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## Labor Migration in a Globalized World: The Human Journey's Challenges for International Law and Policy

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**LABOR MIGRATION IN A GLOBALIZED WORLD**  
**THE HUMAN JOURNEY'S CHALLENGES FOR**  
**INTERNATIONAL LAW AND POLICY**

*Julien Chaisse*<sup>\*</sup>  
*Lloyd Meng*<sup>\*\*</sup>

ABSTRACT

*This Article covers the most recent developments in the field of international economic migration, including the latest WTO Ministerial Conference of December 2015 and the conclusion of the Trans-Pacific Partnership (TPP) in November 2015. The existing standards pertaining to international economic migration are discussed with reference to international organizations such as the International Organization for Migration and the International Labour Organization, as well as trends in global migration governance generally. The development of international economic migration over past years is examined by critical analysis of frameworks found in Preferential Trade Agreements between a number of countries, most notably with the United States, Canada, and Chile. In particular, market access and the standard of treatment afforded to temporary migrants is critically analyzed in light of trends and patterns that have developed over time. Recent European developments in the area of focused bilateral migration agreements are also discussed in the context of international economic migration. Finally, this Article will conclude by analyzing the effect of the TPP, the practices it imposed under the TPP, and the similarities and differences between those practices and the recent practices that have developed through the PTAs.*

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## INTRODUCTION: LIVING IN AN AGE OF MIGRATIONS

International migrations are widely perceived in developed countries as a new “problem,” which is unprecedented, uncontrollable, and often undesirable.<sup>1</sup> These facts provide the foundation for this Article. Indeed, the United Nations (U.N.) estimated the number of international migrants and refugees in the world in the early 1990s to be about 120–130 million, up from seventy-five million in the early 1960s.<sup>2</sup> This number could now be about 150 million, double that of the early 1960s. The world’s population, however, also doubled from three billion in 1960 to six billion in 2000. Thus, the proportion of international migrants and refugees has remained in the range of 2.5% of the world’s population. Furthermore, the movements of this magnitude, in absolute and relative terms, are not new. Between the mid-nineteenth century and the 1930s, emigration from Europe to America and that of Asian workers to the plantations and large yards in America, Africa, and, Asia had already affected one hundred million people. This was in a world in 1900 with a population that was a fourth of what it is today.<sup>3</sup>

The real novelty lies in the explosion in the number of refugees and in the development of South–South flows, i.e., migration from one developing country to another. The number of migrants, according to the Office of the

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<sup>1</sup> See Nathaniel Parish Flannery, *Immigration Debate: What’s More Important, Border Security or Protecting Immigrant Workers?*, FORBES (Sept. 9, 2013, 8:45 AM), <http://www.forbes.com/sites/nathanielparishflannery/2013/09/09/immigration-debate-whats-more-important-border-security-or-protecting-immigrant-workers/>; Sandeep Gopalan, *Fixing Europe’s Immigration Problem*, WALL STREET J. (Jan. 13, 2010, 4:00 PM), <http://online.wsj.com/news/articles/SB1000142405274870436200457500077079822768>; Khalid Koser, *Why Europe’s Immigration Nightmare is Only Beginning*, CNN (Oct. 30, 2013, 10:34 AM), <http://www.cnn.com/2013/10/30/opinion/Europe-immigration-debate-koser/>; see also NERMIN ABADAN-UNAT, *TURKS IN EUROPE: FROM GUEST WORKER TO TRANSNATIONAL CITIZEN* 210–12 (Caterine Campion, trans., 2011) (discussing the case of Turkish immigration in Europe). The latest U.N. high-level summit on migration also highlights the significance of the migration debate. See generally *Summit for Refugees and Migrants—19 September 2016*, UN: ADDRESSING LARGE MOVEMENTS OF REFUGEES AND MIGRANTS, <https://refugeesmigrants.un.org/summit> (last visited Nov. 14, 2016). Prompted by the record numbers of refugees and migrants moving across borders, the General Assembly hosted, for the first time ever, a High-Level summit on addressing large movement of refugees and migrants on September 19, 2016 in New York. *Id.* The summit was held immediately prior to the general debate of the 70th session of the General Assembly. *Id.*

<sup>2</sup> Hania Zlotnik, *Trends of International Migration since 1965: What Existing Data Reveal*, 37 INT’L MIGRATION 21, 22 (1999).

<sup>3</sup> *Id.* Similarly, the end of the Second World War in the mid-1940s, the movement of Africans in the war, the pursuit of European emigration from Southern Europe and labor migration in Western Europe all have affected approximately sixty million people. See *id.*

U.N. High Commissioner for Refugees (UNHCR),<sup>4</sup> has increased from about 1.5 million (early 1960s) to twelve million (late 1990s), of whom nearly five million are in Asia and 3.5 million are in Africa.<sup>5</sup> The available data suggests that the majority of new migrants and refugees are now moving towards other countries—whether neighboring ones or in the wider region—and not to the North, as is generally believed. Various factors explain this trend, such as conflict and the global economic crisis, as well as the needs of the new workforce in emerging countries. This fact is often overlooked: most of these movements are now South–South movements (least developed countries to middle-income countries), whereas in the 1960’s, eighty percent of the movements were North–North and South–North.

What is not new, but should still raise questions, is that economic migrations (concerning “migrant workers”) remain, in the current period of globalization, very low in terms of relative and absolute volume. In fact, international trade in goods and services has increased considerably over recent years.<sup>6</sup> Equally important, foreign direct investments have also significantly increased during the last decade.<sup>7</sup> Foreign direct investments include international movements of capital made to create, develop, or maintain an overseas subsidiary or exercise control (or significant influence) on the management of a foreign company.<sup>8</sup> In other words, goods, services, and capital are moving without much restriction while individuals remain stuck at borders or are subject to cumbersome rules.<sup>9</sup>

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<sup>4</sup> Also known as the U.N. Refugee Agency, UNHCR is a U.N. agency mandated to protect and support refugees at the request of a government or the U.N. itself and assists in their voluntary repatriation, local integration, or resettlement to a third country. See Christiane Ahlborn, *The Normative Erosion of International Refugee Protection Through UN Security Council Practice*, 24 LEIDEN J. INT’L L. 1009 (2011).

<sup>5</sup> OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR REFUGEES, *THE STATE OF THE WORLD’S REFUGEES: FIFTY YEARS OF HUMANITARIAN ACTION* (Mark Cutts et al. eds., 2000).

<sup>6</sup> See John Beghin et al., *Welfare Costs and Benefits of Non-tariff Measures in Trade: A Conceptual Framework and Application*, 11 WORLD TRADE REV. 356 (2012); see also Philippe Gugler & Julien Chaisse, *Editors’ Introduction: Patterns and Dynamics of Asia’s Growing Share of FDI*, in EXPANSION OF TRADE AND FOREIGN DIRECT INVESTMENT IN ASIA—STRATEGIC AND POLICY CHANGES 1, 10 (Julien Chaisse & Philippe Gugler eds., 2011).

<sup>7</sup> Bertram Boie, Julien Chaisse & Philippe Gugler, *The Regulatory Framework of International Investment: The Challenge of Fragmentation in a Changing World Economy*, in THE PROSPECTS OF INTERNATIONAL TRADE REGULATION—FROM FRAGMENTATION TO COHERENCE 417, 422 (Thomas Cottier & Panagiotis Delimatsis eds., 2010).

<sup>8</sup> *Id.* at 418–20.

<sup>9</sup> Zlotnik, *supra* note 2.

This is not only a matter of trivial interrogation but also a true economic problem.<sup>10</sup> The aging and shrinking of the labor force in Japan or Europe in the next fifty years could have a significant impact on international migration. The latest projections by the United Nations indicate that by 2050 the proportion of people over sixty years will be nearly 35–40% in most parts of Europe, and persons eighty and over will be about ten percent of the population.<sup>11</sup> Does this unprecedented situation result in a reliance on foreign immigration? Do we observe instead a marked increase in the age of retirement, deteriorating pension levels, or other scenarios? A recent U.N. study, “Replacement Migration” shows, for instance, in the case of France, that continued immigration of around 100,000 people per year would be required to maintain a constant force at the current level, but a tripled immigration rate would be necessary to limit the degradation of population ratio of fifteen to sixty years to population aged sixty-five and over, which is now 3.5:1.<sup>12</sup>

This Article addresses the transnational regulatory framework that constitutes an impediment to the labor mobility of legal migrant workers. If international economic migrants are not greater in number it is because either migration cannot be reduced to its economic dimension or the restrictive laws and policies that hinder the mobility of migrants have been somewhat effective. However, the political border controls have high costs from a financial perspective. Detecting the hundreds of millions of people crossing borders each year, even those crossing for reasons that have nothing to do with migration (a few thousand “fake tourists” and “potential illegal immigrants”), is a difficult task.<sup>13</sup> Controls hinder the mobility of workers and discourage many potential migrants, but the “out of control” situation is also generating unnecessary frustrations and humiliations. The dilemma is that if freedom of movement is too restricted, it negatively affects exchanges of all kinds between

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<sup>10</sup> The buying and selling of people is a profitable business because, while globalization has made it easier to move goods and money around the world, people who want to move where jobs are face ever more stringent restrictions on legal migration. Karen E. Bravo, *Free Labor! A Labor Liberalization Solution to Modern Trafficking in Humans*, 18 *TRANSNAT'L L. & CONTEMP. PROBS.* 545 (2009).

<sup>11</sup> U.N. DEP'T OF ECON. & SOC. AFF., *WORLD POPULATION AGEING: 1950–2050*, U.N. Doc. ST/ESA/SER.A/207, U.N. Sales No. E.02.XIII.3 (2002).

<sup>12</sup> U.N. DEP'T OF ECON. & SOC. AFF., *REPLACEMENT MIGRATION: IS IT A SOLUTION TO DECLINING AND AGEING POPULATIONS?*, U.N. Doc. ST/ESA/SER.A/206, U.N. Sales No. E.01.XIII.19 (2001); Virginie Guiraudon, *Immigration Policy in France*, BROOKINGS (July 1, 2001), <https://www.brookings.edu/articles/immigration-policy-in-france/>.

<sup>13</sup> Tomer Broude, *The WTO/GATS Mode 4, International Labour Migration Regimes and Global Justice*, in *COSMOPOLITANISM IN CONTEXT: PERSPECTIVES FROM INTERNATIONAL LAW AND POLITICAL THEORY* (Roland Pierck & Wouter Werner eds., 2010).

countries and limits the training opportunities for young northern elites in developing countries. These two harmful consequences affect the North as well as the South.

In order to answer this problem we provide a mapping of the applicable international economic treaties. In Part I we look at the emerging international regime of migration. We then turn in Part II to the role of the World Trade Organization (WTO). Subsequently, we analyze the regulatory innovations promoted by Preferential Trade Agreements (PTAs) in Part III. Finally, we analyze the role of the bilateral migration arrangements in Part IV before we deal with the outstanding issues in the concluding remarks.

## I. THE EMERGING INTERNATIONAL REGIME OF MIGRATIONS

A migrant is a person who leaves his or her country to live, and generally seek work, elsewhere, either temporarily or permanently.<sup>14</sup> Migrants leave for a variety of reasons. For some, their departure is voluntary.<sup>15</sup> Others feel they have no choice because in their home country they suffer economic difficulties or other such problems.<sup>16</sup> Migrants can quickly become vulnerable and suffer as a result of numerous and serious violations of their human rights. When staying in or passing illegally over the territory of a state, migrants are more exposed to potential difficulties. They may well undergo labor exploitation—either forced or slave labor or general discrimination at work—because of their status, making it difficult to access basic rights such as education, health, or housing. These migrants are often more easily abused with regard to their physical and mental integrity because the police authorities of the states or networks against human trafficking or smuggling are unable to successfully intervene.<sup>17</sup>

There are a number of conventions at international and regional levels regarding those affected by migration. Unfortunately, these instruments are dispersed among various branches of law (human rights law, humanitarian law, migrant workers law, and refugee law to name a few), and there is no

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<sup>14</sup> *Glossary: Migrant/Migration, International Migration*, U.N. EDUC. SCI. & CULTURAL ORG., <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/migrant/> (last visited Nov. 14, 2016).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Background Paper, Global Forum on Migration and Dev., Temporary Labor Migration as a Contribution to Development: Sharing Responsibility 5 (July 9–11, 2007), [http://www.gfmd.org/documents/brussels/gfmd\\_brussels07\\_rt1-2\\_en.pdf](http://www.gfmd.org/documents/brussels/gfmd_brussels07_rt1-2_en.pdf).

centralized source where one can easily obtain comprehensive information. In addition, there has hitherto been little attempt to understand the relationships between these instruments. This dispersion of standards and principles partly explains the general impression that there are gaps in the provisions protecting migrants and migration regulations at the international level.

### A. *Complexity of Global Migration Governance: An Overview*

The global governance of migration is a very complex patchwork of rules, which have been developed by different forums or organizations in reaction to various problems. We first define the concept of global governance of migration before looking at the provisions protecting migrants.

#### 1. *Global Migration Governance*

Governance can be defined as:

all processes and institutions, both formal and informal, that guide and restrain the collective activities of a group. . . . Governance need not necessarily be conducted exclusively by governments and the international organizations to which they delegate authority. Private firms, associations of firms, nongovernmental organizations (NGOs), and associations of NGOs all engage in it, often in association with governmental bodies, to create governance, *sometimes without governmental authority*.<sup>18</sup>

Therefore, if governance is no longer a responsibility of an individual state, and responsibilities are divided, “governance only succeeds as a mechanism of control if a majority of those subjected to it accedes,” and “responsibilities and boundaries become more fragmented and less distinct, and the nation-state as traditionally constituted is no longer understood to be the primary or central agent in addressing social and economic issues.”<sup>19</sup>

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<sup>18</sup> Kevin Kolben, *Transnational Labor Regulation and the Limits of Governance*, 12 THEORETICAL INQUIRIES L. 403, 411–12 (2011) (citing ROBERT O. KEOHANE & JOSEPH S. NYE JR, GOVERNANCE IN A GLOBALIZING WORLD (2000)).

<sup>19</sup> *Id.* at 412. For cutting-edge theory regarding the emergence of transnational governance across a spectrum of social and economic areas (including commerce, environmental governance, soft law, and treaty law), see generally Bryan Druzin, *Opening the Machinery of Private Order: Public International Law as a Form of Private Ordering*, 58 ST. LOUIS U. L.J. 423 (2014) (arguing that treaties that require positive actions as opposed to merely the absence of action encourage compliance with governance structures) and Bryan Druzin, *Why Does Soft Law Have Any Power Anyway?*, ASIAN J. OF INT'L L. 1 (2016) (arguing that network effects help explain why soft law is widely adopted and followed and anticipates its future growth). For a discussion of this issue in a commercial context, see Bryan Druzin, *Anarchy, Order, and Trade: A Structuralist*

The Global Migration Governance/migration management has two main duties: (i) liberalization, i.e., making migration easier;<sup>20</sup> and (ii) regulation, i.e., not making migration more difficult but rather safeguarding the interests of both parties to the migration.<sup>21</sup> The source country has readmission obligations.<sup>22</sup> The Global Migration Governance has three main domains: (i) home-country (the regulation of new international production and supply chains); (ii) international and inter-governmental (the lack of scope and regulatory capacity); and (iii) developing countries (the social and economic realms that have expanded with economies).<sup>23</sup>

The International Organization for Migration (IOM), the only entity of the Global Migration Group not associated with the United Nations,<sup>24</sup> is an international organization that interacts with governments, Inter-Governmental Organizations, and other international and domestic non-governmental

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*Account of Why a Global Commercial Legal Order Is Emerging*, 47 VAND. J. TRANSNAT'L L. 1049, 1079–83 (2014) (arguing that the emergence of a transnational commercial legal order may be partially attributed to the unique structural nature of trade) and Bryan Druzin, *Law Without the State: The Theory of High Engagement and the Emergence of Spontaneous Legal Order Within Commercial Systems*, 41 GEO. J. INT'L L. 559, 585 (2010) (arguing that the unique manner of interaction implied by commerce plays a crucial role in the ability of commercial law to evolve transnationally). This issue area is of course of pressing concern with respect to international environmental governance. See, e.g., Bryan Druzin, *The Parched Earth of Cooperation: How to Solve the Tragedy of the Commons in International Environmental Governance*, 27 DUKE J. COMP. & INT'L L. (forthcoming 2016) (proposing to use signaling games to sustain governance structures and solve the tragedy of the commons in environmental governance).

