec. 2018).

The government argued that the ChAFTA provisions did not entail any substantial changes to the Australian visa system, as evidenced by the absence of changes to immigration law in the proposed enacting legislation, but in the end struck a deal with Labour⁹⁵ in order to get the bill through Parliament.⁹⁶ A number of changes were implemented in accordance with the deal, e.g. to guarantee transparency regarding the details of work agreements as part of IFAs. In the case of the IFA, the most important change was an amendment to the 1994 Migration Regulations. It was clarified that work agreements could only be entered into when the project company has ‘made recent and genuine efforts to recruit, employ or engage Australian citizens or Australian permanent residents’,⁹⁷ in other words a form of labour market test. The government also agreed to initiate a review of the TSMIT.

However, in 2017 and 2018 the government launched a series of far more drastic changes to the system. The former 457 visa, which according to then Prime Minister Turnbull had ‘lost its credibility’, was abolished.⁹⁸ It was replaced by the Temporary Skill Shortage visa (subclass 482), which would be ‘manifestly, rigorously, resolutely conducted in the national interest to put Australians and Australian jobs first’.⁹⁹ Much like the 457 visa, eligible candidates need to be sponsored by an employer, fill an occupation in the designated occupation shortage list, and meet a number of requirements, such as English skills, that are somewhat stricter than in the 457 visa. Labour market tests are required, to a greater extent than previously. There are a number of subcategories: the short-term stream for occupations listed in the Short-term Skilled Occupation List; the medium-term stream for occupations listed in the Medium and Long-term Strategic Skills List or Regional Occupation List; the labour agreement stream for candidates sponsored by employers who have entered a labour agreement with the Department.

⁹⁵ Minister for Trade and Investment The Hon Andrew Robb AO MP and Minister for Immigration and Border Protection The Hon Peter Dutton MP *Government and Opposition Reach Agreement on Support for China-Australia Free Trade Deal*, media release of 21 Oct. 2015, <https://neca.asn.au/sites/default/files/media/national/News%20and%20Views/211015%20-%20Joint%20Media%20Release%20-%20ChAFTA.pdf>. (accessed 29 Dec. 2018).

⁹⁶ Letter from The Hon Andrew Robb AO MP, Minister for Trade and Investment to The Hon Senator Penny Wong (20 Oct. 2015) <https://neca.asn.au/sites/default/files//media/national/News%20and%20Views/ChAFTA%20letter%20to%20Senator%20Wong.pdf>. (accessed 29 Dec. 2018).

⁹⁷ S. 2.76A(1) of the Migration Regulations.

⁹⁸ The Hon. M. Turnbull MP, Prime Minister, and the Hon. P. Dutton MP, Minister for Immigration and Border Protection, press conference at 18 Apr. 2017, transcript, <https://www.malcolmturnbull.com.au/media/press-conference-with-the-minister-for-immigration-and-border-protection-th>. (accessed 29 Dec. 2018).

⁹⁹ *Ibid.*

We should not hasten to conclude that ChAFTA alone caused these reforms and the new political discourse of the Turnbull government. Only two days after the press conference on the 457 visa reform, Prime Minister Turnbull announced reforms to tighten the rules on Australian citizenship,¹⁰⁰ a policy area not at all affected by ChAFTA. No doubt, the change in policy was due to a number of reasons. Not least, Australia has a ‘historical antipathy’ toward temporary labour migration, and its temporary work visa regime has undergone several ‘cycles of expansion and contraction’.¹⁰¹ Nonetheless, we argue that the controversy surrounding ChAFTA played its part in the political dynamic through which the 457 visa ‘lost its credibility’, and that the twists surrounding ratification of ChAFTA in the Australian parliament themselves demonstrate the political backlash caused by the provisions on mobility.

