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Standing together apart: Bilateral  
migration agreements and the  
temporary movement of persons  
under “mode 4” of GATS

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## **Abstract**

This paper analyses why the temporary movement of service providers, as liberalized by the WTO in the so-called mode 4 of GATS, lacks potential for managing labor migration. We find instead that international economic migration is increasingly steered by the vertical interplay of migration-related agreements at three levels: the multilateral opening of labor markets in GATS mode 4 and its replicas at regional level, the economic partnership agreements (EPA), the EU mobility partnerships and the bilateral migration management agreements. The latter have moved from the “old” guestworker agreements to second generation templates, which present the most comprehensive regulation of migration currently available in treaty law. This complex treaty landscape on migration is split horizontally along a skill divide: non-trade, bilateral migration agreements are channels for recruiting low-skilled migrants, while trade agreements, including GATS mode 4 tend to be high-skill biased.

**Key words** Skilled migration, GATS mode 4, bilateral agreements, economic partnership agreements

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## Introduction

Migration is one of the key distributional issues in globalization driven by the unequal distribution of labor and capital as factors of production around the globe. Economic globalization and with it, deepening wage differentials between countries, has led to more irregular entries and unauthorized overstays, but also to intensified skill flows. At the international level (but with the exception of the global refugee regime) there is no adequate normative or institutional response to the increasingly diverse and accelerating migratory flows. While Betts (2009) and Koslowski (2008) argued that with the exception of the UNHCR focussing almost exclusively on refugees and IDPs, there is no UN agency nor even a formal international cooperation mechanism in place to manage migration, a fact which Hollifield (1998) described as the “missing regime” for international migration, others have observed more of a mismatch between the law and institutions for managing economic migration, a dichotomy which Aleinikoff (2007) termed “substance without architecture”. The Global Commission on International Migration in its Final Report of 2005 similarly, described international responsibility for managing migration as “diffuse”, in the sense that responsibility is fragmented horizontally among different UN agencies and organizations each managing one particular aspect of migration, such as refugee protection (UNHCR) the rights of migrants (UNHCHR) and labor standards (ILO) (GCIM 2005: 63). An important body of soft law is emerging for managing economic migration, but what is missing are global institutions for implementing and enforcing the principles for actions and recommendations of the Global Commission on International Migration, the common understandings of the International Agenda for Migration Management (IAMM), but also the resolutions of the UN High Level Dialogue on Migration and Development. What unites these soft law initiatives is the attempt to consolidate national and regional best practices on recruiting, admitting, integrating and readmitting migrant workers. Yet, none of these short-lived efforts has paved the way for a new international organization managing all aspects of migration, nor for that matter have they succeeded in formulating an international obligation to liberalize temporary labor migration.

Only a handful of international treaties govern migration. Those which do, for the most part, address issue areas at the fringes of economic migration, namely refugee protection<sup>1</sup> standardization of air travel procedures by the International Civil Aviation Organization (ICAO)<sup>2</sup> or more recently in two Protocols to the United Nations Convention against Transnational Organized Crime of 15 November 2001, the trafficking in persons and the smuggling of migrants by land, air and sea.<sup>3</sup> On the temporary migration for employment there are only two multilateral treaties, the Convention on

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<sup>1</sup> Geneva Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, 4 October 1967, 606 U.N.T.S. 267, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.

<sup>2</sup> International Civil Aviation Organization, available at: <http://www.icao.int/>.

<sup>3</sup> United Nations Convention against Transnational Organized Crime of 15 November 2001, UN doc. A/RES/55/25 (2001), Annexes I, II and III.

Migrant Workers' Human Rights of 18 November 1990, which however, has not been ratified by a single industrialized country so far<sup>4</sup> and the WTO's General Agreement on Trade in Services (GATS). The role of the WTO among these fragmented international institutions tasked with managing labor migration remains little acknowledged, despite Mode 4 of the GATS being the only collective effort at liberalizing skill flows at the multilateral level.

The paper first situates the temporary movement of service providers liberalized in GATS mode 4 within the context of international institution and norms for managing migration. Thereafter it evaluates the advantages and shortcomings of GATS mode 4 and focusses specifically on the question of why the mode 4 commitments offered by most WTO Members have so far failed to deliver commitments which are "meaningful" to developing and least developed countries. It identifies regulatory deficiencies in the scheduling structure of GATS commitments overall, as the main reason for the high-skill bias of liberalizing labor mobility in trade agreements. Against the backdrop of France's pacts on concerted migration management and Spain's agreements on cooperation, the paper next portrays the renaissance of bilateral migration agreements in Europe, as turnaround from the high skill-biased recruitment schemes of recent immigration law reforms. We argue that migrant source countries themselves prompted the return to the unpopular quota-based recruitment schemes in the "second generation" bilateral agreements, which were concluded in the first decade of the new millenium. These agreements aimed to correct, *ex post*, the high skill-bias in migrant recruitment which had been propagated by national immigration law reforms in Europe, which as of the 1990s had sought to shift the ratio between family reunification and economic migration. The paper argues that the market-based logic of trade agreements, at the forefront the multilateral GATS mode 4 was potentially co-responsible for splitting the treaty landscape of migration along this market-based divide of supply and demand. We also find that despite fragmenting the emerging treaty law of migration, the role of the most-favored nation (MFN) clause of GATS in multilateralizing labor market openings is not to be underestimated. It has shifted the burden away from the classic corridors of migration, such as the West Africa-Europe channels towards a more equal distribution of the costs and benefits of economic migration among source and destination countries alike. The paper closes by observing that the "global approach" to migration today may be rather defined by the intensifying interplay of horizontal and vertical layers among treaties managing migration than by the topical issue linkages, such as trade, migration, development and security.

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<sup>4</sup> International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families of 18 December 1990 UN doc. A/RES/45/158 (1990), ratified so far by Azerbaijan, Belize, Bolivia, Bosnia and Herzegovina, Cape Verde, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Mali, Mexico, Morocco, Philippines, Senegal, Seychelles, Sri Lanka, Tajikistan, Uganda and Uruguay.

## **Standing apart: The underestimated role of GATS mode 4 for managing temporary labor migration**

It often comes as a surprise that the WTO, which at first glance liberalizes trade in goods and services also strives to liberalize factor movement. Under the auspices of the General Agreement on Trade in Services (GATS) WTO Members are required to open their services markets (and to a more limited extent their labor markets), by entering commitments in Mode 4. Mode 4 is the technical term GATS uses to define the temporary movement of non-nationals, who move to the territory of another WTO Member to deliver a service. Even if national immigration authorities often remain unaware of this channel for labor migration and despite the fact that Uruguay Round negotiators may have kept the modalities of this type of labor migration purposefully complex, ambiguously defined and hidden away from immigration authorities by placing it under “services trade”, its contribution to managing migration globally is not to be underestimated. GATS mode 4, has shifted as Betts and Nicolaidis (2009) argue, the paradigm of global migration governance, away from the border-based orientation of immigration authorities towards a market-based logic of offer and demand.

Questions remain: does the type of labor migration liberalized in GATS mode 4, deliver to development? Does it facilitate remittances transfer, reduce migratory root causes, prevent skill depletion, allow for circular migration, mobilize the Diaspora to invest productively into their source countries, stimulate the emergence of transnational business networks, encourage the private sector, namely foreign investors to skill upgrade the local workforce and enable intra-corporate labor mobility? Does it address host country’s concerns with migration, such as clandestine entry, overstaying workers? Does it encourage assisted and voluntary returns, facilitate readmission and secure the cooperation by source or transit countries in readmission procedures? The answer is “to a certain extent”.