<sup>20</sup> Marion Panizzon, *Temporary Movement of Workers and Human Rights Protection: Interfacing the "Mode 4" of GATS with Non-Trade Bilateral Migration Agreements*, 104 PROCEEDINGS OF THE ANNUAL MEETING (AM. SOC'Y OF INT'L L.) 131, 132 (2010) (stressing the bias towards highly skilled workers as opposed to low-skill workers) [hereinafter Panizzon, *Temporary Movement*].

<sup>21</sup> See *id.* at 133.

<sup>22</sup> *Id.* "In particular, the migrant-sending country must submit to readmission obligations for its citizens, and at times also for third-country nationals from surrounding countries and stateless persons." *Id.* at 136.

<sup>23</sup> Kolben, *supra* note 18, at 406 (citing Gary Gereffi & Frederick Mayer, *Globalization and the Demand for Governance*, in THE NEW OFFSHORING OF JOBS AND GLOBAL DEVELOPMENT 39, 48–49 (Gary Gereffi ed., 2005)).

<sup>24</sup> *Organizational Structure*, INT'L ORG. FOR MIGRATION, <http://www.iom.int/organizational-structure> (last visited Nov. 14, 2016). The IOM is comprised of three organs: the Council, the Executive Committee, and the Administration. *Id.* All member states of the IOM send representatives to the Council, where policies are decided by vote. *Constitution and Basic Texts of the Governing Bodies*, INT'L ORG. FOR MIGRATION, <http://www.iom.int/constitution-and-basic-texts-governing-bodies> (last visited Nov. 14, 2016). Observer states, which do not pay membership fees, attend Council meetings but are not allowed the right to vote that the member states have. *Rules of Procedure of the Council*, INT'L ORG. FOR MIGRATION, <http://www.iom.int/rules-procedure-council> (last visited Nov. 14, 2016). To increase efficiency, the IOM has regional offices, field locations, and sub-offices, which are responsible for determining and implementing strategies specific for each region, both where the outflow and inflow of migration take place. See *Organizational Structure*, *supra*. The growing importance of the IOM in the international community is evidenced by the growth in membership from sixty-seven states in 1998 to 151 states in 2013. *Id.*

organizations to facilitate the practical management of migration.<sup>25</sup> The IOM bridges the gap between governments and these organizations to address migration issues that have a substantial impact on economic development and growth. Specifically, the IOM assists with improvements to infrastructure and economic opportunities in countries of origin to support the outflow of natural persons along with their subsequent return.<sup>26</sup> Additionally, the IOM assists with the individual and practical aspects of migration for the migrant workers, such as recruitment, language training, and integration into the host country.<sup>27</sup>

## 2. *Protecting Migrant Rights*

The U.N. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (the Migrant Workers Convention)<sup>28</sup> is one of the major international treaties on human rights. This is the first international instrument to explicitly recognize the fundamental rights of all migrant workers and members of their families.<sup>29</sup> The Migrant Workers Convention seeks to unify the international legal standards for the protection of migrant workers and members of their families and protects the rights of all migrants, including those who are in an irregular situation.<sup>30</sup> It provides guarantees against discriminatory treatment and expands provisions for non-discrimination enshrined in other international human rights instruments.<sup>31</sup> It prohibits discrimination on grounds such as nationality or economic status.<sup>32</sup>

The rights of migrants are protected under several international treaties on human rights. International labor law, international refugee law, and any international humanitarian and criminal law also ensure the protection of the rights of migrant workers. The six major international human rights treaties are not restricted to migrant workers because they also apply to other groups of people. The International Convention on the Elimination of All Forms of

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<sup>25</sup> Kevin In-Chuen Koh, *International Organisation for Migration*, in HANDBOOK OF TRANSNATIONAL ECONOMIC GOVERNANCE REGIMES 191 (Christian Tietje & Allen Brouder eds., 2009).

<sup>26</sup> *Mission*, INT'L ORG. FOR MIGRATION, <http://www.iom.int/mission> (last visited Nov. 14, 2016).

<sup>27</sup> *Id.*

<sup>28</sup> *See generally* International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Dec. 18, 1990, 2220 U.N.T.S. 3 [hereinafter Migrant Workers Convention].

<sup>29</sup> *Human Rights Documents on Refugees and Migrants: An Overview, 2010*, MIGRATION CITIZENSHIP EDUCATION (Anne von Oswald & Andrea Schmelz, eds.) [http://www.migrationeducation.org/fileadmin/uploads/Human\\_Rights\\_Documents\\_on\\_Refugees\\_and\\_Migrants\\_21.pdf](http://www.migrationeducation.org/fileadmin/uploads/Human_Rights_Documents_on_Refugees_and_Migrants_21.pdf).

<sup>30</sup> Migrant Workers Convention, *supra* note 28, pmbl.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* art. 7.

Racial Discrimination (ICERD),<sup>33</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>34</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>35</sup> and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention)<sup>36</sup> reflect the general standards applicable to all human beings regardless of their status or situation. The U.N. Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women strive to protect children and women, respectively, including those who are migrants.<sup>37</sup> In addition, some instruments of the International Labour Organization (ILO) protect migrant labor rights. International labor law (including that which is structured around the eight core conventions, as defined by the Governing Body of the ILO) generally does not make a distinction between workers based on their nationality or their legal status. In addition, ILO Conventions No. 97 (1949) and No. 143 (1975) provide specific protection of the rights of migrant workers.<sup>38</sup>

Although the Migrant Workers Convention does not guarantee many new rights, it explicitly and precisely defines how existing standards for human rights apply to migrant workers and their families.<sup>39</sup> This is similar to the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women, which summarize the basic rights of these two specific groups. As with these two groups, migrant workers and their families as a whole are exposed to human rights violations simply because of their membership of that group. The Migrant Workers Convention reinforces that migrant rights apply to all human beings; these rights include the right to life,<sup>40</sup> the right to not be subjected to torture or to cruel, inhuman or degrading treatment,<sup>41</sup> freedom of opinion and expression,<sup>42</sup> and the right to

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<sup>33</sup> Migrant Workers Convention, *supra* note 28, pmble.

<sup>34</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>35</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>36</sup> Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 112.

<sup>37</sup> Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention on the Elimination of All Forms of Discrimination Against Women art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13.

<sup>38</sup> Convention Concerning Migration for Employment (Revised 1949), Jan. 22, 1952, 120 U.N.T.S. 71; Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, Dec. 9, 1978, 1120 U.N.T.S. 323. *See generally*, Mimi Zou, *The Legal Construction of Hyper-Dependence and Hyper-Precarity in Migrant Work Relations*, 31 INT'L J. COMP. LABOUR L. & INDUS. REL. 141 (2015).

<sup>39</sup> Migrant Workers Convention, *supra* note 28, pmbl.

<sup>40</sup> *Id.* art. 9.

<sup>41</sup> *Id.* art. 10.

the recognition of their legal personality.<sup>43</sup> It also reaffirms the right of migrants to obtain consular assistance if they are arrested or subject to detention.<sup>44</sup>

The Migrant Workers Convention differs in that it requires governments to take the necessary measures to ensure that migrant workers and their families are informed by the State of origin, destination, or transit of their rights.<sup>45</sup> It also defines a procedure for migrant workers and their families to file individual complaints when they believe that their rights have been violated.<sup>46</sup> In September 2007, Guatemala was the first State party to make a declaration under Article 77, allowing the U.N. Committee on Migrant Workers, which is composed of independent experts, to monitor the implementation of the Migrant Workers Convention by the State that received such complaints.<sup>47</sup> Moreover, the Migrant Workers Convention guarantees the right of a new migrant to be informed in a language they understand of the conditions of admission of the State concerned.<sup>48</sup> Finally, it is the duty of the countries of origin to provide information and appropriate assistance to migrant workers and members of their families before their departure, as well as other necessary services and appropriate consular services in the State of destination.<sup>49</sup> Countries of origin also “shall facilitate as appropriate the provision of adequate consular and other services that are necessary to meet the social, cultural and other needs of migrant workers and members of their families.”<sup>50</sup>

### *B. Exploring the Economic Dimension: Regulating Flows of Workers over National Borders*

The classic sources of International Migration Law are human rights law, migrant workers law, humanitarian law, refugee law, nationality law,<sup>51</sup> and law

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<sup>42</sup> *Id.* art. 13.

<sup>43</sup> *Id.* art. 24.

<sup>44</sup> *Id.* art. 16.

<sup>45</sup> *Id.* art. 33.

<sup>46</sup> *Id.* art. 77.

<sup>47</sup> Declaration on The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, Guatemala, Sept. 11, 2007, Doc. A/RES/45/158, <http://www.acnur.org/t3/fileadmin/Documentos/BDL/2011/7571.pdf?view=1>.

<sup>48</sup> Migrant Workers Convention, *supra* note 28, art. 33.

<sup>49</sup> *Id.* art. 65.

<sup>50</sup> *Id.*

<sup>51</sup> *See generally* RICHARD PLENDER, INTERNATIONAL MIGRATION LAW (2d ed. 1988).

of the sea.<sup>52</sup> While human rights concerns, such as amnesty and refugee migrations,<sup>53</sup> are relevant, we choose to focus on an economic dimension of migration that has been investigated less by scholars: that of the “migrant worker.”<sup>54</sup> The economic dimension of migration is extremely important for the growth of the global economy.<sup>55</sup> Indeed,

long-term economic development goals are being considered by most states in their approach to migration management as mobile human resources are now seen as critical resources for development—whether as a factor of production in receiving countries, or in countries of origin as a source of skills acquisition, investment and foreign exchange through remittances.<sup>56</sup>

There is hardly a walk of life untouched directly or indirectly by international trade regulation. As economic interdependence is growing, the welfare and livelihood of peoples are largely influenced by trade regulation around the globe, in the North, South, East and West. The classic fields of import and export regulation of goods and services still comprise the core of the subject. Yet trade regulation increasingly entails domestic regulations because countries define market access and conditions of competition in all sectors of the economy, ranging from agriculture to labor mobility.

The neoclassical analysis of the labor market requires that labor follow the same rules as other goods exchanged: it is subject to supply and demand, and it is the meeting of these two entities that fixes the price.<sup>57</sup> Labor supply comes from the labor force, and it is subject to a trade-off by the offeror (the worker)

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<sup>52</sup> See generally N. Mole, *General Principles of International Migration Law as it Affects Stowaways*, in *STOWAWAYS BY SEA* 33–40 (B.A.H. Parritt ed., 1992).

<sup>53</sup> Convention Relating to the Status of Refugees art. 1(A), July 28, 1951, 189 U.N.T.S. 152. The Convention defines a refugee as “any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” *Id.*

<sup>54</sup> Migrant Workers Convention, *supra* note 28, art. 2. “The term ‘migrant worker’ refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national.” *Id.*

<sup>55</sup> See Timothy J. Hatton, *Should We Have a WTO for International Migration?*, 22 *ECON. POL’Y* 339, 345 (2007).

<sup>56</sup> Background Paper, IOM/World Bank/WTO Trade and Migration Seminar 3, IOM/World Bank/WTO (Oct. 4–5, 2004), [http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/microsites/IDM/workshops/Trade\\_2004\\_04051004/seminar%20docs/background.pdf](http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/microsites/IDM/workshops/Trade_2004_04051004/seminar%20docs/background.pdf).

<sup>57</sup> See George R. Boyer & Robert S. Smith, *The Development of the Neoclassical Tradition in Labor Economics*, 54 *INDUS. & LAB. REL. REV.* 199, 202 (2001).

between the disutility of labor (deprivation of leisure) and usefulness (gain of a monetary wage).<sup>58</sup> The labor supply curve is an increasing function of the wage rate.<sup>59</sup> Nevertheless, labor is a specific factor of production,<sup>60</sup> characterized by the fact that it is done by men and women, and cannot therefore be analyzed mathematically like other commodities. Yet the vision behind the “neoclassical theory of labor market” still inspires many analyses.<sup>61</sup> This theory, postulating the existence of a homogeneous labor market, is in contradiction with the reality of management modes. Labor and the complexity of employment systems fit into a social context and political influences affect their operation.

## II. THE MULTILATERAL FRAMEWORK ON THE MOVEMENT OF NATURAL PERSONS

The WTO Agreement of 1994 (formally known as the “Agreement Establishing the World Trade Organization,” and also referred to as the “Marrakesh Agreement” or the “WTO Charter”)<sup>62</sup> establishes the framework of the multilateral trading system, serving as an umbrella agreement.<sup>63</sup> It contains institutional and procedural provisions and provides the organizational structure for the administration of the four annexes.<sup>64</sup> All these

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<sup>58</sup> See *id.* at 208.

<sup>59</sup> See generally *id.* at 202, 208–09. Labor demand originating from business is also the subject of an arbitration: for the entrepreneur hiring an additional employee, it is necessary that the marginal productivity of the employee (who brings additional production) has a value at least equal to the wages paid him. *Id.* at 206. Below this limit, he will not be hired because the demand curve for labor is an inverse function of the wage rate. *Id.*

<sup>60</sup> See EDWARD E. LEAMER, *THE CRAFT OF ECONOMICS: LESSONS FROM THE HECKSHER-OHLIN FRAMEWORK* 107–08 (2012).

<sup>61</sup> See, e.g., Sandra E. Black & Elizabeth Brainerd, *Importing Equality? The Impact of Globalization on Gender Discrimination*, 57 *INDUS. & LAB. REL. REV.* 540, 540 (2004); Boyer & Smith, *supra* note 57, at 207–10.

<sup>62</sup> Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

<sup>63</sup> Pieter Jan Kuijper, *Some Institutional Issues Presently Before the WTO*, in *THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC* 81 (Daniel L.M. Kennedy & James D. Southwick eds., 2002); see also James Cameron & Kevin R. Gray, *Principles of International Law in the WTO Dispute Settlement Body*, 50 *INT’L & COMP. L.Q.* 248, 248 (2001). There is no doubt that this WTO agreement, as well as all the annexed agreements, including the GATS, are binding and oblige the WTO members to transform their laws and regulations. See Julien Chaisse, *Deconstructing the Conformity Obligation—A Theory of Compliance as a Process*, 37 *FORDHAM INT’L L.J.* 57 (2015).