Our analysis is that although there were some legitimate policy concerns at stake, such as lack of clarity regarding the terms and commitments that would apply, the intensity of the debate regarding the temporary entry commitments did not stand in proportion to their actual impact on the Australian immigration system. While the commitments are more far-reaching than CETA and TPP, we argue first of all that their insertion into ordinary work permit application procedures, in accordance with Article 10.1 that allows the signatories to require visas, in practice means that an entirely new channel of labour mobility was not opened up. The commitment regarding contractual services suppliers fit within the existing visa categories at the time and did not introduce new possibilities for entry.

Other provisions, such as the MoU on IFA and the Side Letter on skills assessment, could have a greater impact on the number of natural persons entering Australia. However, in second place we would argue that also these changes constituted the expansion or adaptation of already existing measures in the Australian migration system, although the desirability of these measures can of course be debated. We note that it is likely in the area of recognition of skills and the streamlining of such processes, rather than in the introduction of new categories of workers, that ChAFTA may have the greatest impact on facilitating labour mobility into Australia.

If we are correct in arguing that ChAFTA, despite the considerable criticism levelled against it, did not transform the Australian labour immigration system, one

¹⁰⁰ The Hon. M. Turnbull MP, Prime Minister, and the Hon. P. Dutton MP, Minister for Immigration and Border Protection, *Strengthening the Integrity of Australian Citizenship*, Joint media release of 20 Apr. 2017, <https://www.malcolmtturnbull.com.au/media/strengthening-the-integrity-of-australian-citizenship>. (accessed 29 Dec. 2018).

¹⁰¹ M. Crock, S. Howe & R. McCallum, *Conflicted Priorities? Enforcing fairness for Temporary Migrant Workers in Australia* in *Migrants at Work: Immigration and Vulnerability in Labour Law* 424 (C. Costello & M. Freedland eds, Oxford: Oxford University Press 2014).

significant question arises. If countries do not venture further than their existing legislation, is anything achieved? Or do the FTAs, like the GATS, constitute a 'harvester of autonomous liberalization'?

The reforms to the Australian work permit system suggest that even FTA temporary movement commitments that fit into the existing labour immigration models may have an impact over time. As discussed above, Australia introduced a new set of temporary visas, which ChAFTA applicants must obtain in order to perform work in Australia. There are some interesting differences in the terms and conditions that apply between regular visas and those covered by an FTA. Within the short-term stream, the standard visa duration is two years, while citizens of China may be granted a visa up to four years. Four-year visas are also offered to certain more specific categories, in accordance with other applicable trade agreement commitments. For example, intra-corporate transferees in executive or senior manager occupations who are nationals of a WTO Member country or territory may apply for four-year visas.

The politically sensitive issue of labour market testing is also subject to differentiation according to international trade obligations. As discussed, this was the key concern of trade unions. The extent to which labour markets tests have been required has varied significantly over time, but at the time ChAFTA was agreed they were mandatory for some, though not all, occupations. It is interesting, therefore, to consider the report by Joanna Howe which took a similarly critical line regarding the absence of references to labour market tests, and called for the introduction of these in the implementing legislation. While concluding that 'ChAFTA appears to greatly constrain the ability of the Australian Government to apply labour market testing with respect to Chinese workers',¹⁰² Howe deemed it compliant with the agreement to introduce labour market tests as a general work permit requirement, as long as such provisions were not specifically targeting Chinese workers.

However, the government adopted a rather different interpretation, and posited that 'Both sides have made a commitment not to apply labour market testing to the categories where they have made specific commitments'.¹⁰³ As no provisions on labour market testing were included in Annex 10-A, the treaty text commitment through which the Parties shall not require such tests applies.¹⁰⁴ The Migration Act allows for exemptions for labour market testing in accordance with

¹⁰² Howe, *supra* n. 93, at 6.

¹⁰³ Explanatory Memorandum, Customs Amendment (China-Australia Free Trade Agreement Implementation) Bill 2015, para. 160. Australia's GATS schedule, in contrast, makes a number of specifications regarding when the labour market testing requirement applies or doesn't apply. GATS/SC/6 *Australia – Schedule of Specific Commitments*.