### ***Relationship between trade and labor migration***

Labor is not a good, which can be “traded” in the same sense as exports and imports of goods. Adam Smith in 1776 already made this observation by stating that: The human being, “of all sorts of luggage, [is] the most difficult to be transported”.<sup>5</sup> Trade has grown more quickly than migratory flows have expanded. Liberalized trade flows have lowered transportation and communication costs to the effect that trade is indirectly responsible for the rise in migratory flows around the world in the last twenty years, even if, as the World Bank has said, there is less movement still than at the end of the

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<sup>5</sup> Smith, Adam, *An Inquiry into the Nature and Causes of the Wealth of Nations by 1776, Book 1, Chapter 8, of the Wages of Labour*: “Tenpence may be reckoned its price in Edinburgh. At a few miles distance it falls to eightpence, the usual price of common labour through the greater part of the low country of Scotland, where it varies a good deal less than in England. After all that has been said of the levity and inconstancy of human nature, it appears evidently from experience that a *man is of all sorts of luggage the most difficult to be transported*” (highlight added).

19<sup>th</sup> century. In OECD countries alone, the foreign-born population has grown by about 18% since 2000, even if 20-50% of immigrants leave within five years of arriving into a country (OECD 2008). Today, not only economies, but also migration has “globalized” in the sense that there is no country in the world today remaining unaffected by migration (Castles and Miller 2003).

Migration has become one of the key distributional issues in globalization, driven by the asymmetric allocation of labor and capital as factors of production around the globe (Lucas 2008). According to classic the Heckscher-Ohlin model, labor is abundant in the South while it is scarce in the North where capital is abundant. With economic globalization, as Markusen and Venables (1998) have demonstrated, labor has become increasingly mobile so that migration no longer substitutes trade, but rather complements trade, at least in the short run. Once wage differentials among nations equalize, it is to be expected according to the migration hump model of Philipp Martin that trade will eventually substitute for the mobility of production factors labor and capital (Martin and Taylor 1996). For the time being, however, decreasing transportation and communication costs migration have led to an increase in human capital mobility (Lucas 2008). Global demand is not equal for all types of labor; while it is acute for the “best and the brightest, the same is not true for low-skill labor, for which there is a buoyant offer, but less demand (Delimatsis 2009). This divide between high and low-skill labor makes it difficult to regulate or liberalize migration in a global trading system, such as the WTO’s subscription to the principles of comparative advantage and reciprocal trade liberalization. Labour migration is “more of a one-way street than is trade” (Hatton and Williamson 2005).

The GATS treats the temporary movement of service supplying persons as “trade in services” rather than as one form of labor migration. In Art. 1 para. 2 lit. d of GATS, the temporary movement of natural persons figures as the fourth mode of service supply, therefore the label “GATS Mode 4”. The GATS liberalizes this temporary movement of service supplying persons to the extent to which WTO Members have made binding commitments in Mode 4. Paragraph 3 of the Annex on the Temporary Movement of Natural Persons, which forms an integral part of GATS and contains some important definitions on what the scope of this movement is, encourages commitments within the entire spectrum of skills, ranging from lower skills such as installers and construction workers, to highly skilled, engineers, investment bankers etc. Paragraph 1 of the Annex also defines that service suppliers are non-nationals, who *supply a service*, in the territory of another WTO Member, who can be either self-employed or employees of a foreign employer. Migrant workers in agriculture or some types of manufacturing do not fall under the WTO/GATS regime.

#### **Shortcomings of GATS mode 4**

The systemic bias towards market opening fails to empower the GATS to require the labor sending country to share in the responsibility for the timely and orderly return of the service providers sent abroad (Ruhs 2009: 360-63). This mismatch between labor market opening and lack of regulating migration diminishes the “comfort” for typical labor recipient countries to offer more mode 4 commitments for low-skill workers in the first place (Broude 2007). The Annex to GATS on TMNP clearly exempts GATS from taking on a global responsibility for economic migration: managing border controls or liberalizing access to those foreigners seeking employment remains at the discretion of national immigration authorities, while harmonizing visa policies is left to regional trade agreements rather than GATS (Bast 2008). Due to such technicalities and definitional shortcomings, which will be discussed in the following section, domestic immigration authorities have often misunderstood GATS mode 4, so that in consequence GATS mode 4 remains an underused channel for liberalizing temporary mobility.

### ***Few Openings for Low-Skilled***

Levels of liberalisation obtained for Mode 4 of the GATS are quite low and Mode 4 flows stand at less than 5% of world services trade (Magdeleine and Maurer 2008), compared to 55–60% of worldwide services delivered by mode 3 (commercial presence), 25–30% by mode 1 (cross-border supply) and 10–15% by mode 2 (consumption abroad) (Maurer and Chauvet 2002). Currently, the scheduling structure of GATS commitments is too technical, the scope of application ambiguous, and the limitations and exemptions therein insufficiently defined, for GATS mode 4 to be applied on a broader scale. Economically speaking, the low levels of GATS mode 4 are a paradox. The demand for non-outsourcable services by the ageing populations in Europe and the US will come to rely on migrant labour in the future<sup>6</sup> and also since welfare gains from raising the quota of temporary migrant workers by 3% in each country have been predicted to significantly exceed those accruing from completing the liberalization of cross-border trade in goods and services (Winters et al. 2003: 1137-1162; World Bank, *Global Economic Prospects* 2006).<sup>7</sup>

Those few mode 4 commitments that were made in the Uruguay Round remain biased towards the temporary migration of the highly-skilled, with only 17% of all WTO members’ mode 4 commitments in low-skills.<sup>8</sup> From the 70% commitments in high-skilled services occupations, 25% target executives, managers and specialists, thus persons in high-ranking, high-income positions and

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<sup>6</sup> Commission of the European Communities, COM(2005) 330 final, Communication from the Commission to the Council and the European Parliament Common Actions for Growth and Employment: The Community Lisbon Programme, Brussels, 20.7.2005.

<sup>7</sup> If temporary workers admitted for work in developed economies were increased by 3%, gains forecasted by Winters et al., (2003) were put at \$156 billion while the World Bank in 2006 estimated gains in the height of \$356 billion; Pritchett (2006: 32) forecasts a \$ 39,833 billion in welfare gains from full liberalization of labor migration.

<sup>8</sup> IOM, GATS Mode 4, <http://www.iom.int/jahia/Jahia/about-migration/developing-migration-policy/migration-trade/GATS-mode-4/cache/offonce;jsessionid=E8072373D2C72128A427F6C60FF35B8F.worker01>.

43% intra-corporate transferees (Mamdouh 2008), the latter category targeting a “self-standing” transnational movement of persons, because it has channelled within the private sector, i.e. multinational companies (Sassen 1998). So far mode 4 has failed to deliver development dividends to migrant sending countries. Developing countries and LDCs have taken issue with this fact in the Doha Round. Why is that so? Why would a labor-receiving WTO Member prefer to conclude bilateral agreements on migration management, as France and Spain have done towards North and West Africa and Latin America than to go multilateral and liberalize the temporary movement of workers in GATS? Four reasons can be put forth for why the multilateral liberalization of temporary labor mobility in the WTO has failed to cater to countries facing pools of surplus low-skilled labor.