<sup>64</sup> Julien Chaisse & Debashis Chakraborty, *Implementing WTO Rules Through Negotiations and Sanctions: The Role of Trade Policy Review Mechanism and Dispute Settlement System*, 28 *U. PA. J. INT’L ECON. L.* 155 (2007). Annex 1, the most extensive annex, consists of GATT 1994 and its twelve side agreements (Annex 1A), GATS, its instruments and the Members’ schedules (Annex 1B), and the TRIPS

instruments together, consisting of about 30,000 pages of treaty text, constitute the “WTO agreements,” properly speaking. The General Agreement on Trade in Services (GATS) (Annex 1B)<sup>65</sup> establishes the multilateral framework for the long-term progressive liberalization of services.<sup>66</sup> The agreement borrows from the tradition of the General Agreement on Tariffs and Trade (GATT) 1947 but it features fundamental structural differences due to the fact that services are not suitable for regulation by border measures.<sup>67</sup> While Most Favored Nation (MFN) treatment applies similarly to that in the goods sector under the GATT 1994,<sup>68</sup> national treatment is required only to the extent that sectors are covered and commitments are specified in the schedules of the Members.

The structure of the GATS reveals a careful interplay between a set of generally applicable rules of systemic significance and flexibility for individual Members’ choices. The GATS is composed of a core agreement, annexes dealing with specific sector rules, the specific commitments (schedules) of the Members with regard to individual market access, and the lists of individual Members’ MFN exemptions.<sup>69</sup> This Article will examine the general principles and obligations of the GATS, and the mechanism with which it regulates the movement of natural persons.

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Agreement (Annex 1C). *See id.* Further annexes comprise the DSU (Annex 2), the Trade Policy Review Mechanism (Annex 3) and the plurilateral agreements (Annex 4). *Id.*

<sup>65</sup> *See* Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, General Agreement on Trade and Services, Apr. 15, 1994, 1869 U.N.T.S. 183 [hereinafter GATS].

<sup>66</sup> *See* Joy Kategekwa, Program Officer on Trade in Services, South Centre, Presentation at the OECD Development Centre Panel on Migration and Development (Sept. 25–26, 2006) (transcript available at [https://www.wto.org/English/forums\\_e/public\\_forum\\_e/potentials\\_for\\_unskilled\\_worker\\_liberalisation\\_in\\_gats.doc](https://www.wto.org/English/forums_e/public_forum_e/potentials_for_unskilled_worker_liberalisation_in_gats.doc)) (discussing requests of less developed countries within the WTO negotiation frameworks to broaden the scope of GATS Mode 4 provisions governing the provision of services through the presence of natural persons in line with those countries’ comparative advantage); *The General Agreement on Trade in Services (GATS): Objectives, Coverage, and Disciplines*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/serv\\_e/gatsqa\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm) (last visited Nov. 14, 2016).

<sup>67</sup> *See* Tony Warren & Christopher Findlay, *Measuring Impediments to Trade in Services*, in GATS IN 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 58–60 (Pierre Sauvé & Robert M. Stern eds., 1999); *see also* Sungjoon Cho, *Development by Moving People: Unearthing the Development Potential of a GATS Visa*, in DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM 457, 463–64 (Chantal Thomas & Joel P. Trachtman eds., 2009).

<sup>68</sup> *See infra* Part II.A.1.

<sup>69</sup> *See* GATS, *supra* note 65.

### A. *Regulating the Movement of Natural Persons as a Mode of Service Supply*

Broadly speaking, the GATS contains two sets of obligations that apply to Mode 4: general obligations and specific commitments.<sup>70</sup> There are a number of general obligations that apply to measures affecting trade in services irrespective of whether a member has undertaken specific commitments in a service sector or in a sub-sector.<sup>71</sup> The two most important general obligations are the principles of MFN treatment pursuant to Article II and transparency pursuant to Article III.<sup>72</sup> Article I of the GATS defines the scope and coverage of the agreement. It applies to “measures by Member which affect trade in services.”<sup>73</sup> It encompasses the non-governmental bodies that are exercising powers delegated to them by governments. In principle, all services are covered except those “supplied in the exercise of governmental authority.”<sup>74</sup>

Under Article I(2) of the GATS, services can be traded internationally in four different ways, and they are called the “four modes.”<sup>75</sup> Mode 4 refers to

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<sup>70</sup> UNCTAD Secretariat, *Increasing the Participation of Developing Countries Through Liberalization of Market Access in GATS Mode 4 for Movement of Natural Persons Supplying Services*, U.N. Doc. TD/B/COM.1/EM.22/2, at 3 (June 18, 2003); see also Mitsuo Matsushita, *The WTO Dispute Settlement System 1995-2003*, in *THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003* 455, 460–61 (Federico Ortino & Ernst-Ulrich Petersmann eds., 2004).

<sup>71</sup> Neela Mukherjee, *GATS and the Millennium Round of Multilateral Negotiations—Selected Issues from the Perspective of the Developing Countries*, 33 *J. WORLD TRADE* 87, 89–90 (1999).

<sup>72</sup> However, Article II(2) allows Members to list exemptions from the fundamental obligation to grant MFN status to like services and service suppliers (the “opt-out” approach). Specific commitments mirror the degree of liberalization that a Member deems optimal for its own market; market access and national treatment are only granted to the extent that a specific commitment has been undertaken by the Member in question (the “opt-in” or “positive list” approach). In addition to commitments with respect to market access and national treatment, Article XVIII provides for negotiation of additional commitments that shall likewise be inscribed in a Member’s schedule. In essence, Members are free to negotiate commitments in any sector and may do so to the degree they deem appropriate, but the commitments must of course be subject to successful negotiations with the other Members. GATS, *supra* note 65, art. II–III.

<sup>73</sup> J. Steven Jarreau, *Interpreting the General Agreement on Trade in Services and the WTO Instruments Relevant to the International Trade of Financial Services: The Lawyer’s Perspective*, 25 *N.C. J. INT’L L. & COMM. REG.* 1, 50 (1999).

<sup>74</sup> These being narrowly defined as services that are “supplied neither on a commercial basis, nor in competition with one or more service suppliers.” GATS, *supra* note 65, art. I(3)(b).

<sup>75</sup> Rupa Chanda, *Mobility of Less-Skilled Workers under Bilateral Agreements: Lessons for the GATS*, 43 *J. WORLD TRADE* 479, 480 (2009) [hereinafter Chanda, *Mobility of Less-Skilled Workers*]. The definition of services trade under the GATS is four-pronged, depending on the territorial presence of the supplier and the consumer at the time of the transaction. Pursuant to Article I(2), the GATS covers services supplied “(a) from the territory of one Member into the territory of any other Member [(Mode 1—Cross border trade)]; (b) in the territory of one Member to the service consumer of any other Member [(Mode 2—Consumption abroad)]; (c) by a service supplier of one Member, through commercial presence, in the territory of any other Member [(Mode 3—Commercial presence)]; [and] (d) by a service supplier of one Member, through the presence of

the presence of persons of a WTO member in the territory of another member to supply a service.<sup>76</sup> It does not apply to persons seeking to enter the labor market in the host member, nor to the “measures regarding citizenship, residence, or employment on a permanent basis.”<sup>77</sup>

The natural persons who are subject to Mode 4 are service suppliers of a member (self-employed), or are employed by a service supplier of a member and sent abroad to supply a service.<sup>78</sup> They can be employed by the same company that has a commercial presence in another member’s territory (intra-corporate transferees), or alternatively by a consumer in the territory of another member. The contract is made between the home and host companies (juridical contractual service supplier).

The Annex on Movement of Natural Persons Supplying Services (MONP) stipulates that the GATS does not apply to measures affecting natural persons seeking access to the employment market of a member (thus excluding labor per se).<sup>79</sup> The MONP clearly stipulates that “[t]he sole fact of 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.”<sup>80</sup>

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natural persons of a Member in the territory of any other Member [(Mode 4—Presence of natural persons)]. GATS, *supra* note 65, art. I(2).

<sup>76</sup> GATS, *supra* note 65, art. I(2)(d). Under Article I(2)(d) of the GATS, Mode 4 defines a service as “the supply of a service . . . by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.” *Id.* See generally U.N. Dep’t of Econ. & Soc. Aff. Stat. Division, Background Note on GATS Mode 4 and its Information Needs (Paper submitted by the WTO and OECD), U.N. Doc. TSG/2/8 (2005), <http://unstats.un.org/unsd/tradeserv/TSGdocuments/tsg0502-8.pdf>. Mode 4 movements of service providers can be substitutes or complements to the other types of trade in services. For example, accountancy services can be provided on-line (Mode 1) rather than by sending an accountant abroad to audit financial statements (Mode 4), or the client could travel to the country where the service provider is located to receive services (Mode 2). GATS, *supra* note 65, art. I(2). Similarly, an IT service provider could visit a client abroad (Mode 4) or provide services to foreign clients via the internet (Mode 1). *Id.*

<sup>77</sup> GATS, *supra* note 65, Annex on Movement of Natural Persons Supplying Services Under the Agreement. See Mohammad Amin & Aaditya Mattoo, *Does Temporary Migration Have To Be Permanent?* (World Bank, Policy Research Working Paper No. 3582, Mar. 2005); Chanda, *Mobility of Less-Skilled Workers*, *supra* note 75, at 480; URI FRIEDMAN & DAVID ZAFAR AHMED, QUAKER U.N. OFF., ENSURING TEMPORARINESS: MECHANISMS TO INCENTIVISE RETURN MIGRATION IN THE CONTEXT OF GATS MODE 4 AND LEAST DEVELOPED COUNTRY INTERESTS 1 (June 2008).

<sup>78</sup> *Movement of Natural Persons*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/serv\\_e/mouvement\\_persons\\_e/mouvement\\_persons\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/mouvement_persons_e/mouvement_persons_e.htm) (last visited Nov. 14, 2016); *The General Agreement on Trade and Services (GATS): Objectives, Coverage and Disciplines*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/serv\\_e/gatsqa\\_e.htm#4](https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm#4) (last visited Nov. 14, 2016).

<sup>79</sup> GATS, *supra* note 65, Annex on Movement of Natural Persons Supplying Services Under the Agreement.

<sup>80</sup> *Id.*

### 1. *The Principle of Most Favored Nation Treatment*

Article II of the GATS sets out the principle of MFN treatment for trade in services.<sup>81</sup> Accordingly, WTO Member must “accord immediately and unconditionally to . . . [any other] Member treatment no less favorable than [the treatment that they accord] to like services and service suppliers of any other country.”<sup>82</sup> This obligation is similar to the MFN clause in the GATT 1994.<sup>83</sup> It applies to all services, independent of the specific commitments made.<sup>84</sup> The principle of MFN treatment under the GATS, however, contains one unique feature. Article II(2) of the GATS permits Member to maintain a measure inconsistent with the principle, with a proviso that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions (the “opt-out” approach).<sup>85</sup> It was hence possible for Member, at the time GATS entered into force, to claim MFN exemptions in individual schedules.<sup>86</sup> While Annex II clearly provides that, in principle, such exemptions may not exceed a period of ten years and should then be phased out, reality suggests that they are likely to stay and that they may be further extended.<sup>87</sup>

Article II of the GATS applies to all services alike.<sup>88</sup> There are two types of exemptions to the comprehensive application of MFN treatment. First, Article V sets forth the conditions for preferential trade in services, essentially

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<sup>81</sup> *See id.* art. II.

<sup>82</sup> *See id.*

<sup>83</sup> *See id.*

<sup>84</sup> General Agreement on Tariffs and Trade art. I, ¶ 1, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

<sup>85</sup> *See* Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989, 1003–04 (2001) (discussing the unsettled issues surrounding MFN exemptions).

<sup>86</sup> *See* GATS, *supra* note 65, Annex on Art. II Exemptions, ¶ 6.

<sup>87</sup> *Id.* In *EC—Bananas III*, the Appellate Body was called upon to elaborate, for the first time, on the nature and scope of the MFN clause in the GATS. It established that “treatment no less favourable” in Article II:1 of the GATS should be interpreted to include *de facto* as well as *de jure* discrimination. Appellate Body Report, *European Communities—Regime for the Importation, Sale, and Distribution of Bananas*, ¶ 234, WTO Doc. WT/DS27/AB/R (adopted Sept. 25, 1997).

<sup>88</sup> GATS, *supra* note 65, art. 2. When two or more services and service suppliers from different WTO Members are confronted, the concept of likeness equally becomes of relevance. Aaditya Mattoo, *MFN and the GATS*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW: PAST, PRESENT, AND FUTURE 51, 53 (Thomas Cottier et al. eds., 2000). MFN treatment depends on a comparison of their content, function, nature and qualities. *Id.* The wider the definition of “likeness” is, the greater the set of measures that will be inconsistent with Article II of the GATS. *Id.* Similar questions arise when establishing the likeness of service suppliers. *Id.* Contrary to the concept of like product, which was already at the core of many disputes under the GATT 1947, basic questions concerning adequate criteria for determining likeness of services and service suppliers have not been answered in defining the competitive relationship or substitutionability. *Id.*

paralleling Article XXIV of the GATT 1994.<sup>89</sup> Article V allows for preferential treatment concerning access to labor markets.<sup>90</sup> Second, Article II(2) permits Member to maintain a measure inconsistent with the principle of MFN treatment provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions (the “opt-out” approach).<sup>91</sup> It is important to note that these exemptions were designed as transitional measures that should have been phased out by 2005.<sup>92</sup> However, these transitional measures are likely to stay and they may be further extended.

## 2. *Market Access and the Principle of National Treatment*

Market access for foreign services and service suppliers is the central focus of the GATS. Unlike in the area of goods, market access is not brought about by reducing border measures, but by gradually granting access to competition on an equal footing with domestic suppliers. The principal means by which such access is achieved is national treatment—for example, treating foreigners with the same standard that locals are afforded—and the conditions attached to market access.<sup>93</sup> By doing so, the GATS fully reflects a model of progressive and individualized liberalization.<sup>94</sup> Article XVII of the GATS contains the principle of national treatment for trade in services.<sup>95</sup>

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<sup>89</sup> Sherry M. Stephenson, *GATS and Regional Integration*, in *GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION* 509 (Pierre Sauvé & Robert Stern eds., 2000).

<sup>90</sup> See GATS, *supra* note 65, art. V, ¶ 3.

<sup>91</sup> *Id.* art. II, ¶ 2.

<sup>92</sup> *Id.* Annex on Art. II Exemptions, ¶ 6.

<sup>93</sup> *Understanding the WTO: Principles of the Trading System*, WORLD TRADE ORG., [https://www.wto.org/English/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](https://www.wto.org/English/thewto_e/whatis_e/tif_e/fact2_e.htm) (last visited Nov. 14, 2016). See generally GATS, *supra* note 65, art. 17, ¶ 1. The second notion of equal treatment, and the mainstay of the world trading system under the WTO, is the principle of national treatment prohibiting discrimination between products or goods and services produced domestically and those imported from other member countries. *Principles of the Trading System*, WORLD TRADE ORG., *supra*. Together with the MFN obligations, it forms the fundamental principle of non-discrimination in WTO law. *Id.* It is one of the cornerstones of the system, and it is applicable throughout the WTO agreements. *Id.*

<sup>94</sup> See generally *The General Agreement on Trade in Services (GATS): Objectives, Coverage, and Disciplines*, WORLD TRADE ORG., *supra* note 66. The method of progressive liberalization was adopted due to the difficulties encountered during the negotiations and due to the originality of the GATS. *Id.* Under this method, no Member is obliged to open its markets to international competition, over and above the general legal commitments undertaken by it. *Id.* Hence, the degree of liberalization is determined within trade rounds under which each Member explicitly defines in its national schedule the sectors to be subjected to the GATS and the degree to which sectors are to be open to international competition. *Id.*

<sup>95</sup> Aaditya Mattoo, *National Treatment in the GATS: Corner-stone or Pandora's Box?*, 31 J. WORLD TRADE 107, 133–34 (1997).