¹⁰⁴ Art. 10.4(3)(b) ChAFTA.

international trade obligations.¹⁰⁵ These exemptions are listed annually in a legislative instrument under the Migration Act.¹⁰⁶

3.3 COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TPP

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TP11, CTPP or TPP¹⁰⁷) was signed on 8 March 2018 by eleven Pacific-rim countries. It entered into force for six countries having ratified by 30 December 2018, and for other signatories sixty days after ratification. The agreement is a revived version of the TPP negotiated with the same eleven countries as well as the United States, but from which the United States formally withdrew on 30 January 2017.¹⁰⁸

Chapter 10 – Cross-Border Trade in Services provides the definition of services as the supply of a service:

- (1) from the territory of a Party into the territory of another Party
- (2) in the territory of a Party to a person of another Party; or
- (3) by a national of a Party in the territory of another Party

This definition ‘does not include the supply of a service in the territory of a Party by a covered investment’.¹⁰⁹ Without using the exact wording of the GATS, the definition bears a resemblance to Modes 1, 2 and 4.

The Agreement includes a separate chapter on Temporary Entry for Business Persons (Chapter 12). The chapter defines a business person as a natural person ‘who is engaged in trade in goods, the supply of services or the conduct of investment activities’.¹¹⁰ Just like in CETA and ChAFTA, paragraphs 2, 4 and the footnote of the GATS Annex on Movement of Natural Persons are incorporated into the Chapter.¹¹¹

The parties undertake to improve and speed up application procedures and to ensure that fees charged for processing applications are reasonable in that they do not unduly impair or delay trade or investments.¹¹² Further, the

¹⁰⁵ s. 140GBA(1)(c) and s. 140GBA(2) of the Migration Act 1958.

¹⁰⁶ The legislative instrument in force at the time of writing is Migration (LIN 18/183: Determination of International Trade Obligations Relating to Labour Market Testing) Instrument 2018.

¹⁰⁷ The renegotiated agreement is often abbreviated as TP11 or CPTPP. Since we are dealing with provisions in the original treaty text that have remained intact, we will be using the abbreviation TPP.

¹⁰⁸ Letter from Acting United States Trade Representative María L. Pagán to the TPP Depository (30 Jan. 2017, Washington D.C), https://ustr.gov/sites/default/files/files/Press/R_releases/1-30-17%20USTR%20Letter%20to%20TPP%20Depository.pdf. (accessed 29 Dec. 2018).

¹⁰⁹ Art. 10.1 TPP.

¹¹⁰ Art. 12.1 TPP.

¹¹¹ In Arts 12.2(2), 12.2(3) and 12.2(4), respectively, TPP.

¹¹² Art. 12.3 TPP.

parties will improve transparency regarding, for example, requirements for temporary entry and the typical timeframe within which an application is processed.¹¹³

The chapter provides no further details or definitions, but rather leaves the specifics to the commitments scheduled by the Parties. All eleven Parties have made such commitments, specified in the respective Annex. They specify which categories of workers are covered, and in some cases elaborate lists of sectors or specific occupations included therein. The categories of workers most frequently covered are business visitors, installers and servicers, intra-corporate transferees, contractual service suppliers, services sales persons, investors, independent professionals, as well as spouses of some of these categories.

However, while recurring 'labels' for categories of workers are used in the schedules of commitments, there is no uniformity of definitions or conditions and limitations of entry, but rather a great deal of disparity. Overall, Singapore offers the most restrictive schedule, committing only to temporary entry for up to thirty days for business visitors and investors. Japan, by contrast, offers temporary entry for five years in a range of categories without the condition of reciprocity (see below), with possible permit extensions. Even the more far-reaching provisions of Japan, however, fall within the existing channels for labour immigration in Japanese law. Both countries make explicit reference to the relevant national instruments in their schedules. In other words, definitions and commitments vary according to existing national provisions of the signatory countries. Categories and definitions are not streamlined. As shown in Table 3, the commitments are in most cases more far-reaching in TPP than in the GATS. The most notable exception is Singapore.