Firstly, the liberalization of the temporary movement of persons in GATS works via commitments, which WTO Members enter into a Schedule of commitments and which are binding and thus difficult to modify when labor market cyclicity requires adjustments. Commitments thus provide for the actual level of access to another WTO Member’s services markets and determine to which degree that foreign national will be treated equally or more favourably to a domestic worker in services. A “market access” commitment indicates the type of services sectors a Member is opening to foreign competition (banks, insurance, tourism, construction) and how much market access it is offering. Pursuant to Art. XVI of GATS, a market access commitment can be conditioned on authorization requirements or quantitative restrictions (Delimtsis and Molinuevo 2008). A “national treatment” commitment defines how equally a *foreign* service supplier will be treated in comparison to a *national* provider of the “same” services.

Secondly, the GATS lacks an emergency safeguard mechanism, which would allow WTO Members to temporarily close markets to unexpected surges of service providing persons. Without this safety valve to adjust the supply of low-skilled workers to the cyclical nature of labor market demands, governments find it difficult to gather the political support necessary for offering commitments in the first place (Crosby 2009). Even if GATS allows for the flexibility to steer the offer of migrant labor, by inscribing wage and working conditions parity requirements to a national treatment provision for instance, safeguards allow more flexibility to adjust to labor market demands, than qualifications to GATS commitments would do. The possibility of temporarily closing markets to unexpected surges of migrant labour is a key factor for governments to gather the political support necessary for liberalizing the cross-border movement of persons in the first place.<sup>9</sup> For instance, Art. 10 of the bilateral agreement on free movement between Switzerland and the EU is such a safeguard,

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<sup>9</sup> Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons - Final Act - Joint Declarations, OJ L 114, 30.4.2002, p. 6–72. The safeguard can be invoked if the number of new residency permits for employees and self-employed during a year exceeds by the average of the last three years by at least 10%. The new quota must be lie at least 5% above the average of the last three years and the measure can be upheld for a maximum of two years, after which the situation is evaluated . The safeguard can be invoked a consecutive, second time again fro a maximum period of two years.



which Switzerland, but not the EU can invoke, if there is a sudden influx of migrant labor from the EU. Without this safety valve to adjust the supply in low-skilled workers to the cyclical nature of demands, WTO Members lack the comfort that temporary migrants, will not come to burden their social welfare in an economic downturn. There is a residual mandate from the Uruguay Round in Art. X GATS for WTO members to negotiate such a safeguard, but industrialized countries have so far refused to concretize this mission (Panizzon forthcoming).

Thirdly, GATS grants the flexibility not to open certain services sectors or to limit, qualify and condition such access. Labor-receiving WTO Members have used this in-built flexibility to protect their domestic workforce against competition from foreign workers and have in consequence diminished or neutralized any comparative advantage of workers from developing countries. The *de facto* bias of GATS mode 4 commitments towards the mobility of the high-skilled and of the free trade agreements replicating this model, have often been held co-responsible for brain drain in developing and least developed countries (Self and Zutschi 2003).

Finally, while GATS leaves the discretion of immigration authorities mostly untouched to apply visa requirements selectively, the most-favored nation obligation of GATS prohibits WTO Members from preferentially liberalizing the access to their labor market only towards select WTO Members. Instead, the MFN requires that WTO Members generalize their commitments “immediately and unconditionally” to all 154 WTO Members. What’s more, WTO Members are only willing to bind in multilateral GATS commitments a high-skilled labor mobility, which is driven by multinational companies (Castles 2004). For recruiting low-skilled foreign labor, WTO Members seem to rely rather on bilateral non-trade, migration agreements. It is no coincidence that legal toolkits for steering labor migration evolve in the *parallel tracks* of trade and non-trade agreements.

### ***Lack of a regulatory mandate to manage (irregular) migration***

The GATS falls short of offering tangible answers to the regulatory challenges posed by the risks associated with labor migration, be these overstaying workers, levels of employability, but also skill depletion and brain waste (Amin and Aaditya 2005). This is hardly surprising, since generally speaking, the weak regulation of migratory flows in the international framework is the rule rather than the exception. The GATS scheduling structure is institutionally inapt for regulating the risks associated with migration, be these overstaying workers, levels of employability but also skill depletion and brain waste. This is because GATS uses a closed list of categories, divided into “market access”, “national treatment” and “additional” commitments, which are biased towards liberalizing and against regulating markets (Chanda 2008). The GATS commitments allow the scheduling of safety valves to protect the domestic workforce against the risk of wage downward pressure and job displacement that may come through competition by foreign service-providers. Inversely, there is no regulatory space in GATS commitments to mitigate the risk of skill depletion to migrant source countries or to

enforce regulatory obligations upon the source country which would require these to ensure the timely return of the service providers at the end of their contract (Chanda 2009).

The flexibility to condition market access and national treatment works only one-way in terms of regulation: while the scheduling structure of GATS commitments grants the right to limit market access, as well as national treatment and additional commitments, the country “benefiting” from the market access commitment of another WTO Member may not be required to take on some positive obligations. The consequence of GATS lacking a regulatory mandate is that destination countries of migrants prefer to liberalize in the high-skill level of occupations, where the risk of unemployment is lower and the potential burden to that country’s social welfare system lighter.

When it comes to liberalizing low-skilled labor migration, where the risks are higher, destination countries prefer to conclude bilateral migration agreements, even if such preferential schemes run the risk of being inconsistent with the MFN obligation in GATS. Thus, because the GATS lacks a regulatory mandate to manage migration, GATS mode 4 indirectly exacerbates a skill divide in temporary labor migration, whereby high-skill labor is liberalized multilaterally while low-skill labor if liberalized at all, remains a matter of bilateral migration agreements, which conditionally link labor market admissions to readmissions and irregular migration. Such structural shortcomings hinder GATS from contributing more comprehensively to “managing” migration. For the time being, still more persons seem to be moving within the channels for lawful migration outside the GATS (defined as “unbound” openings in the GATS), than under mode 4. Nonetheless, when considering that only half or less of bilateral migration agreements do in fact open labour markets to foreign workers (Abella 2006), discounting the potentially unrecorded mode 4 flows (Magdeleine and Maurer 2008). GATS mode 4 is more promising than at first sight.

### **Advantages of Multilateral Liberalization: A ‘Corrective’ to the Classic Corridors of Migration?**

Despite its many systemic shortcomings, institutional limitations and ambiguities, mode 4 of GATS is the only collective action responses to the “missing regime” in the area of labour migration (Hollified2002). Even if quite technical in its application and systemically unfit for regulating, GATS mode 4 is the single international regime to establish a binding obligation on WTO Members to temporarily admit non-nationals involved in the cross-border supply of services. GATS has been credited for “*de facto* transnationalization of immigration policy” (Sassen 1998 : 6).