Although the principle also lies as a cornerstone of the GATS, its mechanism and function differ from those under the GATT 1994. In the absence of tariff protection available for goods, market access in services is essentially defined by means of granting or denying national treatment to like services or its conditioning. It is apparent that the general application of the national treatment principle would amount, in one strike, to full-fledged market access in all services. Laws and regulations of Members, however, are far from granting broad access, and it is important to make use of the principle of national treatment in a process of progressive and gradual liberalization. The GATS, therefore, provides for an “opt-in” or a “positive list” approach.<sup>96</sup>

Article XVII of the GATS demands national treatment only with regard to those services and service suppliers that are inscribed in a member’s schedule.<sup>97</sup> If a member undertakes specific commitments in a sector or sub-sector, it shall accord to services and to service suppliers’ treatment no less favorable than that which it accords to its own like services and service suppliers. The basic commitment, however, can be further conditioned for different modes of supply, and Article XVI permits further qualifications and restrictions. Access to competition is granted only to the extent that a member has undertaken market access commitments for a specific sector or sub-sector of services using the four modes of supply set out in Article I(2) of the GATS. Articles XVI and XVII of the GATS adopt the “positive list” approach.<sup>98</sup>

Article XVI—titled Market Access—essentially focuses on a number of measures that Members must not adopt unless deliberately and explicitly included in their schedules.<sup>99</sup> These measures relate to quantitative limitations of service suppliers, limitations of the total value of imported service transactions, limitations on the total number of service operations, limitations on the total number of natural persons employed, measures requiring specific legal qualifications of service operators, and limitations on foreign capital or

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<sup>96</sup> Rudolf Adlung et al., *FOG in GATS Commitments—Boon or Bane?*, 12 WORLD TRADE REV. 1 (World Trade Org., Working Paper ERSD-2011-04, 2011) (“Pursuant to GATS Article XX:1, each WTO Member is required to submit a schedule specifying the sectors in which it undertakes such commitments and the respective levels of market access and national treatment. However, the Agreement is silent concerning the scope of commitments, i.e. the type and range of the services selected, and their content, i.e. the levels of access provided. This is widely referred to as the positive-list, or bottom-up, approach to undertaking commitments whereby no sector is subject to access obligations unless specifically included.”).

<sup>97</sup> GATS, *supra* note 65, art. XVII.

<sup>98</sup> Both provisions refer to national treatment, and their relationship is not entirely clear. *See* Petros C. Mavroidis, *Highway XVI Re-visited: The Road from Non-discrimination to Market Access in GATS*, 6 WORLD TRADE REV. 1 (2007).

<sup>99</sup> GATS, *supra* note 65, art. XVI, ¶ 2.

shareholding.<sup>100</sup> Article XVII—titled National Treatment—expounds this principle by listing obligations of national treatment of like services.<sup>101</sup>

Importantly, Members are at a certain liberty to control and set the degree of liberalization through their commitments, subject to reservations and conditions. In sectors not scheduled by a Member, no commitments to liberalize beyond the general obligations are undertaken. The Member thus continues to define its own policy of granting market access and national treatment.<sup>102</sup>

We will detail the way these provisions are implemented in the paragraphs below, addressing the liberalization of the temporary movement of highly skilled workers.

### *B. Liberalizing the Temporary Movement of Highly Skilled Workers*

Article XX of the GATS requires each Member to maintain a schedule of the specific commitments it undertakes.<sup>103</sup> As in the area of goods, such schedules are annexed to the agreement and form an integral part thereof.<sup>104</sup> Article XX provides in some detail the design of the schedules.

#### *1. Schedules of Commitments and Progressive Liberalization*

A schedule as a whole is divided into two Parts: Part I lists provisions that apply to foreign services and service suppliers of any service that has been scheduled (“horizontal commitments”); Part II sets out the specific

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.* art. XVII.

<sup>102</sup> Article I(3)(c) of the GATS excludes services “supplied in the exercise of governmental authority.” Eric Leroux, *What is a “Service Supplied in the Exercise of Governmental Authority” Under Article I:3(b) and (c) of the General Agreement on Trade in Services?*, 40 J. WORLD TRADE 345, 347–48 (2006).

<sup>103</sup> Commitments are part of WTO law and therefore binding. *Principles of the Trading System*, WORLD TRADE ORG., *supra* note 93. As the Panel made clear in the gambling case pursuant to Article XVI(4) of the WTO Agreement, “[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.” *Legal Issues Arising in WTO Dispute Settlement Proceedings, Dispute Settlement System Training Module*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_settlement\\_cbt\\_e/c10s8p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c10s8p1_e.htm) (last visited Nov. 14, 2016). Thus, independent of any expectation or any unintentional mistake, the U.S. obligations pursuant to Article XVI(4) are to ensure that its relevant laws are in conformity with its WTO obligations, including any commitments undertaken in its GATS Schedule. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DC285/R (adopted Apr. 20, 2005).

<sup>104</sup> See THE WTO SECRETARIAT, *GUIDE TO THE URUGUAY ROUND AGREEMENTS* 171 (1999) “[S]ervice commitments resemble those in a GATT schedule at least in one very important respect: they are bindings which set out the minimum, or worst permissible, treatment of the foreign service or its supplier.” *Id.*

commitments undertaken for each listed sector or sub-sector (“sector-specific commitments”). In this Part, a schedule delineates the sectors and sub-sectors for which a Member has chosen to make commitments, in accordance with the Services Sectorial Classification List.<sup>105</sup>

For each chosen sector or sub-sector, a schedule indicates the limitations and conditions of market access and national treatment, respectively, and the additional commitments, if any, that are undertaken. Limitations and conditions vis-à-vis market access and national treatment must be indicated for each of the four modes of supply set out in Article I(2) of the GATS.

Article XIX of the GATS sets forth the principle that trade in services will be progressively liberalized.<sup>106</sup> It provides for new rounds of negotiations beginning no later than five years from the date of entry into force of the WTO Agreement.<sup>107</sup> They shall be conducted periodically thereafter.<sup>108</sup> The goal is clearly set, namely, to achieve a higher level of liberalization. Since 2000, Members are therefore obliged to negotiate on further commitments with respect to market access and national treatment. Moreover, there is a common understanding that such negotiations need to address the improvement of the institutional issues of the GATS, among them domestic regulations (Article VI), safeguards (Article X), government procurement (Article XIII), and subsidies (Article XV).

## 2. *The Practice of Mode 4*

In practice, the Mode 4 Schedule must indicate any limitations on market access or national treatment that are to be maintained.<sup>109</sup> Where there are no limitations on market access or national treatment in a given sector, the entry

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<sup>105</sup> The GATS Services Sectorial Classification List, also known as the W120 list, was circulated by the GATT Secretariat in 1991. See WTO Secretariat, *Services Sectorial Classifications List*, WTO Doc. MTN.GNS/W/120 (July 10, 1991). It contains a list of relevant service “sectors and subsectors,” along with “corresponding CPC” numbers—from the UN Provisional Product Classification—for each subsector. *Id.*

<sup>106</sup> Gary Hufbauer & Sherry Stephenson, *Services Trade: Past Liberalization and Future Challenges*, 10 J. INT’L ECON. L. 605, 611 (2007) (“The agreement in [the GATS] Preamble references the aim of ‘progressive liberalization’ no fewer than twice in four paragraphs . . . there is no rule or understanding in the GATS as to how many sectors or modes of supply need to be included in a schedule of commitments.”).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> See Michael J. Chapman & Paul J. Tauber, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services under the General Agreement on Trade in Services*, 16 MICH. J. INT’L L. 941, 961–72 (1995) (analyzing the submitted legal services schedules of WTO Members and concluding that in the majority of cases, the commitments “merely preserved existing regulatory measures.”).

reads “None.”<sup>110</sup> All commitments in a schedule are bound unless otherwise specified. If a Member desires to be free to introduce or keep in place measures that are inconsistent with market access or national treatment in a given sector and mode of supply, “the Member has entered in the appropriate space the term ‘UNBOUND.’”<sup>111</sup>

The particularities of Mode 4 commitments practice are as follows. First, national treatment and market access limitations are used extensively. Second, market access (Art. XVI) is a conditional GATS obligation (limitations are allowed if scheduled in the commitment: authorization requirements, referring to immigration law, or economic necessity tests). Third, possible National Treatment differences include (i) limitations on geographical mobility and switching employer and/or social security and its portability and/or education grants; and (ii) those of a discriminatory nature (linguistic requirements, recognition of diplomas, professional qualifications, training requirements, subsidies and other fiscal measures, prohibitions on land/property ownership, nationality, and residency requirements).

For Mode 4 commitments, ninety-three percent of commitments are for high-skilled labor; twenty-three percent thereof are for business visitors; twenty-eight percent are for executives, managers or specialists; and forty-two percent are for employees transferring between branches of a corporation.<sup>112</sup> In conclusion,

the degree of Mode 4 access that has been bound is quite shallow. In most instances, members have scheduled an initial “unbound” (i.e., no binding of access conditions) and then qualified it by granting admission to selected categories of persons, with a marked bias towards persons linked to a commercial presence (e.g., intra-

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<sup>110</sup> RAJ BHALA, *INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE* 1591 (2d ed. 2001). Different from general obligations applying to all service sectors, specific commitments are binding on WTO Members only if those nations put specific service sectors in their Schedule and make them be bound. *Id.*

<sup>111</sup> See generally *Guide to Reading GATS Schedules of Specific Commitments and the List of Article II (MFN) Exceptions*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/serv\\_e/guide1\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm) (last visited Nov. 14, 2016). A Member may have preserved its right to impose more restrictive regulations in the future by noting in its schedule that a particular sector or mode of supply is “unbound.” *Id.*

<sup>112</sup> Antonia Carzaniga, *The GATS, Mode 4 and Pattern of Commitments*, in *MOVING PEOPLE TO DELIVER SERVICES* 21–26 (Aaditya Mattoo & Antonia Carzaniga eds., 2003). See generally Saskia Gent & Ron Skeldon, *GATS Mode 4: How Trade in Services Can Help Developing Countries*, 4 DEV. RES. CTR. ON MIGRATION, GLOBALISATION & POVERTY (2005), [http://www.migrationdrc.org/publications/briefing\\_papers/BP4.pdf](http://www.migrationdrc.org/publications/briefing_papers/BP4.pdf).

corporate transferees) and highly skilled persons (managers, executives, and specialists).

In addition to limiting access to certain categories of persons, other restrictions frequently inscribed in schedules include: defined duration of stay; quotas, including on the number or proportion of foreigners employed; “economic needs tests” (a test that conditions market access upon the fulfillment of certain economic criteria) or “labour market tests,” generally inscribed without any indication of the criteria of application; pre-employment conditions; residency; and training requirements.<sup>113</sup>

### III. THE REGULATORY INNOVATIONS PROMOTED BY MODERN PREFERENTIAL TRADE AGREEMENTS

Although NAFTA, which regulates business visitor visas, has already been in force for two decades, recent years have witnessed a significant increase in PTAs throughout the world.<sup>114</sup> More and more international transactions enjoy preferential privileges while others no longer benefit from MFN treatment enshrined in WTO law.<sup>115</sup> It must be stressed that, under this general tide of regionalization and preferential trade, specific stimulants are at work. Every

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<sup>113</sup> *Movement of Natural Persons*, WORLD TRADE ORG., *supra* note 78.

<sup>114</sup> Anirudh Shingal & Pierre Sauvé, *Reflections on the Preferential Liberalization of Services Trade 3* (Swiss Nat'l Ctr. of Competence in Research, Working Paper No. 2011/05, 2011); see A. James Vazquez-Azpiri & Daniel C. Home, *The Doorkeeper of Homeland Security: Proposals for the Visa Waiver Program*, 16 STAN. L. & POL'Y REV. 513, 529–30 (2005); Douglas Hauer, *Navigating the Complexities of Immigration Law*, in EMPLOYING INTERNATIONAL WORKERS: LEADING EMPLOYERS ON COMPLYING WITH REGULATIONS WHEN HIRING INTERNATIONAL EMPLOYEES 47, 50 (2013).

An additional overarching problem involved with bringing international workers into the United States involves inconsistent adjudications at US consulates of visa applications for people who wish to come to the United States for legitimate business reasons—*i.e.*, to meet with colleagues, engage in contract negotiations, and plan work that will be done abroad. Essentially, many US consulates and embassies do not uniformly adjudicate B-1 business visitor visa applications. Some consulates take an overly narrow and restrictive view of what the law means with respect to short-term, permissible business visitor activities.

*Id.*

<sup>115</sup> Julien Chaisse & Mitsuo Matsushita, *Maintaining the WTO's Supremacy in the International Trade Order: A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism*, 16 J. INT'L ECON. L. 9, 28–29 (2013). The trend to increase such bonds is unabated and can be explained by the need to create sufficiently large and competitive markets with a view to attracting foreign investment. *Id.* Moreover, the variety of agreements, both in terms of scope and level of integration, has increased—notably coinciding with protracted efforts to further strengthen the global multilateral trading system of the WTO. *Id.*

preferential agreement is unique, and this explains why some PTAs do include rules on migration whereas some other PTAs simply ignore the issue.<sup>116</sup>

There are two major exceptions to the principle of MFN treatment in WTO law: regional trade agreements pursuant to Article XXIV of the GATT 1994 and to Article V of the GATS (as well as labor markets integration agreements pursuant to Article V bis of the GATS) and special and differential treatment of developing countries pursuant to the Enabling Clause.<sup>117</sup>

The *raison d'être* of PTAs is to free up the trade in goods and flows of investment. However, many modern PTAs also include rules aimed at expediting the movement of business investors, service providers, and sometimes workers employed for wages in a PTA partner country.<sup>118</sup> Recently, there has been an increase in the number of PTAs, including provisions on trade in services.<sup>119</sup> PTAs between states have the potential to lower costs for both parties in services trade by removing or limiting the amount of constraint brought on by trade across borders, particularly where GATS Mode 4 suppliers are concerned.<sup>120</sup> More recently, there has been an increased trend in including provisions addressing the movement of natural persons between states, showing the diverse functions of PTAs in liberalizing trade of services between states.<sup>121</sup>

Our research focuses on PTAs negotiated by the United States, Canada, and Chile.<sup>122</sup> While other countries have similar or the same number of notified trade agreements as either the United States or Canada,<sup>123</sup> the scope of research was specifically limited to only the U.S. agreement with Singapore,<sup>124</sup> Canada's participation in NAFTA,<sup>125</sup> and Chile's agreement with Canada.<sup>126</sup>

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<sup>116</sup> Shingal & Sauvé, *supra* note 114.

<sup>117</sup> Warren H. Maruyama, *Preferential Trade Arrangements and the Erosion of the WTO's MFN Principle*, 47 STAN. J. INT'L L. 177, 180 (2010); *see also* Chaisse & Matsushita, *supra* note 115.

<sup>118</sup> Shingal & Sauvé, *supra* note 114.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Heribert Dieter, *The Multilateral Trading System and Preferential Trade Agreements: Can the Negative Effects Be Minimized?*, 15 GLOBAL GOVERNANCE 393, 396 (2009).

<sup>122</sup> *See Participation in Regional Trade Agreements*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/region\\_e/rta\\_participation\\_map\\_e.htm](https://www.wto.org/english/tratop_e/region_e/rta_participation_map_e.htm) (last visited Nov. 14, 2016).