Another significant pattern is that a majority of commitments made are conditioned on the principle of reciprocity. The condition of reciprocity is in some cases defined rather narrowly, as a like-for-like. In other cases, it is introduced more broadly, e.g. when commitments by another Party have been made within one of several categories of workers.

These temporary entry clauses have not escaped political controversy, especially in the US before their withdrawal from the agreement. Before President Obama was granted a negotiating mandate (Trade Promotion Authority, TPA) in June 2015 covering all FTAs concluded within six years, a heated debate took place. Immigration emerged as one of several contested issues at a late stage in the process. It was for example claimed by Jeff Sessions, then US Senator for Alabama, that the TPA would enable President Obama to use the concluded trade deals as a

¹¹³ Art. 12.6 TPP.

Table 3 GATS and TPP Temporary Entry Commitments of the TPP Signatories

Cate- gories	Australia			Brunei Darussalam			Canada			Chile								
	GATS Max duration	Notes	TPP Max duration	GATS Max duration	Notes	TPP Max duration	GATS Max duration	Notes	TPP Max duration	GATS Max duration	Notes	TPP Max duration						
BV		BVs 3 mos.; SSP 12 mos.				12 mos. Incl. SSP	90 days		6 mos. incl I/S/Mr			90 days incl I/S/Mr						
CSS		incl IP & Sp										1 Yr. P + T; post-sec. degree						
ICT	4 yrs.	E, M	2 yrs.	5 yrs.	M, E, Sp		3 yrs.	E, M, Sp	3 yrs.	E/M; Sp; management trainee		1 Yr. E; M; Sp; management trainee						
IE	2 yrs.	E, M	2 yrs.									1 Yr. incl T						
IP																		
I/S/Mr			3 mos.			12 mos.												
Inv						12 mos.			1 Yr.									
M/E/Sp																		
OP																		
P					Highly specialised + core energy sector services 2 yrs.	12 mos.	90 days	Service contracts in listed professions	1 Yr.	Incl. T; country-specific commitments in listed occupation/sectors								
Sp	4 yrs.	SSPs																
SSP	6 mos. *	as BVS																
S&D					ICT; P					ICT; Inv; P/T		ICT; Inv; IPs + T; CSS						
T										See P								
	Japan						Malaysia			Mexico			New Zealand					
	GATS			TPP			GATS			TPP			GATS			TPP		
Cate- gories	Max duration	Notes	Max duration	Notes	Max duration	Notes	Max duration	Notes	Max duration	Notes	Max duration	Notes	Max duration	Notes	Max duration	Notes		
BV	90 days	Short-term BV	90 days		90 days	Incl Inv, SSP, I/S/Mr	90 days		180 days							3 mos.		
CSS			5 yrs	technological /adv. skills; unil. sector			12 mos.	Sp/Exper t; P; listed sectors		4 yrs.	TP in listed sectors; incl I/S/Mr							
ICT	5 yrs.	Executive, managerial and specialist activities	5 yrs.	Executive, managerial and specialist activities	5 yrs.	M; Sp/experts	M 10 yrs.; Sp/Exper t 5 yrs.		2 yrs.	E, M, Sp	4 yrs.	E, M, Sp	2 yrs.	E, M, Sp	4 yrs.	E/M 3 yrs.; Sp pers. 3 yrs.; Sp/senior pers. 12 mos.; I/S 3 mos.	3 yrs.	E; M; Sp

Abbreviations

BV	Business visitors	CSS	Contractual service suppliers	E	Executives
ICT	Intra-corporate transferee	IE	Independent executives	IP	Independent professionals
I/S/Mr	Installers, servicers, and/or maintainers/repair	Inv	Investors	M	Managers/Senior managers
OP	Other personnel	P	Professionals	Sp	Specialists/Experts
SSP	Service Salespersons/Service Sellers	S&D	Spouses & Dependents	T	Technicians
TP	Technical-Professionals				

way to ‘facilitate immigration increases above current law’.¹¹⁴ Despite these claims, the finally approved TPA did not grant any authority on matters relating to either immigration or temporary entry, and the US stood as the one signatory to the original TPP that did not make commitments under the chapter.