With the exception of the *non-refoulement* duty to admit those, whose life and health are threatened in their home country,<sup>10</sup> the WTO Members’ commitments in the so-called mode 4 of

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<sup>10</sup> Art. 33:1 of the Geneva Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, 4 October 1967, 606 U.N.T.S. 267 and Art. 3:1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85.

the GATS, are the only binding international obligation in place to limit national sovereignty over the admission of foreigners (Koslowski 2008). The MFN clause of GATS mode 4 by way of disciplining the preferential labor market access quotas for service supplying persons has had a beneficial impact on bilateral agreements. Trade agreements, including mode 4 of GATS have advantages over bilateral migration agreements as migration steering tools. Firstly, bilateral migration agreements formalize or deepen classic corridors of labor migration with costs to traditional source and transit countries (Ruhs 2009). In contrast, the GATS (through the MFN) multilateralizes the costs of migration and shifts the burden away from typical transit countries as centers of gravity to all WTO Members equally. Thus, the sharing of the costs of migration occurs *ex ante* and is more evenly spread about the different destination countries of migrants, because it is multilaterally distributed among all WTO Members. In addition, the multilateralization of market access quotas for service providing workers prevents the unhealthy race to the bottom on readmission and race to top over labor migration quotas, which has become an unfortunate defining feature of bilateral migration agreements. Secondly, the advantage of trade agreements, including GATS is that trade-offs can be made on a broader set of issues, ranging from agriculture over services to intellectual property protection. In bilateral migration agreements, on the other hand, the *quid pro quo*s for border securitization and cooperation on readmission procedures are limited to visa relaxation, labour market openings and development aid.

### **Bilateral, non-Trade Migration Agreements: Past and Present**

Steering temporary migration has always been an important migration policy goal, but tools have varied in success. “Old” guestworker or seasonal migrant worker schemes in the 1950-1980s for instance, have failed to manage the risk of temporary migration, turning into permanent migration (Castles 2006). During the same time period, demographic pressure on productivity in industrialized countries increased demand for temporary migrant labor at all skill levels. In 2006, temporary migration into OECD countries reached 2.5 million new entrants (4 million new immigrants entered on a permanent basis), an increase of 5% from 2005 even if there is still less global movement than at the end of 19th century (World Bank 2008). Irregular migration also increased with 5 million of Europe’s 56.1 million migrants in 2000 having an irregular status (10%) (GCIM 2005: 4).

In reaction to these migratory challenges, policy attention has re-focused on agreements as management tools. OECD countries most affected by irregular flows, such as Spain, France and Italy reformulated their bilateral agreements on migration. A second generation of bilateral migration management agreements thus surfaced. In the same time period, templates for trade agreements too, moved from first generation to second generation. With the advent of the WTO in 1994, second generation trade agreements include the temporary movement of persons, albeit limited to service suppliers or high skilled professionals on their menu.

## From one-dimensional to composite migration partnership agreements

In the past, no one single treaty type was uniquely devoted to liberalizing labor migration. The one exception were perhaps the guestworker agreements predominantly used by Switzerland, France and Germany to recruit seasonal agricultural and construction work from Spain, Portugal, Italy, Croatia, France and Greece. Similar such large-scale guestworker recruitment schemes were in place in the Americas, such as the Bracero programme of the US towards Mexico, stopped in 1964 and transformed into maquiladores, which are assembly plants in Mexican border cities (Martin et al. 2006). The Canada Caribbean and Mexico Seasonal Agricultural Workers Programme (CCMSAWP), ongoing since 1966<sup>11</sup> is a classic and at the same time, the worldwide's largest, bilateral temporary labor recruitment scheme. In 2006 7,806 Mexican and 7,770 Caribbeans moved for work to Canada (Basok 2007) and it has been recently extended to Guatemala, Honduras, and China. In addition to such guestworker agreements, there were other provisions facilitating cross-border movement of workers which were, however scattered about in a variety of different agreements each addressing another, specific aspect of migration.

France's agreements exemplify the trend from fragmentation to coherence in the emerging treaty framework for managing migration. Between the 1950s and 1970s France not only had guestworker agreements, but also agreements labelled "free movement", which, however, contrary to their name, (re-)introduced, instead of eliminated visas towards persons from former colonies. Nonetheless these agreements punctually liberalized the cross-border movement for specific categories of persons: for either technical and teaching staff (education) or judicial and military personnel. At first, such movements occurred below the actual labor market admission threshold: "dispatched" scientists or technicians were paid by their respective country's government and scientists or trainees of developing country were funded by grants or stipends offered by the host country. Civil servants, students and professors from former colonies could apply for training internships in France. Conversely, French civil servants, teachers and professors, scientific staff and military were deployed to former colonies for "secondments", to provide the developing country's government with technical support in delivery of government, education and military services.<sup>12</sup> Neither host nor source country trainees, scientists or other exchanged personnel were allowed to take up remunerated activities in the host, respectively source country. Later, visas were introduced for persons from recently independent countries via agreements on "movement of persons".<sup>13</sup>

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<sup>11</sup> Human Resources and Social Development Canada, available at: <http://www.hrsdc.gc.ca/en/epb/lmd/fw/seasagri.shtml>, last accessed 20 September 2007; see also Service Canada, available at: <http://www1.servicecanada.gc.ca/en/on/epb/agri/termination.shtml>, last accessed 20 September 2007.

<sup>12</sup> France and Senegal, Convention concerning personnel assistance provided by the French Republic for the operation of the public services of the Republic of Senegal (with annexes), signed at Paris on 29 March 1974, UNTS No. 16173.

<sup>13</sup> France and Senegal, Agreement on the movement of persons (with exchange of letters), signed at Paris on 29

Finally, treaties on establishment usually had a free movement regime between former colonies and motherland. Lest they be accused of relinquishing their developmental responsibility to their former colonies, bilateral agreements on air transport, fishery, development cooperation incidentally contained clauses offering traineeships (*stagiaires*), student and young professional exchanges with a view to contributing to the human capital development of former colonies. While mobility for economic development was not the primary aim of these non-migration agreements of the mid-1970s, exchanges and traineeships were at least a subsidiary rationale. Their effect was to offset, at least for certain categories of persons, the prohibitive effects of the recently raised border barriers (visa, work permits).

With rise of irregular migratory flows in the 1980s, a new set of agreements emerged, which often were interlinked (such as visa and readmission) or else applied as “clusters” to migrant source countries. Agreements “liberalizing” the movement of economically active persons, were often conditionally linked to “regulatory” agreements, controlling and preventing irregular flows (Trauner and Kruse 2008). Since the late 1990s there have been attempts at making these varied strands of bilaterally organized migration management more coherent. Formerly fragmented, but tactically interlinked treaty types (readmission, visa relaxation) are now integrated (to save administrative, operational, technical costs) into a single agreement. The new flagship migration agreements are spearheaded by France and Spain and to a lesser extent by Italy and Switzerland. They all strive to embody a ‘partnership’ approach to migration, where responsibility for migratory flows, including irregular migration and its negative effects, such as human trafficking and smuggling is shared between the source, transit and destination countries. In terms of issue linkage, these new generation agreements are more comprehensive than their precursors, since they integrate readmissions, visa policy, border securitization, labor migration and development aid into one single framework. Specifically, they combine within a single agreement, the labor market admission quotas of the “old guestworker” agreements. Second-generation agreements do not overall lift the aggregate levels of labor market for non-nationals. Their contribution is to bring the quotas scattered about in the first-generation labor, trade, education, development, student/trainee exchange, fishery, agriculture agreements into the coherent framework of a second-generation agreement, where the quota can be used for migration control. New generation agreements do not add much in terms of liberalization. They do not raise the individual labor market access quotas of their precursors, but simply use the labor market access liberalized by pre-existing agreements for migration control and preventive purposes.

### **France’s and Spain’s new Migration agreements: “Correctives” to Immigration Law Reform?**

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March 1974, UNTS, No. 16174.