<sup>123</sup> *See id.* Mexico, Panama, Peru, Singapore, Australia, Japan, China, the EU, and Iceland all fall within the category of highest participation in Services Regional Trade Agreements. *Id.*

<sup>124</sup> United States-Singapore Free Trade Agreement, Sing.-U.S., May 6, 2003, Temp. State Dep't. No. 04-36, [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/Singapore/asset\\_upload\\_file708\\_4036.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/Singapore/asset_upload_file708_4036.pdf).

<sup>125</sup> North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

This research was limited to these agreements for two reasons. First, the relatively large number of agreements entered into by both the United States and Canada regarding trade in services allows for a full and detailed analysis of the trends and patterns in negotiation over time. Second, two developed countries, such as the United States and Canada, are involved with rulemaking and setting precedents. Developed countries with more bargaining power create benchmark practices that become standard forms used in trade with most, if not all, of their trade partners.<sup>127</sup> We included Chile in this study to better examine this assertion because, as a developing country, it is presumed to have less bargaining power. By observing the changes in the agreements entered into by the United States and Canada, we are able to ascertain trends in the international trade of services, particularly in how cross-border trade in services is addressed in PTAs. By contrasting these results with those of the Chilean practice, we are able to find evidence showing that bargaining power makes a difference in PTA negotiations.

#### A. *The U.S. Law and Practice*

Generally, each of the PTAs listed in *Table 1* included provisions regarding market access, as well as provisions allowing both National Treatment and MFN.<sup>128</sup> The market access provisions are encouraging, as generally market access is fairly restricted to certain sectors between certain states.<sup>129</sup> Including such provisions liberalizes market access in the services sector. While service providers located in the host nation are afforded a high standard of legal rights through the National Treatment and MFN provisions, little is done to get them to the host nations in the first place.

Within the U.S. PTAs, there is a clear trend evincing a negative change of attitude towards facilitating entry. First, examining the earlier of the two PTAs with Singapore and Chile in 2003<sup>130</sup> reveals that there are clear provisions facilitating the entry of business professionals. All of the PTAs deal with trade in services. However, the distinction between these two PTAs is that they

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<sup>126</sup> Canada-Chile: Free Trade Agreement, Can.-Chile, Dec. 5, 1996, 36 I.L.M. 1067 (1997).

<sup>127</sup> Dieter, *supra* note 121, at 396. Indeed, the United States has offered a standard template to its trade partners in its recent PTAs. *See id.*

<sup>128</sup> *See infra* Table 1.

<sup>129</sup> Alireza Falsafi, *Regional Trade and Investment Agreements: Liberalizing Investment in a Preferential Climate*, 36 SYRACUSE J. INT'L L. & COM. 43, 74 (2008-2009).

<sup>130</sup> *See infra* Table 1.

include separate sections entitled “Temporary Entry of Business Persons.”<sup>131</sup> Within these additional sections, there are specific provisions allowing for expedited special visas for foreign service providers from both Singapore and Chile. The United States-Singapore PTA, signed on May 6, 2003, allows for “5,400 initial applications of business persons of Singapore seeking temporary entry under Section IV of Annex 11A to engage in a business activity at a professional level.”<sup>132</sup> In the United States-Chile PTA, signed a month later on June 6, 2003, this number was reduced to “1,400 initial applications” of the same nature.<sup>133</sup> Moreover, these applications refer to special fast-track H1-B1 entry visas reserved for such foreign service providers.<sup>134</sup>

The next three PTAs, with Morocco, Bahrain, and Oman, did not include any such provision allowing a particular number of business professionals access to such special visas, and they were more or less silent on the issue of entry. However, following the signing of the United States-Oman PTA, a side-letter was issued by the United States to Oman clarifying that “[n]o provision of this Agreement shall be construed as imposing any obligation on a Party regarding its immigration measures.”<sup>135</sup> This was the first indication that the United States no longer wanted their PTAs to be used as grounds to facilitate the entry of foreign service providers into the United States. In the four final PTAs signed following the United States-Oman PTA, a similar provision was included directly into the PTAs, stating again that no part of the PTA imposed any obligation on either party regarding its immigration measures, and further specifying that this included “admission or conditions of admission for temporary entry.”<sup>136</sup> The trend here shows that while the United States initially

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<sup>131</sup> United States-Singapore Free Trade Agreement, *supra* note 124, art. 11, 14; United States-Chile Free Trade Agreement, Chile-U.S., June 6, 2003, 42 I.L.M. 1026, Temp. State Dep’t. No. 04-35, <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text>.

<sup>132</sup> United States-Singapore Free Trade Agreement, *supra* note 124, app. 11A.3.

<sup>133</sup> United States-Chile Free Trade Agreement, *supra* note 131, app. 14.3(D)(6).

<sup>134</sup> Panizzon, *Temporary Movement*, *supra* note 20, at 133 (citing Kotaro Matsuzawa, *Movement of Natural Persons and the United States: Probability of the Mode 4 Offers Improvement by the United States*, 42 J. WORLD TRADE 653, 655 (2008)).

<sup>135</sup> United States-Oman Free Trade Agreement, Oman-U.S., Jan. 19, 2006, <http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text>; Letter from Rob Portman, U.S. Trade Representative, to Maqbool Bin Ali Sultan, Minister of Commerce and Indus., Oman (Jan. 19, 2006), [https://ustr.gov/sites/default/files/uploads/agreements/fta/oman/asset\\_upload\\_file285\\_8838.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/oman/asset_upload_file285_8838.pdf).

<sup>136</sup> United States-Colombia Trade Promotion Agreement, Colom.-U.S., art. 11.1(7), Nov. 22, 2006, <https://ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text>; United States-Panama Trade Promotion Agreement, Pan.-U.S., art. 11.1(7), June 28, 2007, <https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text>; United States-Peru Free Trade Agreement, Peru-U.S., art. 11.1(7), Apr. 12, 2006, <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>; United States-Korea Free

deliberately allowed the entry of foreign service providers through their PTAs, over time their general attitude shifted from merely removing such entry mechanisms to an outright statement that the PTA did not address or influence the issue of entry.

Table 1: U.S. PTAs

<b>PTA</b>	<b>NT</b>	<b>MFN</b>	<b>MARKET ACCESS</b>	<b>OTHER</b>
U.S. – Singapore Signature: May 6, 2003 Entry: January 1, 2004 End: 2016	Yes	Yes	Yes	Appendix 11A.3(1): “Beginning on the date of entry into force of this Agreement, the United States shall annually approve as many as 5,400 initial applications of business persons of Singapore seeking temporary entry under Section IV of Annex 11A to engage in a business activity at a professional level.” <sup>137</sup>
U.S. – Chile Signature: June 6, 2003 Entry: January 1, 2004 End: 2014	Yes	Yes	Yes	Appendix 14.3(D)(6)(1): “Beginning on the date of entry into force of this Agreement, the United States shall annually approve as many as 1,400 initial applications of business persons of Chile seeking temporary entry under Section D of Annex 14.3 to engage in a business activity at a professional level.” <sup>138</sup>
U.S. – Morocco <sup>139</sup> Signature: June 15, 2004 Entry: January 1, 2006	Yes	Yes	Yes	

Trade Agreement, S. Kor.-U.S., art. 12.1(7), June 30, 2007, <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>.

<sup>137</sup> United States-Singapore Free Trade Agreement, *supra* note 124, app. 11A.3.

<sup>138</sup> United States-Chile Free Trade Agreement, *supra* note 131, app. 14.3(D)(6).

<sup>139</sup> United States-Morocco Free Trade Agreement, Morocco-U.S., art. 22.7, June 15, 2004, [https://ustr.gov/sites/default/files/uploads/agreements/fta/morocco/asset\\_upload\\_file85\\_3862.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/morocco/asset_upload_file85_3862.pdf); *see also Morocco FTA*, OFF. U.S. TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/morocco-fta> (last visited Nov. 14, 2016).

Table 1: U.S. PTAs

End: 2030				
U.S. – Bahrain <sup>140</sup> Signature: September 14, 2005 Entry: August 1, 2006 End: 2015	Yes	Yes	Yes	
U.S. – Oman Signature: January 19, 2006 Entry: January 1, 2009 End: 2018	Yes	Yes	Yes	Immigration Side-Letter from United States to Oman: <sup>141</sup> <i>“Dear Mr. Minister: In connection with the signing on this date of the United States-Oman Free Trade Agreement (the “Agreement”), I have the honor to confirm the following understanding reached by the Governments of the United States of America and the Sultanate of Oman regarding the Agreement: <b>No provision of this Agreement shall be construed as imposing any obligation on a Party regarding its immigration measures.</b> I would be grateful if you would confirm that your Government shares this understanding and have the honor to propose that this letter and your letter in reply confirming that your Government shares this understanding shall constitute an agreement between our two Governments, to enter into force on the date of entry into force of the Agreement.”</i>

<sup>140</sup> United States-Bahrain Free Trade Agreement, Bahr.-U.S., Sept. 14, 2005, [https://ustr.gov/sites/default/files/uploads/agreements/fta/bahrain/asset\\_upload\\_file137\\_6304.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/bahrain/asset_upload_file137_6304.pdf).

<sup>141</sup> Letter from Rob Portman, *supra* note 135 (emphasis added).

Table 1: U.S. PTAs

U.S. – Peru Signature: April 12, 2006 Entry: February 1, 2009 End: 2015	Yes	Yes	Yes	Article 11.1(7): “Nothing in this Chapter or any other provision of this Agreement shall be construed to impose any obligation on a Party regarding its immigration measures, including admission or conditions of admission for temporary entry.” <sup>142</sup>
U.S. – Colom. Signature: November 22, 2006 Entry: May 15, 2012 End: 2030	Yes	Yes	Yes	Article 11.1(7): “Nothing in this Chapter or any other provision of this Agreement shall be construed to impose any obligation on a Party regarding its immigration measures, including admission or conditions of admission for temporary entry.” <sup>143</sup>
U.S. – Pan. Signature: June 28, 2007 Entry: October 31, 2012 End: N/A	Yes	Yes	Yes	Article 11.1(7): “Nothing in this Chapter or any other provision of this Agreement shall be construed to impose any obligation on a Party regarding its immigration measures, including admission or conditions of admission for temporary entry.” <sup>144</sup>
U.S. – Kor. Signature: June 30, 2007 Entry: March 15, 2012 End: 2031	Yes	Yes	Yes	Article 12-1(7): “Nothing in this Chapter or any other provision of this Agreement shall be construed to impose any obligation on a Party regarding its immigration measures, including admission or conditions of admission for temporary entry.” <sup>145</sup>

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<sup>142</sup> United States-Peru Free Trade Agreement, *supra* note 136, art. 11.1(7).

<sup>143</sup> United States-Colombia Trade Promotion Agreement, *supra* note 136, art. 11.1(7).

<sup>144</sup> United States-Panama Trade Promotion Agreement, *supra* note 136, art. 11.1(7).

<sup>145</sup> United States-Korea Free Trade Agreement, *supra* note 136, art. 12-1(7).

The reason for this trend is unclear. The initial two PTAs, both of which have the provisions allowing a number of foreign service providers, were negotiated between Singapore and Chile. Singapore has been classified as a “more advanced developing” Asian country, whereas Chile is a developing South American country.<sup>146</sup> It is difficult to draw a relationship between the two countries, yet they both included the same provision in their respective PTAs, which were signed within one month of each other.<sup>147</sup> Similarly, of the four most recent PTAs including the provision following the Oman side letter, three were conducted with countries in South America,<sup>148</sup> and the most recent with Korea.<sup>149</sup> The party to the PTA seems to have little relation to the United States’ attitude towards entry governed by the PTA. Moreover, all of the agreements mentioned were signed between 2003 and 2007, when there was no change in the political regime of the United States.

If the U.S. practice is any indication of international attitudes, it is clear that there is a general hesitation towards addressing the entry of foreign service providers through PTAs. However, this simply means that recent PTAs leave the question of entry open for other facilitating mechanisms or instruments; there is neither an explicit nor implicit rejection of facilitated entry via other means. In fact, all of the PTAs mentioned contain Domestic Regulation provisions that explicitly allow negotiations relating to “Article VI:4 of the GATS (or the results of any similar negotiations undertaken in other multilateral fora in which the Parties participate),” to be included in the PTA via amendment.<sup>150</sup> If further negotiations resulting in facilitated entry occur, the PTA is more than equipped to facilitate it. The trend shown by the United States’ PTAs is that PTAs are not the best mechanism or instrument with which to negotiate the entry of foreign service providers, although they will address other issues relevant to temporary migration.

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<sup>146</sup> See United Nations Development Programme, World Economic Situation and Prospects 2016, [http://www.un.org/en/development/desa/policy/wesp/wesp\\_current/2016wesp\\_full\\_en.pdf](http://www.un.org/en/development/desa/policy/wesp/wesp_current/2016wesp_full_en.pdf); Peter Wilson, *The Dilemma of a More Advanced Developing Country: Conflicting Views on the Development Strategy of Singapore*, 38 DEVELOPING ECONOMIES 105, 105 (2000).

<sup>147</sup> See United States-Singapore Free Trade Agreement, *supra* note 124; United States-Chile Free Trade Agreement, *supra* note 131.

<sup>148</sup> United States-Peru Free Trade Agreement, *supra* note 136; United States-Colombia Trade Promotion Agreement, *supra* note 136; United States-Panama Trade Promotion Agreement, *supra* note 136.

<sup>149</sup> United States-Korea Free Trade Agreement, *supra* note 136.

<sup>150</sup> See, e.g., United States-Panama Trade Promotion Agreement, *supra* note 136, art. 11.8.

## B. *The Canadian Practice*

Within each of the Canadian PTAs, there is an explicit article stating that the PTA does not “impose an obligation on a Party with respect to a national of the other Party seeking access to its employment market, or employed on a permanent basis in its territory.”<sup>151</sup> Therefore, there has been no noticeable trend regarding the entry of foreign service providers in Canadian PTAs. A trend does exist, however, in the legal standards that are afforded to foreign service providers in Canada. In all five PTAs, foreign service providers are guaranteed National Treatment and MFN.<sup>152</sup> However, in the first three PTAs, there exists an additional “Standard of Treatment” provision that guarantees the better of either two forms of treatment.<sup>153</sup> In the latter two PTAs, the Standard of Treatment provision is not present.<sup>154</sup>

Similar to the case with the U.S. PTAs, there is no answer to be found simply by looking at the parties with which Canada is entering into trade agreements. All of the parties involved in the examined PTAs are from South America.<sup>155</sup> There is no difference between how Canada treats countries based on their geographical location. What is of note is that the removal of the Standard of Treatment provision came relatively abruptly. The five PTAs range from being signed in 1992<sup>156</sup> to being signed in 2010,<sup>157</sup> a range of approximately eighteen years. However, the removal of the provision took

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<sup>151</sup> Canada-Chile Free Trade Agreement, Can.-Chile, art. H-01(3)(a), Dec. 5, 1996, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/chap-h26.aspx?lang=en>; Canada-Colombia Free Trade Agreement, Can.-Colom., art. 901(3), Nov. 21, 2008, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/chapter9-chapitre9.aspx?lang=eng>; Canada-Panama Free Trade Agreement, Can.-Pan., art. 10.02(3), May 14, 2010, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/chapter-chapitre-10.aspx?lang=eng>; NAFTA, *supra* note 125; Canada-Peru Free Trade Agreement, Can.-Peru, art. 901(3), May 29, 2008, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-9.aspx?lang=eng>.