Some criticism regarding temporary entry has emerged in the signatory countries of the final agreement as well, particularly in Australia. The debate has centred on the issue of labour market testing. Unlike CETA and ChAFTA, there are no provisions in the TPP chapter to prevent the signatories from applying economic needs tests or numerical quotas, but there is a requirement for each Party to ‘specify the conditions and limitations for entry and temporary stay’.¹¹⁵ Labour market tests constitute one of many possible conditions and limitations that could be included.

When reviewing the signatories’ schedules, there are strikingly few references to labour market tests. Mexico explicitly commits to not applying labour market tests. Brunei Darussalam reserves the right to impose an economic needs test, and New Zealand includes it as a condition for the specific category of independent professional. Peru applies a condition of reciprocity in order not to apply an economic needs test, whereas Canada only extends possibilities for temporary

¹¹⁴ J. Sessions, *Critical Alert: Top Five Concerns with Trade Promotion Authority*, media release (4 May 2015).

¹¹⁵ Art. 12.4(1) TPP.

entry to signatories that commit to not imposing such tests. Most signatories, however, make no reference to economic needs tests at all.

This is the case also for the Australian schedule of commitments. In its commitments for intra-corporate transferees, independent executives and contractual service suppliers, the column on conditions and limitation includes the following:

Temporary entry of business persons is subject to employer sponsorship. Full details of employer sponsorship requirements, including the list of eligible occupations for sponsorship, are available on the website of the Australian government department responsible for immigration matters (as at entry into force, the address of that website was www.border.gov.au). Sponsorship requirements, including eligible occupations, may change from time to time.

This begs the question as to whether or not the introduction of labour market testing could be included in the list of sponsorship requirements, explicitly presented as subject to change. The interpretation advanced by both the Australian government and its critics is that there is no such room. For this reason, the ACTU continues to direct sharp criticism towards the government for having 'signed up to carve out Australia's domestic labour market testing rules, removing basic protections and allowing it to employ an unlimited number of temporary workers'.¹¹⁶ Their primary concern is the category of contractual service suppliers, owing to its expansive definition, and that the commitments made by other signatories are more modest.¹¹⁷

This criticism has thus far not had the same consequences as the objections raised against ChAFTA. Against the background of the political repercussions of and the political costs associated with the temporary entry provisions of ChAFTA, it is nonetheless interesting that the Australian government did not renegotiate or limit their temporary entry commitments in TPP, as part of the renegotiation of the agreement after the US withdrawal.

Finally, it should be noted that there are some provisions for improved recognition of skills within TPP. These can be found in an annex to the chapter on cross-border trade in services, Annex 10-A Professional Services. The Annex provides a framework for facilitating licensing or registration procedures, as well as recognizing professional qualifications to make it possible for engineers and lawyers to practise their occupations in the territory of another party. The provisions do not strictly commit the parties to recognizing the qualifications of any another party, but rather stipulate that Parties will 'consult with', 'encourage its relevant

¹¹⁶ ACTU, *Tens of Thousands of Job Losses Under the TPP Threat*, media release at 26 Apr. 2018.

¹¹⁷ ACTU Senate Foreign Affairs Defence and Trade References Committee *Trans Pacific Partnership (TPP) Inquiry: ACTU Submission* (Melbourne, 28 Oct. 2016)., <https://www.actu.org.au/actu-media/media-releases/2018/tens-of-thousands-of-job-losses-under-the-tpp-threat>. (accessed 29 Dec. 2018).

bodies' and 'consider' the relevant measures.¹¹⁸ As in the case of CETA, it is the political will of the signatories that will determine the actual effect of these provisions.