The diffuse exercise of international responsibility for migratory flows assigns a particularly important role to bilateral and regional arrangements in managing the complex challenges of labour mobility (Delimatsis et al. 2009: 63). At the forefront stand the new agreements North and West African countries have signed since the turn of the millennium with Spain, France and to a lesser extent, Italy. These new bilateral migration agreements however, must be understood in the broader context of immigration law reforms in Europe, which have taken place since the late 1990s (Kapur and McHale 2005). The centerpiece of these new immigration laws are points-based schemes designed to attract skilled human capital primarily in fields such as science, engineering, economics, research, health, medicine, biotechnology and information technology.<sup>14</sup> Spain's immigration law reform of 2004<sup>15</sup> and France's equivalent of 2006,<sup>16</sup> as well as Switzerland's new alien act of 2008 are all aimed at shifting the *ratio* of family reunification and asylum seeking migration on the one hand to high-skilled temporary labor migration on the other hand. This paradigm shift of attracting the "best and the brightest" comes at a time for Europe when aging populations and impact on productivity levels make it necessary to compete alongside countries like Australia, Canada or the US in the global hunt for talent. Developing and least developed countries were negatively affected by the skill-based recruitment schemes in terms of human capital depletion, also because they thereby lost the traditional outlet for their surplus workforce in low-skills, the so-called guestworker status. To correct the high-skill bias of their new immigration laws, destination countries of migrants in Europe designed a new generation of bilateral migration agreements. These mark an *ex post* return to the quota-based recruitment systems of the post-war period which risks to be inconsistent with the most-favored nation clause of GATS. At the same time however, the preferential labor market openings, which these agreements offer to Latin America, North and West Africa, substitutes for the missing political will to open labor markets on a multilateral MFN-basis at the WTO. The new templates, which emerged in response to immigration law reforms in Spain, are precedent-setters in many ways.<sup>17</sup>

It is no coincidence that Spain, France and Italy, all three countries at the borders of Europe and shouldering the main burden of the 500,000 undocumented migrants estimated to reach Europe each year have pioneered the renaissance of these new agreements (Castles 2006, White 2007). These agreements were not designed from scratch, but actual labor market access quotas offered in those bilateral schemes are often only the aggregate sum of openings liberalized in various precursor agreements, such as seasonal guestworker agreements, on student exchange and co-development. France's pacts on concerted migration management and Spain's cooperation agreements—the two

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<sup>14</sup> Economic Commission for Africa (ECA), International Migration and Development, Implications for Africa, 2006, ECA/SDD/06/01, p. 24.

<sup>15</sup> Spain's Law 4/2000 (Ley orgánica or Ley de extranjería) and Law on Aliens 14/2003.

<sup>16</sup> France's Law of 24 July 2006 (Loi n°2006-911 du 24 juillet 2006 relative à l'immigration et à l'intégration).

<sup>17</sup> UN Resolution 61/208 International Migration and Development, adopted by the 61. UN General Assembly on 20 December 2006, UN Doc. A/RES/61/208 of 6 March 2007.

path-breaking models—are predominantly concluded with countries whose citizens have a record of entering the host country irregularly or remaining there in unauthorized stays. The majority of Spain's and France's agreements regulate Europea-Africa migratory flows and those from Latin America. Spain and France have concluded their version of bilateral agreements with the same set of countries, but there are differences (Pinyol 2009).

France's new pacts are a poster-child of the newly created Ministry of Immigration, Integration, National Identity and Development Partnership. They were designed to dissipate tensions with former colonies in West Africa, which, as source countries of low-skilled and unemployed would-be migrants, had been disproportionately affected by the high skill-orientation of France's new point-based recruitment scheme. In response, France had to backtrack from its two-tiered labor market admission scheme and re-introduced a quota-based recruitment scheme, albeit limited to shortage occupations. The 28 countries of France's ZSP zone were targeted, with priority given to those migrant source countries which have a representative number of citizens residing temporarily or permanently in France, primarily in Western and Northern Africa. Not the least, because source countries take advantage of the competition between Spain and France, a *race-to-the-top* over admission quotas is emerging which heightens the urgency for a common European solution. France has signed nine such pacts, but so far only the one with Gabon has entered into force on 5 July 2007. Undergoing ratification are those with Congo (signed 25 October 2007 in Brazzaville), Benin (signed 28 November 2007 in Cotonou), Senegal (signed on 23 September 2006 in Dakar and expanded by the covenant-agreement of 2008 signed on 25 February 2008 in Dakar), Tunisia (signed on 28 April 2008 in Tunis and Mauritius (signed on 23 Sept. 2008 in Paris). Under negotiation are further pacts with Algeria and Morocco, Cap Verde, Burkina Faso, and Cameroon. No agreement could be reached with Mali due to a clash over the number of Malians to be repatriated from France.<sup>18</sup> Spain has concluded bilateral migration agreements as part of its "migratory diplomacy" with countries in Latin America and Western Africa, accounting for the highest number of migrants into Spain: in 2006, 800,000 foreigners moved to Spain, an increase of 17% over the previous year, of which 110,000 were from Romania followed by 69,000 from Bolivia and 60,000 from Morocco.<sup>19</sup> Spain's "cooperation agreements on migration" form part of the Ministry of the Exterior's, Action Plan for sub-Saharan Africa 2006–2008 (Plan África). Spain concluded agreements with Guinea Bissau and the Gambia on 9 October 2006, followed by one with Senegal on 10 October 2006, on with Mali on 23 January 2007, with Cap Verde on 20 March 2007 and with Niger on 10 June 2008. Further agreements are anticipated with priority countries such as Ghana, Cameroon, Côte d'Ivoire, and Guinea-Conakry (Pinyol 2009).

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<sup>18</sup> ILO, The Co-development Programme, The Partnership France/Mali: available at: [http://www.ilo.org/dyn/migpractice/migmain.showPractice?p\\_lang=en&p\\_practice\\_id=4](http://www.ilo.org/dyn/migpractice/migmain.showPractice?p_lang=en&p_practice_id=4).

<sup>19</sup> OECD, International Migration Outlook, 2008, Country Report, Spain.

## **Topical Issue Linkage in Second-Generaton Migration agreements**

Bilateral solutions have the advantage over the principle of MFN non-discrimination, to permit conditioning of market access on migration control and prevention schemes. Bilateral migration agreements liberalize, but also regulate the temporary movement of migrant workers in lower skills categories. As such they step into the gap left by WTO Members' high-skill biased scheduling practice and so complement GATS mode 4 and its replicas in regional trade agreements. By providing for admission quotas in low-skill shortage occupations, they also correct the high-skill bias of national immigration laws and deliver important development dividends for migrant source countries.

### ***Border Securitization and Labor Migration***

There is a downside to managing migration through bilateral, non-trade agreements. It means going back to the “border-based logic of immigration authorities” (Betts and Nicolaidis 2009). Unlike trade agreements for which liberalization is the primary goal, bilateral agreements liberalize admissions as compensation for rewarding source countries to cooperate in combating irregular migration and for shifting border control. Such agreements have seen a renaissance in the past couple of years as they lend themselves to asymmetric tactical issue linkages (border securitization in return for labour migration) but with few exceptions, have not yet been systematically studied (Martin 1993). The OECD describes the value of bilateral agreements for managing migration as: “while some disadvantages have been identified with bilateral migration agreements, in the absence of a global regime for international labour migration they remain an important mechanism for inter-state cooperation in protecting migrant workers, matching labour demand and supply, managing irregular migration, and regulating recruitment.”<sup>20</sup>

France's “pacts on concerted migration management” have two ways of granting preferential admissions to persons from the partner country. The first allows the country signing the pact with France to add professions to the pre-existing occupational shortage list defined for non-EU countries. The occupational shortage list itself eliminates the ENT and so fast-tracks admissions because it allows entry for migrant workers regardless of the current employment market situation (Cholewinski 2008). For non-EU countries, France removed by decree of 18 January 2008 the ENT for 30 professions while for EU Members States and Switzerland that same decree set up an occupational shortage list of 150 professions. If a migrant source country signs one of France's new pacts it is allowed to add further professions to the list. The pact with Senegal added 18; the one with Benin 16; the one with Congo 15; the one with Gabon 9 and the one with Tunisia 17 professions.<sup>21</sup> In addition to renouncing on ENTs for additional occupations, France's pacts introduce

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<sup>20</sup> OSCE, IOM and ILO Handbook on Establishing Effective Labor Migration Policies in Countries of Origin and Destination, 2006, p. 8.