<sup>152</sup> This includes NAFTA, which is a multiparty treaty. NAFTA, *supra* note 125, art. 1202–03; Canada-Chile Free Trade Agreement, *supra* note 151, art. H-02–H-03; Canada-Peru Free Trade Agreement, *supra* note 151, art. 903–04; Canada-Colombia Free Trade Agreement, *supra* note 151, art. 902–03; Canada-Panama Free Trade Agreement, *supra* note 151, art. 10.03–10.04.

<sup>153</sup> NAFTA, *supra* note 125, art. 301(1)–301(2); Canada-Chile Free Trade Agreement, *supra* note 151, art. H-02–H-04; Canada-Peru Free Trade Agreement, *supra* note 151, art. 903–05.

<sup>154</sup> See Canada-Panama Free Trade Agreement, *supra* note 151; Canada-Colombia Free Trade Agreement, *supra* note 151.

<sup>155</sup> NAFTA is an exception, as it involves the United States. See *supra* Table 2.

<sup>156</sup> NAFTA, *supra* note 125, art. 1202–04, 2203; *Fact Sheet: North America Free Trade Agreement (NAFTA)*, U.S. DEP’T OF AGRIC. (Jan. 2008), [http://www.fas.usda.gov/sites/development/files/nafta1.14.2008\\_0.pdf](http://www.fas.usda.gov/sites/development/files/nafta1.14.2008_0.pdf).

<sup>157</sup> Canada-Panama Free Trade Agreement, *supra* note 151.

place with the Canada-Colombia FTA, signed on November 21, 2008, with its predecessor (retaining the provision) being signed only six months earlier on May 29, 2008.<sup>158</sup>

Table 2: Canadian PTAs

PTA	NT	MFN	MARKET ACCESS	OTHER
NAFTA <sup>159</sup> Signature: December 17, 1992 Entry: January 1, 1994 End: 2008	Yes	Yes	No	Article 1204 Standard of Treatment: “Each Party shall accord to service providers of any other Party the better of the treatment required by Articles 1202 (National Treatment) and 1203 (Most-Favored Nation)
Can. – Chile <sup>160</sup> Signature: December 5, 1996 Entry: July 5, 1997 End: 2014	Yes	Yes	No	Article H-04 Standard of Treatment: “Each Party shall accord to service providers of any other Party the better of the treatment required by Articles H-02 (National Treatment) and H-03 (Most-Favoured Nation Treatment)”
Can. – Peru <sup>161</sup> Signature: May 29, 2008 Entry: August 1, 2009 End: 2025	Yes	Yes	Yes	Article 905 Standard of Treatment: “Each Party shall accord to service providers of any other Party the better of the treatment required by Articles 903 (National Treatment) and 904 (Most-Favoured Nation Treatment)”
Can. – Colom. <sup>162</sup>	Yes	Yes	Yes	

<sup>158</sup> Canada-Colombia Free Trade Agreement, *supra* note 151.

<sup>159</sup> NAFTA, *supra* note 125, at 649.

<sup>160</sup> Canada-Chile Free Trade Agreement, *supra* note 151, art. H-02–H-04; *Canada–Chile: Basic Information*, WORLD TRADE ORG., <http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?rtaid=110> (last updated Nov. 15, 2016).

<sup>161</sup> Canada-Peru Free Trade Agreement, *supra* note 151, art. 903–06; *Canada–Peru: Basic Information*, WORLD TRADE ORG., <http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?rtaid=672> (last updated Nov. 15, 2016).

Signature: November 21, 2008 Entry: August 15, 2011 End: 2032				
Can. – Pan. <sup>163</sup> Signature: May 14, 2010 Entry: April 1, 2013 End: N/A	Yes	Yes	Yes	

While one could make the argument that removing the Standard of Treatment provision might not have been a significant change, two considerations remain. First, while the PTAs are rather similar in form and order of provisions, it is clear that the Standard of Treatment provision was taken out deliberately. Second, if the Standard of Treatment provision made no significant change, there would have been no difference in leaving it in the PTAs. It is clear that there has been a deliberate lowering of the standard afforded to foreign service providers. When looking at the PTAs holistically, however, even though the standard has been lowered, the National Treatment and MFN provisions are still guaranteed, and relatively speaking, the level of legal rights and protection afforded by them is in conformity with international standards.

### C. *The Chilean Practice*

An examination of the Chilean PTAs shows that, indeed, bargaining power seems to have an influence on PTA negotiations. It can be assumed that Chile, a developing country, has less bargaining power over many of its trade partners who are more developed and economically advanced states. By observing the Chilean PTAs, it is evident that there is no clear trend linking the PTAs, unlike the practice with the United States and Canada, where clear trends could be observed.

As previously mentioned, the Canada-Chile PTA included both provisions on National Treatment and MFN, as well as a Standard of Treatment

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<sup>162</sup> Canada-Colombia Free Trade Agreement, *supra* note 151, art. 902–04; *Canada–Columbia: Basic Information*, WORLD TRADE ORG., <http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?rtaid=162> (last updated Nov. 14, 2016).

<sup>163</sup> Canada-Panama Free Trade Agreement, *supra* note 151, 10.03–10.05; *Canada–Panama: Basic Information*, WORLD TRADE ORG., <http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?rtaid=608> (last updated Nov. 15, 2016).

provision.<sup>164</sup> The Australia-Chile,<sup>165</sup> United States-Chile,<sup>166</sup> and Japan-Chile<sup>167</sup> PTAs all include National Treatment and MFN provisions, but no Standard of Treatment provision. Finally, the Korea-Chile PTA<sup>168</sup> includes only a National Treatment provision without an MFN provision. On top of all of this, the Japan-Chile PTA includes a note alongside its National Treatment provision stating that “[f]or greater certainty, nothing in this Article shall be construed to require either Party to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.”<sup>169</sup>

Table 3: Chilean PTAs

PTA	NT	MFN	MARKET ACCESS	OTHER
Canada – Chile <sup>170</sup> Signature: 5 December 1996 Entry: 5 July 1997 End: 2014	Yes	Yes	No	Article H-04 Standard of Treatment: “Each Party shall accord to service providers of any other Party the better of the treatment required by Articles H-02 (National Treatment) and H-03 (Most-Favored Nation)”
EU – Chile <sup>171</sup> Signature: 18 November 2002	Yes	No	Yes	

<sup>164</sup> Canada-Chile Free Trade Agreement, *supra* note 151, at 2.

<sup>165</sup> Australia-Chile Free Trade Agreement, Austl.-Chile, July 30, 2008, <http://dfat.gov.au/trade/agreements/acfta/Documents/Australia-Chile-Free-Trade-Agreement.pdf>.

<sup>166</sup> United States-Chile Free Trade Agreement, *supra* note 131.

<sup>167</sup> Japan-Chile Free Trade Agreement, Chile-Japan, Mar. 27, 2007, [http://www.bilaterals.org/IMG/pdf/Japan-Chile\\_FTA\\_2007\\_.pdf](http://www.bilaterals.org/IMG/pdf/Japan-Chile_FTA_2007_.pdf).

<sup>168</sup> Republic of Korea-Chile Free Trade Agreement, Chile-S. Kor., Feb. 15, 2003, [http://www.sice.oas.org/Trade/Chi-SKorea\\_e/ChiKoreaind\\_e.asp](http://www.sice.oas.org/Trade/Chi-SKorea_e/ChiKoreaind_e.asp).

<sup>169</sup> Japan-Chile Free Trade Agreement, *supra* note 167, art. 107.

<sup>170</sup> Canada-Chile Free Trade Agreement, *supra* note 151; *Canada Chile Free Trade Agreement: Background Information*, GLOBAL AFF. CAN., <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/info.aspx?lang=eng> (last visited Nov. 14, 2016).

<sup>171</sup> Agreement Establishing an Association Between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, Chile-European Union, Nov. 18, 2002, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/chile/>; *Chile-European Union: Background and Negotiations*, FOREIGN TRADE INFO. SYS., [http://www.sice.oas.org/TPD/CHL\\_EU/CHL\\_EU\\_e.asp](http://www.sice.oas.org/TPD/CHL_EU/CHL_EU_e.asp) (last visited Nov. 14, 2016).

Entry: 1 March 2005 End: 2013				
Republic of Korea – Chile <sup>172</sup> Signature: 1 February 2003 Entry: 1 April 2004 End: 2020	Yes	No	No	
US – Chile <sup>173</sup> Signature: 6 June 2003 Entry: 1 January 2004 End: 2016	Yes	Yes	Yes	Appendix 14.3(D)(6)(1): “Beginning on the date of entry into force of this Agreement, the United States shall annually approve as many as 1,400 initial applications of business persons of Chile seeking temporary entry under Section D of Annex 14.3 to engage in a business activity at a professional level.”
EFTA – Chile <sup>174</sup> Signature: 26 June 2003 Entry: 1 December 2004 End: 2010	Yes	Yes	Yes	
Japan – Chile <sup>175</sup> Signature: 27 March 2007 Entry: 3 September 2007 End: 2022	Yes	Yes	No	

<sup>172</sup> Republic of Korea-Chile Free Trade Agreement, *supra* note 168; *Korea, Republic of-Chile: Basic Information*, WORLD TRADE ORG., <http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=53%20&lang=1&redirect=1> (last updated Nov. 14, 2016).

<sup>173</sup> U.S.-Chile Free Trade Agreement, *supra* note 131; *Chile and U.S. Sign Accord on Free Trade*, N.Y. TIMES (June 7, 2003), [http://www.nytimes.com/2003/06/07/business/chile-and-us-sign-accord-on-free-trade.html?\\_r=0](http://www.nytimes.com/2003/06/07/business/chile-and-us-sign-accord-on-free-trade.html?_r=0); *US-Chile: Basic Information*, WORLD TRADE ORG., <http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=59%20&lang=1&redirect=1> (last updated Nov. 14, 2016).

<sup>174</sup> Free Trade Agreement Between the EFTA States and the Republic of Chile, Chile-Ice.-Liech.-Nor.-Switz., June 26, 2003, <http://www.efta.int/media/documents/legal-texts/free-trade-relations/chile/EFTA-Chile%20Free%20Trade%20Agreement.pdf>; *EFTA-Chile: Basic Information*, WORLD TRADE ORG., <http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=43> (last updated Nov. 14, 2016).

<sup>175</sup> Japan-Chile Free Trade Agreement, *supra* note 167, art. 107–08; *Japan-Chile: Basic Information*, WORLD TRADE ORG., <http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=3> (last updated Nov. 14, 2016).

Australia – Chile <sup>176</sup> Signature: 30 July 2008 Entry: 06 March 2009 End: 2015	Yes	Yes	Yes	
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What can be seen here is that there is a lack of coherency between the PTAs. This evidences Chile's lack of bargaining power. The consistency and trend seen with the U.S. and Canada PTAs shows the strong bargaining power and ability of the United States and Canada to use their standard term PTAs in negotiations with other countries. Similarly, the lack of consistency and trends in the Chilean PTAs show a lack of such power.

Assuming that the MFN and National Treatment provisions are respected, the disadvantage to Chilean foreign service providers is evident. Without consistency in Chilean PTAs, it is difficult for Chilean workers to develop expectations of their rights abroad. The rights given in one country may vastly differ from those in another country, and a lack of market access may make it difficult for foreign providers to bypass limitations or controls on the services that they wish to provide. While it has already been discussed that the quality of treatment provided in the United States and Canada is of a high standard, the situation of Chile and its foreign workers is one that warrants discussion and observation, particularly with regard to its dealings with other countries.

*D. The Trans-Pacific Partnership: The Harmonization of the Chilean, Canadian, and U.S. Practices*

The Trans-Pacific Partnership (TPP) is a trade agreement signed by twelve countries along the Pacific Rim, including the United States, Canada, and Chile.<sup>177</sup> The TPP covers issues relating to a broad spectrum of areas, covering both trade of goods (notably with regards to the facilitation of trade), as well as trade in services.<sup>178</sup> The TPP builds upon and expands on existing trade agreements, and will supersede bilateral trade agreements and other

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<sup>176</sup> Australia-Chile Free Trade Agreement, *supra* note 165, art. 9.3–9.5; *Australia-Chile FTA*, AUSTRALIAN DEPT. OF FOREIGN AFF. & TRADE, <http://dfat.gov.au/trade/agreements/acfta/pages/australia-chile-fta.aspx> (last visited Nov. 14, 2016).

<sup>177</sup> *The Trans-Pacific Partnership*, OFF. U.S. TRADE REP., <https://ustr.gov/tpp/> (last visited Nov. 15, 2016).

<sup>178</sup> *Id.* art. 2.2–2.8(8), 10.2.

agreements, including NAFTA, where any conflicts arise.<sup>179</sup> As such, it is clear that the TPP is seen by member states as a progressive agreement that expands on current practices, and creates a unified, high standard across the board.

Chapter 12 of the TPP is titled “Temporary Entry for Business Persons” and addresses matters relating to temporary migration of service providers.<sup>180</sup> Chapter 12 of the TPP mirrors many of the corresponding sections in some of the more liberal PTAs that have already been examined in this Article, such as the United States-Singapore PTA.<sup>181</sup> The TPP is progressive in that it contains provisions for Market Access, National Treatment, and MFN, thereby requiring all member states to adhere to these high standards.<sup>182</sup> However, in Appendix 12-A, there are no limitations imposed on the number of entry visas each country will provide to facilitate temporary entry, but rather there are limitations on the conditions imposed by each country for entry.<sup>183</sup> Most notably, each country sets out the duration of stay in Appendix 12-A, as well as any requirements for temporary migration that are permitted under section 12 of the TPP.<sup>184</sup> As such, while the TPP is a document that imposes a high standard of obligations on each member state, the overall commitment of each member state is tailored to its own immigration regime and practices through the specific protocols set out in Appendix 12-A.

Appendix 12-A is reflective of emerging trends in recent PTAs. As previously mentioned, later U.S. PTAs have explicitly mentioned that the obligations under the PTAs are not indicative of any obligation on a party to change its immigration policies. This is represented in Appendix 12-A by allowing each member state to declare clearly what its immigration policy under the TPP is to be in accordance with temporary entry under Chapter 12, whether or not that is different from its policies for entry otherwise.<sup>185</sup> Under this mechanism, member states can comfortably maintain high standards in facilitating all service providers who are granted temporary entry, while still maintaining their own independent conditions and regulations for entry.

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<sup>179</sup> *Forget NAFTA, the TPP is the New ‘Gold Standard’ of Global Trade*, FIN. POST (Feb. 4, 2016), <http://business.financialpost.com/news/economy/forget-nafta-the-tpp-is-the-new-gold-standard-of-global-trade>.

<sup>180</sup> *The Trans-Pacific Partnership*, *supra* note 177, art. 12.2.

<sup>181</sup> United States-Singapore Free Trade Agreement, *supra* note 124.

<sup>182</sup> *The Trans-Pacific Partnership*, *supra* note 177, art. 10.3–10.5.

<sup>183</sup> *Id.* app. 12-A.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

The TPP is also in line with recent Canadian PTA trends. Canadian PTAs have been offering high standards to service providers with Market Access, National Treatment, and MFN provisions. No Standard of Treatment clause permitting the better of either National Treatment or MFN is present in the TPP, which is similarly indicative of the general trend in Canadian PTAs not to include such a clause.