4 DISCUSSION

This article has reviewed the mobility provisions contained in three recently concluded FTAs. These FTAs, including the chapters on mobility, have not been constructed on the modal approach of the GATS as they are not limited to the trade in services. Nonetheless the mobility provisions in all three agreements draw on core parts of the GATS MNP Annex.

Against the backdrop of the limited success of the GATS in liberalizing Mode 4, we attempted to explore a number of specific questions. The first of these is whether the signatories have made more extensive commitments in the applicable FTA than in the GATS. The second question is whether such provisions have escaped some of the controversy often attached to labour migration policy.

Our review in section 3 and Tables 1, 2 and 3 shows that most of the signatory countries have indeed been willing to schedule more far-reaching commitments through these FTAs than through the GATS. However, the categories included in the schedules of commitments have been typical GATS categories, such as intra-corporate transferees and contractual service suppliers. Furthermore, commitments have predominantly been scheduled to favour high-skilled mobility. Where commitments are made for workers other than the most highly skilled university-educated, certain limitations typically apply, either in the form of a quota (as for some of the occupations included in Australia's ChAFTA commitments on contractual service suppliers) or more frequently in the limitation to specific sectors (as in Peru's TPP commitments on technicians). We have therefore not seen the kind of extensive labour mobility commitments for medium- or low-skilled labour mobility that some of the reviewed literature has called for.

Moreover, when compared to existing national regimes rather than the GATS, it is not clear that these commitments expand labour mobility channels in practice. With a few exceptions, countries do not agree to more far-reaching provisions than those that already exist in domestic law. Commitments tend either to be limited in number and scope, or to be reined in by the catch-all provision that preserves the right for signatories to impose measures to regulate the entry or temporary stay of natural persons, including through visa requirements. Rather than opening up new labour mobility channels, commitments are effectively incorporated into existing visa regimes and subject to its limitations.

¹¹⁸ Paras 1–4, Annex 10-A to TPP.

This does not mean that FTAs have no impact on labour mobility. Based on our case studies we can see two major mechanisms through which FTAs play a role. First, while the FTAs examined do not for the most part open up labour mobility channels for categories of workers that are not covered by existing legislation or GATS commitments, they serve to *facilitate* labour mobility in a number of ways. In part, they do so by shaping the terms and conditions that apply in the issuing of the relevant permits. In both TPP and ChAFTA the key issue has been labour market tests, from which signatories have been exempt. In part, the agreements and associated MoUs serve to simplify or streamline the recognition of skills, in accordance with GATS Article VII which allows countries to enter into agreements on recognition. Both of these components answer to some of the obstacles to mobility identified in the literature, and may increase temporary entry or at least simplify existing processes.

Second, while a temporary entry commitment may not at the time of negotiation constitute liberalization beyond existing mobility regimes, they prevent changes at a later stage and lock the signatory countries into particular arrangements. This is most clearly illustrated by the case of Australia that has reformed its work permits since signing ChAFTA and TPP. In order to honour its FTA commitments, it has had to maintain more favourable conditions, such as visa duration and exemption from labour market tests, for Chinese nationals compared to the general visa requirements. As several countries covered by the review in this article opt for more restrictive labour migration programmes, temporary entry commitments in FTAs may very well end up playing a more decisive role in determining which channels of mobility remain open.

If policy-makers therefore conclude that FTAs serve as a convenient way to circumvent the political difficulties of labour migration, the ChAFTA case study in particular suggests they are mistaken. Despite making commitments that, when reviewed individually, for the most part fit into the existing national migration regime, political turbulence ensued. Without necessarily agreeing with all of the criticism, we do not find it particularly surprising that such reactions emerge when issues that usually belong to the sphere of domestic policy are inserted into the more opaque processes of the ever more comprehensive FTAs. Given the inflexibility of commitments made through FTAs compared to domestic legislation, they may in fact amplify concerns and controversy.