<sup>21</sup> France, National Assembly, Report by Michel Terrot of 17 February 2009, op. cit., p. 31.



annual recruitment quotas for the various visa types. A quota capped at 1000 entries per year is reserved for Senegalese citizens hired by French employers in Art. 2 of the covenant-agreement between Senegal and France of 2008. A preferential recruitment quota for France's competencies and talent admission card was capped at 150 for eligible citizens of Benin and Congo. France's agreement with Tunisia will have higher quotas, than those foreseen for Western African countries: 1500 for competencies and talents, 3,500 annual entries for employees in one of the 80 or more professions, which France lists in the Annex to the France—Tunisia agreement; and 2,500 annual entries for seasonal workers.<sup>22</sup> Spain's "cooperation agreements on migration" encourage Spanish firms and companies to go on prospecting missions into the partner countries to directly recruit workers. Since 2007, prospecting missions of Spanish employers (multinationals such as Acciona, Carrefour and McDonald's) to Senegal have been taking place, leading to an annual recruitment quota of roughly 4,000 Senegalese on a temporary one-year visa.<sup>23</sup> Spain trains would-be migrant workers prior to their departure abroad. France, in contrast, trains migrant workers in France for their return home, as exemplified in its agreement with Senegal of 1987. Spain operates a system of preferential foreign labour recruitment that circumvents the scope of GATS using a two-fold strategy: firstly, Spain's second-generation agreements admit in the non-services categories both seasonal agricultural and fishery workers. Spain, under its agreement with Senegal on cooperation in immigration matters signed on 9 November 2007, admitted 2,700 Senegalese to work on strawberry farms (700) and in the fishery sector (2,000) (Pinyol 2009). Secondly employment of foreign workers is limited to sponsorship by employers domiciled or residing Spain, the type of cross-border movement, which mode 4 of GATS, when narrowly defined, excludes.

### ***Non-Compliance of bilateral migration agreements with the most-favored nation clause of GATS***

Any bilateral migration agreement recruiting foreign workers in services preferentially from third countries must secure compliance with the MFN obligation of Article II GATS. There are at least five options for ensuring WTO-consistency of a preferential recruitment scheme. Firstly, the preferential labor market access scheme is generalized to all WTO Members. Secondly, the bilateral migration agreement eliminates all visa and work permit requirements between the two countries and the MFN deviation is thus justified as a labour market integration agreement under the exception of Art Vbis GATS 9 (Grynberg and Qalo 2007). Thirdly, the bilateral migration agreement liberalizes not only the temporary movement of service-supplying persons, but all services trade (in all four modes of

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<sup>22</sup> Accord cadre France-Tunisie Projet de loi autorisant l'approbation de l'accord-cadre et des protocoles annexés, signés à Tunis le 28 avril 2008 ; Assemblée Nationale N° 1472, Rapport par M. Jean-Claude Guibal, Député, 17 February 2009, p. 27 ; available at : <http://www.assemblee-nationale.fr/13/documents/index-rapports.asp>.

<sup>23</sup> Workpermit.com, Spain to issue 2,700 work permits for Senegal migrants, 12 November 2007, available at: <http://www.workpermit.com/news/2007-11-12/spain/2700-spanish-work-permits-senegalese-migrants.htm>.

services supply and in all services sectors) and is justified under an Art. V exception of GATS. Fourthly, the parties to that agreement apply for a waiver under Art. XI of the WTO Marrakesh Agreement. If a developing or least developed country is involved the waiver could invoke Special and Differential Treatment, much like the LDC waiver proposal did. Finally, one could check whether one of the parties to that agreement has listed an MFN Art. II exemption in its Schedule back in 1994. France, for instance, can invoke its 1994 Art. II MFN exemption towards Francophone Africa to justify the preferential annual quotas it grants in its new pacts.<sup>24</sup> An important policy objective for the bilateral migration agreements will be how best to tailor and labour market admission schemes within such bilateral migration agreements so as to ensure that bilateral migration agreements complement and “compete”, rather than conflict, with the multilateral level of GATS mode 4.

### **Regional EU-wide Migration and Trade Agreements: Overcoming the Skill Divide?**

A new division between individual EU Members’ new-generation migration agreements and the emerging EC treaty law on migration is emerging, which can be described as one aspect of the EU Global Approach to Migration.<sup>25</sup> The split between trade and non-trade agreements dealing with temporary migration also holds true for this regional layer, which consists of EU mobility partnerships and EU visa relaxation and readmission agreements on the one hand and EU economic partnership agreements on the other hand. The EU-wide agreements on migration interlink the national level bilateral migration agreements, such as those of France and Spain with the multilateral level of GATS mode 4. Overlaps, conflict and complementarities between the migration agreements concluded by individual EU Member-States and those concluded on behalf of EU Member States by the EC Commission cannot be avoided and represent what may more generally become a regular feature of international migration governance: a framework of vertically competing layers of agreements, which horizontally split, along a skill divide, into trade and non-trade agreements.

In the EU context, the communitarization of EU powers to conclude migration-related agreements occurred in three steps. A first set of EU-wide migration agreements, the communitarized visa relaxation and readmission agreements emerged in the aftermath of the Amsterdam Treaty of 1999 empowering the EU with supranational powers in the field of Schengen-visa, border securitization and readmissions. Based on these shared powers, the EU communitarized the treaty law on migration towards third countries, by gradually intensifying the net of EU-wide visa relaxation or readmission agreements (Art. 63:3 (a) and (d) ECT) at the EU Eastern and Southern borders (Peers 2008). The global approach to migration, led to a second step, namely the current

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<sup>24</sup> European Communities and their Member States, List of Article II:2 Annex of GATS (MFN exemptions).

<sup>25</sup> Communication from the Commission to the Council and the European Parliament, The Global Approach to Migration one year on: Towards a comprehensive European migration policy Brussels, 30.11.2006, COM(2006) 735 final.

practice of interlinking EU visa relaxation agreements to EU readmission agreements. Such “de facto” joined agreements became a package deal which increasingly started “competing” against Member States’ newly designed bilateral agreements. Logically, source countries take advantage of this competition, as it creates policy space for treaty-shopping in the area of labor market admission quotas, readmission quotas and cooperation. In a third step and since 2007, the new tool of EU mobility partnerships became available.