Perhaps the greatest change in practice can be seen when comparing the TPP to the recent Chilean PTAs. As previously mentioned, there is a distinct lack of consistency in the standards provided under Chilean PTAs, with a generally lower standard present than what is found in the U.S. and Canadian PTAs. The Japan-Chile PTA (the only Chilean PTA examined that is currently in force) does not include a Market Access provision.<sup>186</sup> As such, the TPP represents the unified standard attainable for countries like the United States and Canada who have more bargaining power and are able to negotiate better standards for temporary service providers. This means not only will Chile have the benefit of a better agreement under the TPP, but also the TPP may act as a precedent for any other agreements that Chile may enter into in the coming years. This, in turn, can help negate the disadvantage of Chile's relatively weaker bargaining power against larger and more economically developed States.

The magnitude, membership, and potential of the TPP represent a codification of the practices of three major users of PTAs to regulate labor mobility. On top of this, the TPP addresses inconsistencies and issues with these PTAs. All in all, the inclusion of Appendix 12-A allows for member states to adopt the generally high standards under Chapter 12 while maintaining their own individual standards and requirements for entry in conjunction with their obligations. While this means that the TPP may not relax entry requirements, it marks a trend moving towards increased facilitation of temporary migration in all stages of the migration process.

#### IV. THE PARALLEL DEVELOPMENT OF FOCUSED BILATERAL MIGRATION AGREEMENTS

Various EU countries have attempted different versions of bilateral mobility partnerships. Spain and France have been at the forefront of the

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<sup>186</sup> See Japan-Chile Free Trade Agreement, *supra* note 167.

movement towards new types of bilateral migration agreements.<sup>187</sup> This may be due in part to their position on the western edge of the European Union. This part will present how France has been at the forefront of this movement, and then compare this to the actions taken by Canada in the United States in Sections B and C, respectively.

### A. *France*

Since 2006, France has concluded thirteen agreements by sending countries to carry through a partnership,<sup>188</sup> a coherent migration management tailored to the needs of both signatory countries and the migration profile of the partner country.<sup>189</sup> Such agreements shall illustrate that migration and development are closely linked.<sup>190</sup> In general, they are based on three components: the organization of legal migration, the fight against illegal immigration, and

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<sup>187</sup> Natasha Ward, *Facilitating the Temporary Movement of Natural Persons: Economic Partnership Agreements Versus Bilateral Migration Agreements and Mobility Partnerships*, in MULTILAYERED MIGRATION GOVERNANCE: THE PROMISE OF PARTNERSHIP 143, 148 (Rahel Kunz et al. eds., 2011); see Marion Panizzon, *International Law of Economic Migration: A Ménage à Trois? GATS Mode 4, EPAs and Bilateral Migration Agreements*, 44 J. WORLD TRADE 1207 (2010).

<sup>188</sup> Seven of the agreements are on concerted management of migration flows: Agreement with Senegal signed September 23, 2006 and supplemented by an addendum February 25, 2008 (entered into force on 1 July 2009); Agreement with Gabon signed July 5, 2007 (entered into force on September 1, 2009); Agreement with the Republic of Congo signed October 25, 2007 (entered into force on August 1, 2007); Agreement with Benin signed November 28, 2007 (entered into force on March 1, 2010); Agreement with Tunisia signed April 28, 2008 (entered into force on July 1, 2009); Agreement with Cape Verde signed November 24, 2008 (entered into force on April 1, 2011), and Agreement with Burkina Faso signed January 10, 2009 (entered into force on June 1, 2011). *Attracting Highly Qualified and Qualified Third-Country Nationals to France: Good Practices and Lessons Learnt*, EUR. MIGRATION NETWORK (July 2013), [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-studies/attracting/09a.france\\_final\\_national\\_report\\_highlyqualified\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/attracting/09a.france_final_national_report_highlyqualified_en.pdf). Five agreements are on the mobility of young people and professionals: Agreement with Mauritius 23 September 2008 on stay and circular migration of professionals (entered into force on September 23, 2008); and Agreements with Macedonia signed 1 December 2009, Montenegro signed 1 December 2009, Serbia signed 2 December 2009, and Lebanon signed 26 June 2010 relating to the mobility of young people (all in the process of ratification). *Id.* Finally, there is only one agreement on labor migration: Agreement with Russia 27 November 2009 (entered into force 1 March 2011). *Id.*

<sup>189</sup> Marion Panizzon, *Migration and Trade: Prospects for Bilateralism in the Face of Skill-Selective Mobility Laws*, 12 MELB. J. INT'L L. 95, 120 (2011) [hereinafter Panizzon, *Migration and Trade*] ("Debate over the objectives pursued by bilateral migration agreements remains somewhat inconclusive. Some believe that they were designed to dissipate tensions with former colonies in West Africa, which had been disproportionately affected by the high-skill orientation of France's 2006/07 immigration law reform. In that function, the bilaterals would 'actively solicit' low-qualified labour and complement the common interests France and source countries shared with respect to the management of migratory flows. Others have found that France's bilaterals further entrench the skill-selectivity of its new immigration law.").

<sup>190</sup> *Id.* ("In the context of its 2006/07 immigration law reform under the guidance of Nicolas Sarkozy, then Minister of the Interior, France in 2006 began designing its second-generation bilateral migration agreements.").

inclusive development.<sup>191</sup> The regulation of professional immigration touches upon three distinct issues: first, the exchange of young professionals, second, the residence permit “skills and talents,” and finally, the residence card “employee” or “temporary worker.”<sup>192</sup>

The key feature of the new French migration agreements is that they

sensitise[] the source country to the negative effects entailed by irregular migration, while focusing attention on the benefits that migration, if well managed, can have for development (such as remittances, skill and technology transfers, tourism and foreign direct investment).

Unlike the first-generation agreements, which were one-dimensional in direction and content, these post-9/11 migration agreements are multifaceted policy tools. They must offer a broad enough platform for negotiating the types of trade-offs a balanced partnership requires. In order to entice a country of origin to share responsibility in migration, the bilateral agreement must address a broad panoply of issues, ranging from combating irregular entry and stay, to development and labour migration.<sup>193</sup>

The Exchange of Young Professionals Agreements, with the exception of the one with Burkina Faso, provide for the possibility of issuing work permits to young professionals who want to gain experience of paid work abroad. These provisions are included in specific agreements for Senegal and Tunisia signed on June 20, 2001 and December 4, 2003, respectively.<sup>194</sup> The remainder of this section will break down these specific Young Professional Agreements.

Age Requirements: 18 to 35 years, except for Benin (18 to 40 years) and Russia (18 to 30 years).<sup>195</sup>

Authorized Period of Employment:

- Senegal, Gabon, Congo, Tunisia, Mauritius, Cape Verde: 3 to 18 months;
- Benin, Cameroon: 6 to 18 months;
- Russia, Macedonia, Montenegro, Serbia, Lebanon: 12 months, renewable once.

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<sup>191</sup> *Id.* at 120–21.

<sup>192</sup> *Id.* at 99.

<sup>193</sup> *Id.* at 120–21.

<sup>194</sup> *Id.* at 120.

<sup>195</sup> *Young Professionals*, IMMIGRATION-PROFESSIONNELLE.GOUV.FR <http://www.immigration-professionnelle.gouv.fr/en/procedures/fiche/young-professionals/> (last updated Dec. 8, 2014).

### Annual Quotas:

- Senegal, Gabon, Congo, Cape Verde, Montenegro, Lebanon: 100;
- Benin, Mauritius, Macedonia: 200;
- Russia, Serbia: 500;
- Tunisia: 1,500.

### Residence Permit “Skills and Talents:”

These agreements, except those concluded with Russia and Serbia, provide for the issuance of a residence permit marked “skills and talents” on the basis of a significant and lasting contribution to the economic development of France and directly or indirectly from the country of origin.<sup>196</sup>

This permit is valid for three years, issued under a quota, and renewable under the conditions below:

- Benin, Cape Verde, Congo, Mauritius, Tunisia, renewable once;
- Burkina Faso, Cameroon, Gabon, Macedonia, Montenegro, renewable without limitation.

### Annual Quota:<sup>197</sup>

- Cape Verde: 100;
- Congo, Benin, Mauritius (nationals residing in Mauritius), Burkina Faso: 150;
- Cameroon: 200;
- Tunisia (nationals residing in Tunisia): 1,500.

Residence card “employee” or “temporary worker.” The residence permit marked “employee” or “temporary worker” is issued when a company abroad is not on the French labor candidate profile vacancy market.

Benin:<sup>198</sup> 16 external link trades listed in Article 14 of the Agreement;

Burkina Faso:<sup>199</sup> 21 external link trades listed in Annex II of the Agreement (annual quota: 500);

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<sup>196</sup> Panizzon, *Migration and Trade*, *supra* note 189, at 104 n.48.

<sup>197</sup> *Id.* at 130.

<sup>198</sup> Accord entre le Gouvernement de la République française et le Gouvernement de la République du Bénin relative à la gestion concertée des flux migratoires et au codéveloppement [Agreement between France and Benin relative to the concerted management of migratory flows and co-development], Benin-Fr., art. 14, Nov. 28, 2007, 2663 U.N.T.S. 50.

Cameroon:<sup>200</sup> 41 businesses (annual quota: 750);  
 Cape Verde:<sup>201</sup> 10 trades listed in Annex II of the Agreement (annual quota: 500);  
 Congo:<sup>202</sup> 15 external link trades listed in Article 223 of the Agreement;  
 Gabon:<sup>203</sup> 9 external link trades listed in Annex I of the Agreement;  
 Mauritius:<sup>204</sup> 9 trades (annual quota: 500);  
 Senegal:<sup>205</sup> 108 trades (annual quota: 1,000);  
 Tunisia:<sup>206</sup> 17 external link trades (annual quota: 3,500).

In addition, the Franco-Russian agreement provides for the issuance of permits without consideration of the employment situation for certain categories of workers, including employees performing an intra-group

<sup>199</sup> Accord entre le Gouvernement de la République Française et le Gouvernement du Burkina Faso relatif à la gestion concertée des flux migratoires et au développement solidaire [Agreement Between the Government of the French Republic and the Government of Burkina Faso relative to the concerted management of migration flows and solidarity development], Burk. Faso-Fr., Jan. 10, 2009, [http://www.immigration-professionnelle.gouv.fr/sites/default/files/fckupload/AccordBurkinaFaso\\_du\\_10-01-2009.pdf](http://www.immigration-professionnelle.gouv.fr/sites/default/files/fckupload/AccordBurkinaFaso_du_10-01-2009.pdf).

<sup>200</sup> Accord France Cameroun relatif à la gestion concertée des flux migratoires et au développement solidaire (ensemble six annexes) [France Cameroon Agreement relative to the concerted management of migration flows and solidarity development], Cameroon-Fr., art. 2, May 21, 2009, [http://www.gisti.org/IMG/pdf/Accord\\_France-Cameroun.pdf](http://www.gisti.org/IMG/pdf/Accord_France-Cameroun.pdf).

<sup>201</sup> Accord entre le gouvernement de la République française et le Gouvernement de la République du Cap-Vert relatif à la gestion concertée des flux migratoires et au développement solidaire [Agreement between France and Cape Verde relative to concerted management of migratory flows and joint development], Cape Verde-Fr., Nov. 24, 2008, [http://www.immigration-professionnelle.gouv.fr/sites/default/files/fckupload/Accord\\_CapVer\\_t\\_du\\_24-11-2008.pdf](http://www.immigration-professionnelle.gouv.fr/sites/default/files/fckupload/Accord_CapVer_t_du_24-11-2008.pdf).

<sup>202</sup> Accord entre le Gouvernement de la République française et le Gouvernement de la République du Congo relatif à la gestion concertée des flux migratoires et au codéveloppement [Agreement between the Government of the French Republic and the Government of the Republic of the Congo relative to concerted management of migratory flows and co-development], Congo-Fr., Oct. 25, 2007, 2614 U.N.T.S. 49.

<sup>203</sup> Accord entre le Gouvernement de la République française et le Gouvernement de la République Gabonaise relatif à la gestion concertée des flux migratoires et au codéveloppement [Agreement between France and Gabon relative to concerted management of migratory flows and co-development], Fr.-Gabon, July 5, 2007, <http://www.immigration-professionnelle.gouv.fr/sites/default/files/fckupload/Accord%20GABON%20du%205%20juillet%202007.pdf>.

<sup>204</sup> Accord entre le Gouvernement de la République française et le Gouvernement de la République de Maurice relatif au séjour et à la migration circulaire de professionnels [Agreement between France and the Republic of Mauritius relative to the stay and circular migration of professionals], Fr.-Mauritius, Sept. 23, 2008, [http://www.immigration-professionnelle.gouv.fr/sites/default/files/fckupload/MAURICE\\_\\_AC\\_COR\\_D\\_du\\_23-09-2008.pdf](http://www.immigration-professionnelle.gouv.fr/sites/default/files/fckupload/MAURICE__AC_COR_D_du_23-09-2008.pdf).

<sup>205</sup> *Bill authorizing the approval of the agreement on the joint management of migratory flows between the Government of the French Republic and the Government of the Republic of Senegal and its rider*, SÉNAT (Fr.), <https://www.senat.fr/rap/108-129/108-1295.html> (last visited Nov. 14, 2016).

<sup>206</sup> *Id.*; EUROPEAN TRAINING FOUND., *MIGRANT SUPPORT MEASURES FROM AN EMPLOYMENT AND SKILLS PERSPECTIVE 7* (2015), [http://www.etf.europa.eu/webatt.nsf/0/2938DD5003574A3EC1257E9A002BF071/\\$file/MISMES%20Tunisia.pdf](http://www.etf.europa.eu/webatt.nsf/0/2938DD5003574A3EC1257E9A002BF071/$file/MISMES%20Tunisia.pdf).

mobility, business leaders, workers highly qualified and who hold a “working holiday” visa.<sup>207</sup> The Franco-Lebanese agreement also provides for the issuance of permits for the unopposed employment of highly skilled workers; that is to say, ones who hold a contract with a higher remuneration than 1.5 times the gross annual salary medium and holding a diploma showing at least three years of study or justifying an experience of at least five years at a comparable level.<sup>208</sup>

### B. Canada

This section provides an overview of Canada’s Temporary Foreign Worker Program (TFWP).<sup>209</sup> The framework regulation is provided by the Immigration and Refugee Protection Act (IRPA),<sup>210</sup> which regulates the entry of all temporary foreign workers into Canada. In parallel, the TFWP is jointly managed by Human Resources and Skills Development Canada (HRSDC)<sup>211</sup> and Citizenship and Immigration Canada (CIC).<sup>212</sup> According to CIC, employer demand drives the entry of foreign workers into Canada because: (i) “[t]here are no numerical limits or quotas;” (ii) “[a]n employer can apply to HRSDC to hire a temporary foreign worker when Canadians [or] permanent residents are not readily available;” (iii) “[e]mployers may hire foreign nationals from any country in the world to work in any legal occupation, provided that both the employers and the workers meet the requirements and regulations outlined in *IRPA*;” and (iv) “182,322 temporary foreign workers

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<sup>207</sup> See generally *Jeunes Professionnels*, POUR LA PROMOTION DE L’IMMIGRATION PROFESSIONNELLE, [Young Professionals, FOR THE PROMOTION OF ECONOMIC MIGRATION] <http://www.immigration-professionnelle.gouv.fr/proc%C3%A9dures/fiche/jeunes-professionnels?highlight=Russie> (last updated Dec. 8, 2004).

<sup>208</sup> *Attracting Highly Qualified and Qualified Third-Country Nationals to France: Good Practices and Lessons Learnt*, EUR. MIGRATION NETWORK (July 2013), [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/European\\_migration\\_network/reports/docs/emn-studies/attracting/09a.france\\_final\\_national\\_report\\_highlyqualified\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/European_migration_network/reports/docs/emn-studies/attracting/09a.france_final_national_report_highlyqualified_en.pdf).