Why, then, might it be that certain parts of the literature have placed their hopes in FTAs as the appropriate political instrument to regulate and expand international labour mobility? We would argue that they make the mistake of viewing labour as just another factor of production.

We would insist that there are a number of rather obvious reasons why the movement of persons is something very different from the movement of capital or

goods. One that is particularly important for us to highlight, and that is alarmingly absent from both the literature as well as many FTAs, is that migrating workers are the bearers of rights. While labour migration should be embraced as a tool for creating important opportunities for workers, the governance of that migration should be carefully constructed to avoid compromising the rights of those workers.

Given the repeated calls for temporary labour migration programmes in order to resolve the political difficulties of migration, it is of critical importance to note that these programmes can pose particular challenges for ensuring those rights. For example, temporary migrant workers have been highlighted as one of the groups of migrants specifically at risk of exploitation by the UN Special Rapporteur on the rights of migrants.¹¹⁹ FTAs and bilateral agreements are not immune to these risks.¹²⁰ Challenges to decent work and to fundamental principles and rights at work associated with temporary work programmes are among the key concerns raised by trade unions.¹²¹ Temporary labour migration has a legitimate role to play in labour migration policy, but filling permanent labour needs with temporary migrants without any available routes to permanent residence has deeply problematic implications from a labour perspective. These issues are typically not considered in depth by the literature proposing these programmes.

The case studies in this article leave us sceptical of the prospects of success of FTAs as a tool for significantly expanding labour migration, especially for low-skilled labour. If, however, previous political resistance diminishes, it is not enough to consider the interests of sending and receiving states. The perspective and rights of workers must also play a key role, not only in the normative framework of the ILO and the UN but also in the treaties and institutions that govern the actual admission of migrants.

We would highlight the need for these agreements to be designed to promote long-term migration patterns, rather than to heed the calls for uncompromisingly temporary labour mobility as a politically motivated response to the controversial nature of migration. Agreements should allow workers to move from temporary to permanent status, or at the very least not preclude such a transition. In accordance with this, they must also include the right to work for different employers. The basis of these agreements should be the principle of equal treatment, and place of work standards should be applied, rather than country of origin. Finally, they

¹¹⁹ United Nations General Assembly, *Labour Exploitation of Migrants*. Report of the Special Rapporteur on the human rights of migrants, François Crépeau, A/HRC/26/35 (2014), para. 49.

¹²⁰ United Nations General Assembly, *Report of the Special Rapporteur on the Human Rights of Migrants on the Impact of Bilateral and Multilateral Trade Agreements on the Human Rights of Migrants*, A/HRC/32/40 (2016).

¹²¹ See e.g. the contribution of the workers' representative in International Labour Conference, 106th Session, *Reports of the Committee for Labour Migration: Summary of proceedings* (International Labour Organization: Geneva 2017).

should incorporate full respect of fundamental and labour rights standards as enshrined in the conventions of the ILO, including the freedom of association and collective bargaining, as well as the instruments on migrant workers of the ILO and the UN.

5 CONCLUSION

This article examined mobility provisions in three recently concluded FTAs: CETA, ChAFTA and TPP. It emerges that the signatories have agreed to more far-reaching commitments in these FTAs than in their GATS schedules. However, with a few exceptions, they do not typically go further than existing national legislation. In addition, the case studies show that labour mobility provisions in FTAs have not been free from political controversy.

These FTAs may still come to have some impact on labour mobility. First, they provide frameworks for the recognition of skills, which may facilitate the movement of natural persons. Second, in a context where many countries are restricting their domestic systems for labour migration, the FTAs may play a role in preserving certain already existing channels for labour mobility that would otherwise be closed.

However, on the basis of these case studies we conclude that contrary to the hopes of many scholars and analysts, FTAs do not appear to be successful as a tool either for expanding labour mobility or for circumventing the political difficulties arising from migration.