### ***EU-Mobility partnerships***

Mobility partnerships attempt to merge the dual track of national and EU-wide migration agreements by offering a single template for concluding agreements between “interested” EU Member States, the EU and a third country. Unlike EU-wide visa relaxation or readmission agreements these multilateral EU mobility partnerships are not signed by all EU member states. Typically, they are concluded with a migrant source country either to the East or South of the EU. There are four such “plurilateral” agreements in place today (Senegal, Cap Verde to the South and Moldova and Georgia to the East). Nonetheless, they are a further step towards harmonized EU migration policy, because they are the first to bring up the subject of EU-wide labor market access and step-up the EU’s steering role. They improve EU-wide coherence in managing economic migration, despite not being able to offer concrete admission to the EU Member States’ labor markets due to a lack of EU-wide competency in the field. Nonetheless, they move beyond the interlinking of visa and readmission agreements, because they package into a single agreement the different EU Member States’ migration policies, which are annexed as ‘programmes’ to the mobility partnerships. The rationale for the emergence of such partnerships is to better respond to the increased complexity of migration linked to the globalization, diversification and acceleration of migratory flows. The new concept was presented by a communication on “circular migration and mobility partnerships between the European Union and third countries” from the EC Commission to the EU Council on 16 May 2007<sup>26</sup> precisely, by the Directorate of Justice and Home Affairs based on the 1999 Tampere Council’s conclusion calling for a partnership approach for global migration management.<sup>27</sup> The EC Council endorsed the concept on 10 December 2007 and called for two pilots.<sup>28</sup> A first pilot EU mobility partnership was signed with Cap Verde by the EU together with Spain, France, Luxembourg and Portugal; it is based on Council of the European Union on 19 November 2007,<sup>29</sup> and its Action Plan, but also the Cotonou

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<sup>26</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on circular migration and mobility partnerships between the European Union and third countries, COM/2007/0248 final, 16 May 2007

<sup>27</sup> Tampere European Council 15 and 16 October 1999 Presidency Conclusions.

<sup>28</sup> Council Conclusions on mobility partnerships and circular migration in the framework of the global approach to migration, 2839th General Affairs, Council meeting, Brussels, 10 December 2007; <http://www.eu2007.pt/NR/rdonlyres/4B8B3D1F-86EA-4591-93AD-C09DAAD6D42E/0/97508.pdf>.

<sup>29</sup> EU Rapid Press Release, IP/08/894, The European Union and Cape Verde enter into a mobility partnership, Luxembourg/Brussels, 5 June 2008.

Partnership Agreement.<sup>30</sup> A second pilot was signed with Moldova by the EU together with Bulgaria, Cyprus, the Czech Republic, France, Germany, Greece, Hungary, Italy, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia and Sweden on 5 June 2008.<sup>31</sup> Two others will be concluded with Senegal and Georgia, reflecting the symmetry of each an Eastern and Southern EU border management policies. EU mobility partnerships' advances over GATS mode 4 and free trade agreements are to facilitate job offer and demand matching, circular migration by setting up the necessary and EU-funded institutional framework, including the strengthening of administrative bodies in source countries; they do not offer labor market access yet. Compared with bilateral migration agreements, their advances are limited, as they only offer a "dialogue" on the key migratory issues of labor market access, visa and readmission, without foreseeing implementation or an action plan for translating such dialogue into concrete actions and legally binding language; EU Member States can propose further actions, which are listed in an Annex to the EU mobility partnership. Their contribution lies more in the streamlining diverging Member States migration policies into a communitarized framework for future joint action (Nellen-Stucky 2010).

### ***Economic Partnership Agreements***

Free trade and economic partnership agreements require liberalization in substantially all modes and sectors of services supply and are thus usually more in compliance with the regionalism exception (GATS Article V) to the MFN obligation of Art. II GATS, than bilateral migration agreements are (Roy et al. 2006). Two such economic partnership agreements liberalizing the temporary movement of workers stand out in this context, because they made a threefold advances over the GATS in terms of: 1) widening the categories of persons targeted, 2) broadening the direction of the movement to be liberalized and 3) regulating the risks associated with cross-border skill flows. These are the Japan-Philippines Economic Partnership Agreement (JPEPA) of 9 September 2006 (entered into force on 11 December 2008) and the EC—CARIFORUM Economic Partnership agreement of 5 and 20 October 2008. They may offer guidance but also caveats to African countries facing the policy choice of concluding economic partnership agreements with the EU or bilateral migration agreements. The JPEPA and the EC—CARIFORUM EPA may inform countries in Africa as to the advantages and costs of integrating temporary labor mobility and its regulation, including voluntary return, readmission and border control into an economic partnership agreement or whether to go for a non-trade agreement, modelled after the Spanish or French template. The Cotonou agreement of the EU with the ACP countries 23 June 2000 has somewhat pre-determined the trade avenue.

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<sup>30</sup> Council of the European Union Joint Declaration on a Mobility Partnership between the European Union and the Republic of Cape Verde Brussels, 21 May 2008; <http://europapoort.eerstekamer.nl/9345000/1/j9vvy6i0ydh7th/vgbwr4k8ocw2/f=/vhvffe33hyya.pdf>.

<sup>31</sup> EU Rapid Press Release, IP/08/893 The European Union and the Republic of Moldova enter into a mobility partnership.

The EU economic partnership agreement (EPA) with the CARIFORUM countries of 15 and 20 October 2008 offers some limited advances over the EC 27 Schedule in GATS, by adding two new categories of service providers (graduate trainees and short term business visitors). Systemically, it is impossible for the EU to go beyond the EC 27 Schedule levels of commitments or to offer advances in mode 4 that reach further than the improvements on market access, which the EU has made in its Doha offer in mode 4. The EU still lacks exclusive competencies over the access to the labor markets of its Member States.<sup>32</sup> Consequently, in its first EPA, the one with the CARIFORUM countries, the EU improved on the mode 4 *acquis* of the current EC 27 Schedule of commitments in GATS to the extent that such improvements corresponded with its Doha offer. The only addition the EC made was to liberalize an additional type of temporary movement namely, from subsidiary to headquarters for graduate trainees (Carzaniga 2009). In this sense, the EC—CARIFORUM follows the trend of many preferential trade agreements of the newer, Doha Round generation, which has been to liberalize the temporary movement of graduate trainees, which are considered quasi-service suppliers since their cross-border movement is only partially motivated by the supply services abroad (usually education) (Nielson and Cattaneo 2003). Pursuant to the EC-27 Schedule of commitments in mode 4 of GATS, graduate trainees are only allowed to move from headquarters to a subsidiary or between subsidiaries. The EC-CARIFORUM EPA expands on the “direction” of movement, by liberalizing the channels for graduate trainee from a CARIFORUM country, to that from a company’s subsidiary, usually in a CARIFORUM country to the firm’s headquarters (in Europe).<sup>33</sup> This additional type of movement offers important skill-upgrading possibilities to graduate trainees from CARIFORUM countries and thus delivers a development dividend for the CARIFORUM economies (Sauvé and Ward 2009). Surprisingly, the EU has not made any use its supranational powers in the field of readmissions and migrant return policies (Art. 63 ECT), by introducing a return obligation for CARIFORUM migrant workers in its recently concluded EPA with the CARIFORUM countries (Sauvé and Ward 2009 : 18). The EC—CARIFORUM EPA lacks such obligations. Art. 13 of the Cotonou agreement between the EU and ACP countries of 23 June 2000 has in place a programmatic rather than legally binding obligation calling on cooperation on lawful returns and readmissions. Yet, the spectre of including readmission and return clauses within EPAs may be one of the reasons slowing down the negotiation of EPAs between the EU and African countries. The Joint Africa-EU Declaration on Migration and Development Tripoli, of 22-23 November 2006 mentioned both readmission cooperation and economic partnership agreements.<sup>34</sup> The Africa-EU Ministerial

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<sup>32</sup> The Treaty of Nice expanded the EU’s powers over common commercial policy by adding a paragraph 5 to Art. 133, which codifies the ECJ’s opinion 1/94 granting the EU shared powers to liberalize mode 4 movement.