<sup>209</sup> See also Catherine Dauvergne, *How the Charter Has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence*, 58 MCGILL L.J. 663 (2012-2013). See generally Einat Albin, *Precarious Work and Human Rights*, 34 COMP. LAB. L. & POL’Y J. 1 (2012-2013).

<sup>210</sup> The Immigration and Refugee Protection Act (IRPA) and the Immigration and Refugee Protection Regulations (IRPR) are federal legislation that govern immigration, both temporary and permanent, to Canada. See Immigration and Refugee Protection Act, S.C. 2001, c 27 (Can.).

<sup>211</sup> *Fact Sheet—Temporary Foreign Worker Program*, CITIZENSHIP & IMMIGR. CAN., <http://www.cic.gc.ca/english/resources/publications/employers/temp-foreign-worker-program.asp> (last updated Oct. 1, 2012).

<sup>212</sup> *Id.*

entered Canada in 2010 in professional, managerial, technical, trade, and lower-skilled occupations.”<sup>213</sup>

Basically, over the last decade or so, the Government of Canada has expanded the TFWP at the request of employers while decreasing the number of entrants under the FSWP.<sup>214</sup> The reduction of the latter program includes a government refusal to process a large number of skilled worker applicants under the pretense of eliminating a long standing backlog, due in part to the shift in resources to expeditiously process TFWP applications.<sup>215</sup> For every application by a foreign national, CIC: (i) “[v]erifies that the job offer from the employer has been “confirmed” by HRSDC;” (ii) “[e]nsures that the worker meets temporary resident criteria related to criminality and security;” (iii) “[e]nsures that the worker has appropriate or required skills to work in the occupation in Canada;” (iv) “[v]erifies that foreign workers meet medical tests required for temporary residents to Canada;” and (v) “[i]f the applicant meets these criteria, CIC issues a work permit authorizing the worker to enter and work in Canada.”<sup>216</sup>

In light of many years of experience, regulatory amendments to the Immigration and Refugee Protection Regulations were prepared, and they came into effect on April 1, 2011.<sup>217</sup> The basic “[i]ntent of the regulatory changes is to improve protections for all TFWs, including agriculture.”<sup>218</sup> There were three regulatory amendments, which provided: (i) “[c]larification of the factors to assess the genuineness of a job offer;” (ii) “[v]erification that employers provided wages, working conditions and employment in an occupation that were substantially the same as originally offered to a foreign

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<sup>213</sup> *Entry of Agricultural Workers in Canada*, CITIZENSHIP & IMMIGR. CAN. (May 2011), <https://migrationfiles.ucdavis.edu/uploads/cf/files/2011-may/burrows-entry-of-agricultural-workers.pdf> (last visited Nov. 14, 2016).

<sup>214</sup> Amar Bhatia, *In a Settled Country, Everyone Must Eat: Four Questions about Transnational Private Regulation, Migration, and Migrant Work*, 13 GERMAN L.J. 1282, 1287 n.16 (2012).

<sup>215</sup> *Id.*

<sup>216</sup> *Entry of Agricultural Workers in Canada*, *supra* note 213.

<sup>217</sup> *Id.*

<sup>218</sup> *Entry of Agricultural Workers in Canada*, *supra* note 213. Recent changes to the regulation of the TFWP by the Government of Canada place further faith in voluntary systems of private self-regulation. See generally Judy Fudge & Fiona MacPhail, *The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labor*, 31 COMP. LAB. L. & POL’Y J. 5, 32–33 (2009); Sarah Marsden, *The New Precariousness: Temporary Migrants and the Law in Canada*, 27 CAN. J.L. & SOC. 209 (2012); Audrey Macklin, *Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?*, 37 MCGILL L.J. 681 (1992).

worker;” and (iii) the “[a]bility of CIC to prevent employers who do not fulfill the terms of the offer of employment from hiring TFWs for two years.”<sup>219</sup>

### C. *United States*

Durkin discusses the Summer Work Travel (SWT) program, a program designed for foreign students to travel and work in the United States over their summer holidays.<sup>220</sup> This program came under scrutiny when foreign students employed by Hershey’s led a publicized protest against their employer, after the company paid them between U.S. \$1.00–\$3.50 per hour in “grueling” conditions.<sup>221</sup> In perhaps more extreme examples, SWT students were forced to work in strip clubs and were not provided adequate living arrangements.<sup>222</sup> The focal point of Durkin’s article is the importance of regulation and enforcement in SWT-like initiatives, because a lack of regulations and enforcement can result in shortcomings and violations.<sup>223</sup> There is a clear lack of incentive to police and enforce such policies, both from the perspective of employers and of program sponsors, and indeed to regulate the rights and privileges of the foreign students.

Durkin proposes a two-stage regulatory framework to deal with matters such as this: first, regulations that provide greater security over wages for SWT students should be implemented; and second, control over policing such regulations should be transferred from the Department of State to the Department of Labor (DOL).<sup>224</sup> The first point, in an ideal sense, is an absolute necessity for safeguarding foreign workers. Without deductions, the SWT students working at Hershey’s were making at or above minimum wage, but unchecked and unregulated deductions from these salaries for necessities, such as housing and other living expenses, resulted in two unfortunate circumstances: extremely low pay after deductions and living arrangements that fell far below the standard for the amount deducted.<sup>225</sup>

Perhaps more interestingly, the second recommendation to transfer authority and control over policing of the proposed regulations to the DOL

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<sup>219</sup> *Entry of Agricultural Workers in Canada*, *supra* note 213.

<sup>220</sup> Nicole Durkin, *All Work and Not Enough Pay: Proposing a New Statutory and Regulatory Framework to Curb Employer Abuse of the Summer Work Travel Program*, 81 GEO. WASH. L. REV. 1294, 1296 (2013).

<sup>221</sup> *Id.* This payment was calculated after improper deductions for housing and living expenses. *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *See id.* at 1305.

<sup>224</sup> *Id.* at 1313.

<sup>225</sup> *Id.* at 1314.

addresses the issue of internal capacity building in the United States for foreign workers. There are three proposed elements of inspection to be carried out by the DOL: first, employers must attest to the DOL that they comply with the regulations; second, the DOL must periodically conduct compliance audits; and, finally, the employers and the sponsors must be penalized for any violations to the proposed regulations.<sup>226</sup>

Durkin recognizes the socio-economic and political importance of foreign workers,<sup>227</sup> and while her analysis is limited to the example of the Hershey's SWT students, her recommendations are useful considerations to be taken into account by any host state in the context of any level of migrant worker to ensure legitimacy and international recognition of standards.

### CONCLUDING REMARKS

The entities in the Global Migration Group, such as the IOM (which deals primarily with economic migration), function by implementing projects and advising governments on policy and the technical aspects of migration<sup>228</sup>—this is not a legal function but facilitative one. The role of these entities is rather limited when looking at “migrant workers.” In contrast, the WTO, PTAs, and bilateral migration agreement play a more important role.

As for the PTAs, it is clear from recent examples that there is hesitancy to directly address the entry of foreign service providers through the provisions in PTAs. However, it is encouraging that PTAs do comprehensively address the rights available to foreign service providers. One point of focus regarding PTAs is the disparity between what countries can expect during negotiations as a result of their relative bargaining power. PTAs can provide a strong framework to allow and facilitate future negotiations regarding market entry for foreign service providers.<sup>229</sup>

The provisions in the GATS Mode 4 exclusively facilitate the temporary movement of service suppliers across borders.<sup>230</sup> First, GATS Mode 4 does not

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<sup>226</sup> *Id.* at 1316.

<sup>227</sup> *See id.* at 1324–25.

<sup>228</sup> Koh, *supra* note 25, at 197–98.

<sup>229</sup> *See* Thomas Cottier, *The Challenge of Regionalization and Preferential Relations in World Trade Law and Policy*, 1 EUR. FOREIGN AFF. REV. 149, 157–58 (1996).

<sup>230</sup> Chantal Thomas, *Undocumented Migrant Workers in a Fragmented International Order*, 25 MD. J. INT'L L. 187, 197–98 (2010). In addition to the commitments undertaken in the GATS schedule pertaining to the temporary entry of natural persons (Mode 4), the following additional obligation is assumed with respect to insurance: host country Members shall provide temporary visa and associated work permits, where required, to

address manufacturing or agriculture, excluding the very sectors that most commonly feature undocumented workers.<sup>231</sup> Second, this exclusion within Mode 4 is accompanied by a *de facto* focus of the GATS, in its entire orientation, on high-skilled service sectors such as accounting and financial services.<sup>232</sup> Third, the Annex to the GATS covering MONP does not provide any authorization for a worker to enter a country but stipulates only certain constraints (such as non-discrimination and national treatment) once that authorized worker enters.<sup>233</sup>

As a result, WTO GATS Mode 4 provides a framework but “lacks the regulatory mandate to address the difficult issues associated with labour migration, such as overstays, brain drain, and migrant worker exploitation.”<sup>234</sup> The GATS is seen as a tool to “promote orderly and legal labor migration.”<sup>235</sup> Professor Brode concludes that “the GATS Mode 4 does not appear to be the appropriate model” for the establishment of an international migration regime that is “morally permissible and politically possible as well as likely to be effective.”<sup>236</sup> The WTO is currently negotiating GATS Mode 4 schedules with limited success until the Nairobi Ministerial of December 2015.<sup>237</sup>

Forecasted gains from a three percent increase or full liberalization of temporary labor migration are relative to continued trade in goods

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professional level personnel employed by the foreign insurance services supplier’s home and third country offices in a timely manner for the purpose of entering the country and providing short- and mid-term assistance to its host country insurance services operations. *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> Panizzon, *Migration and Trade*, *supra* note 189, at 115. For further analysis regarding shortcomings of GATS, see also Panizzon, *Temporary Movement*, *supra* note 20, at 132–34.

<sup>235</sup> Philip Martin, Migrants in the Global Labor Market, Paper Prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration 2 (2005), [http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy\\_and\\_research/gcim/tp/TP1.pdf](http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy_and_research/gcim/tp/TP1.pdf). Furthermore, “despite the migration process . . . being built around a ‘triangular relationship among a person, a sending state, and a receiving state,’ on the human rights protection issue, GATS Mode 4, PTAs, and bilateral migration agreements all are largely deficient.” Panizzon, *Temporary Movement*, *supra* note 20, at 137 (quoting Alexander T. Aleinikoff, *International Legal Norms and Migration: A Report*, in *MIGRATION AND INTERNATIONAL LEGAL NORMS 2* (Alexander Aleinikoff & Vincent Chetail, eds., 2003)). In neither template are market access rights offered directly to the individual migrant worker. *Id.*

<sup>236</sup> Brode, *supra* note 13, at 7–8, 31.

<sup>237</sup> General Council Decision, *Recommendations of the Special Session of the Council for Trade in Services, Doha Work Programme, Annex C*, WT/L/579 (adopted Aug. 1, 2004). “Members shall aim to achieve progressively higher levels of liberalization with no a priori exclusion of any service sector or mode of supply and shall give special attention to sectors and modes of supply of export interest to developing countries. Members note the interest of developing countries, as well as other Members, in Mode 4.” *Id.*

liberalization,<sup>238</sup> which helps to understand the importance of some WTO Member' proposals. Among developing countries' proposals and statements on Mode 4, India's proposal stands out (and it has been replicated by Colombia, Pakistan, and Brazil).<sup>239</sup> India's proposal introduces the Service Provider Visa, also called the GATS visa,<sup>240</sup> which integrates the ILO ISCO-88 into W/120 Services Sectoral Classification List to expand low-skilled categories.<sup>241</sup> Fourteen developing countries have initiatives similar to India's proposal (Argentina, Bolivia, Chile, The People's Republic of China, Colombia, Dominican Republic, Egypt, Guatemala, India, Mexico, Pakistan, Peru, Philippines, and Thailand).<sup>242</sup> The proposals for expansion of the scope of GATS Mode 4 take the following forms: creation of a GATS visa; expansion of the concept of service supplier; and expansion of the breadth and depth of commitments by member states. For example, Ryan Walters has suggested that the United States should champion the introduction and expansion of GATS visas that would provide multilateral trans-border access to visa-bearers.<sup>243</sup> The benefits of such visas would include the expansion of the number and type of workers who possess the ability to undertake legal movements in response to trans-border stimuli and the streamlining of administrative barriers to entry. An alternate proposal would more closely link "trade and . . . labor" concerns by offering enhanced labor liberalization in return for recognition and enforcement of minimum labor standards.

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<sup>238</sup> See generally L. Alan Winters, *The Economic Implications of Liberalising Mode 4 Trade*, in MOVING PEOPLE TO DELIVER SERVICES 59, 59 (Aaditya Mattoo & Antonia Carzaniga, eds., 2003); Lant Pritchett, *The Future of Migration: Irresistible Forces meet Immovable Ideas* 26, Paper Presented at the University of Yale Conference: The Future of Globalization: Explorations in Light of the Recent Turbulence (Oct. 10, 2003), <http://www.ycsg.yale.edu/activities/files/Pritchett.pdf>.

<sup>239</sup> L. Alan Winters, *The Temporary Movement of Workers to Provide Services (GATS Mode 4)*, in A HANDBOOK IN INTERNATIONAL TRADE IN SERVICES 480, 517 (Aaditya Mattoo, et al, eds., 2008); see Richard Self & B.K. Zutshi, *Temporary Entry of Natural Persons as Service Providers: Issues and Challenges in Further Liberalization Under the Current GATS Negotiations*, Joint WTO-World Bank Symposium on Movement of Natural Persons (Mode 4) Under the GATS (Apr. 2002), [https://www.wto.org/english/tratop\\_e/serv\\_e/symp\\_mov\\_natur\\_perso\\_april02\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/symp_mov_natur_perso_april02_e.htm); see also Special Session of the Council for Trade in Services, *Communication from Argentina, Bolivia, Chile, China, Colombia, Dominican Republic, Egypt, Guatemala, India, Mexico, Pakistan, Peru, Philippines, and Thailand: Proposed Liberalization of Mode 4 Under the GATS Negotiations*, WTO Doc. TN/S/W/14, (July 3, 2003) [hereinafter *Communication from Argentina et al.*]; Rupa Chanda & Sasidaran G., *GATS and Developments in India's Service Sector*, in INDIA'S LIBERALISATION EXPERIENCE: HOSTAGE TO WTO? (Suparna Karmakar, Rajiv Kumar, Bibek Debroy, eds., 2007).

<sup>240</sup> *Id.*

<sup>241</sup> See Special Session of the Council for Trade in Services, *Communication from India: Proposed Liberalisation of Movement of Professionals Under General Agreement on Trade in Services (GATS)*, WTO Doc. S/CSS/W/12 (Nov. 24, 2000).

<sup>242</sup> *Communication from Argentina et al.*, *supra* note 239.

<sup>243</sup> Bravo, *supra* note 10, at 591.

The TPP, as a harmonization of the practices of three major countries, represents progress and development in international economic migration. While the TPP itself is not a driving instrument that changes existing trends in temporary migration, its adherence to the trends under the existing PTAs examined here shows the significance of the mechanisms and procedures that have been formulated through years of PTA negotiations and drafting. As such, while the TPP itself is a modest development in the area of international economic migration, it is a meaningful one that suggests that, despite the many shortcomings of PTAs, they may still be the best legal instruments for the future development of international economic migration regulation.

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