<sup>33</sup> Art. 80 para. 2 lit. b CARIFORUM–EC EPA.

<sup>34</sup> Joint Africa-EU Declaration on Migration and Development Tripoli, of 22-23 November 2006, p. 6 (economic partnership agreements)

Troika meeting of 31 October 2007, strengthened the nexus between trade and migration and readmission, but the express mention of economic partnership agreements was dropped; yet it may only be a question of time before EPAs with African countries possibly include readmission clauses.

#### *Japan—Philippines EPA (2008)*

Economic partnership agreements are not only concluded by the EU. The Japan—Philippines EPA (2008) so far is the only preferential trade agreement to include provisions on migrant return. It was the Philippines' first trade agreement and Japan's fourth.<sup>35</sup> Article 11 of the Implementing Agreement to the JPEPA lays down a mandatory regulatory obligation to the address of the government of the Philippines to issue travel documents for ensuring the immediate return to the Philippines of nurses and caregivers, who are required to leave Japan under Japanese immigration laws and regulations. Interestingly, this regulatory source country mandate to ensure timely and orderly return is limited to nurses and caregivers and does not exist for the other categories of service providing Filipino nationals. In lieu of mutually recognizing each others' professional and vocational qualifications, Section 6 I of the Japan–Philippines Economic Partnership Agreement of 2008 (JPEPA) and Section 6 of Annex 8 on the Movement of Natural Persons to the JPEPA only liberalize the temporary movement of nurses and caregivers, which fulfil the qualifications identified and required by the agreement. On top of recognizing in Appendix 2 the qualification as nurse “under Philippine laws and regulations with work experience as a nurse for at least three (3) years” or the Philippine certification for caregivers, the JPEPA requires such Filipino nurses and caregivers to acquire the accreditation of nurse and caregiver under Japanese law, which relies on passing the Nurse Board exam or the Care Worker's Board exam of Japan before they can be admitted for work in Japanese hospitals and care centres. In addition, for nurses and caregivers Japanese language training is required (Art. 6 Annex 8) at an institution either in Japan or the Philippines, which will be defined by the government of Japan based on Art. 10 of the Implementing Agreement to the JPEPA. Unlike for the professional training, the linguistic training requirement can be waived if the candidate shows a level of proficiency “sufficient to engage in the activities” of nursing and caregiving (Note 2 to Art. 6 of Annex 8).<sup>36</sup>

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<sup>35</sup> [http://www.bilaterals.org/rubrique.php3?id\\_rubrique=113&lang=en](http://www.bilaterals.org/rubrique.php3?id_rubrique=113&lang=en)

<sup>36</sup> Annex 8 referred to in Chapter 9: Specific Commitments for the Movement of Natural Persons, Agreement Between Japan and the Republic of the Philippines for an Economic Partnership, 28 August 2008, <http://www.mofa.go.jp/region/asia-paci/philippine/epa0609/index.html>, Chanda (2004: 33-34).

## **Conclusions: Two-Tracks of Global Migration Management: Trade and Non-Trade agreements**

International, regional and national legal frameworks liberalizing the temporary movement of workers have no uniform, coherent global regime in place for managing the accelerating, globalizing and diversifying flows of economic migration. In the absence of a coherent architecture of multilateral norms and disciplines, a spaghetti bowl of overlapping provisions on different levels has arisen in the international arena. A new interface emerges in this context between trade agreements (Mode 4 of GATS, labour mobility provisions found in PTAs) and the rise of non-trade, bilateral migration agreements. Trade agreements, liberalize the temporary movement of highly skilled workers without guaranteeing against overstays and irregular migration.

Today's treaty law of migration divides into bilateral migration agreements designed to regulate (irregular) migratory flows and trade agreements, including the WTO's General Agreement on Trade in Services' (GATS) progressively liberalizing market access. Trade and non-trade, bilateral and migration agreements exist at both the national and regional levels, with the EU visa relaxation, readmission and mobility partnerships agreements occupying an increasingly significant regional role in global migration governance (Betts 2008).

The abovementioned *missed regulatory* opportunities of GATS have led to a rise of bilateral migration agreements. As Carzaniga has said, "when it comes to natural persons, WTO Members want to retain the flexibility "to be more open towards certain nationalities than others" (Carzaniga 2009: 484). Unlike the GATS, bilateral migration agreements dispose of the structural flexibility to require source countries to cooperate. They allow for tailor-made trade-offs and tactical issue linkages, including border security, visa policy, (dual) citizenship, residence, development, remittances; issue areas which the immigration caveat of GATS excludes. As a result, bilateral migration agreements have seen a renaissance in the past couple of years, even if they are asymmetrically tilted towards the interests of labor receiving countries (Chanda 2009).

Central to trade agreements is the desire to *open* markets to the temporary movement of the highly skilled workers, while non-trade bilateral migration agreements, seek to *contain* and prevent irregular migration. Non-trade bilateral migration agreements open markets to low-skilled labor, but unlike trade agreements also provide for institutional set-ups to facilitate migrant worker selection, training and recruitment, to stimulate their integration, to encourage their timely return and reintegration process and to ensure readmissions and repatriation, where these become necessary (Friedman and Ahmed 2008). Bilateral migration agreements are the avenue used when it comes to migration control and prevention. Voluntary return and readmission are thus key regulatory features of bilateral migration agreements. Even if bilateral migration agreements facilitate the recruitment of migrant labor, they do so only to offer a valid alternative to migrating irregularly (Heilbronner 1996).

Both treaty types have moved from first to second generation templates: trade agreements include since the advent of the WTO in 1994 chapters or annexes on the temporary movement of persons, albeit limited to service suppliers or high skilled professionals, while bilateral labor migration agreements since the late 1990s include chapters on prevention of migratory flows, return, readmission and reintegration of migrant workers, and on development cooperation, including diaspora-led development. EU visa relaxation, readmission agreements and mobility partnerships occupy an increasingly important regional place in global migration governance, even if they do not yet offer channels for labor migration. The densifying EU-level treaty networks communitarize the treaty-making autonomy of EU Member States.

If GATS mode 4 is to be criticized for exacerbating the high-skill bias of destination countries' migrant labor recruitment policies, bilateral agreements for their part too, embody the interests of destination countries, namely border securitization, migration control and prevention. In so far, the statement holds true that "in essence, bilateral migration agreements are 'unilateral' arrangements, because the host country generally retains significant margins of flexibility as regard labour market access levels and conditions" (Carzaniga 2009 :500).

Because it disassociates labor mobility from irregular migration Mode 4 of GATS carries important advantages in terms of an unbiased approach towards labor migration, which is perhaps better suited than bilateral migration agreements, to deliver "meaningful" market access to the pool of surplus labor from developing countries and LDCs. In its current format, however, the scheduling structure of GATS commitments is too technical, the scope of application for mode 4 exceedingly ambiguous, and the limitations and exemptions therein insufficiently defined, for GATS mode 4 to be applied on a broader scale. For the Doha Round in services to conclude on a win-win tenor in mode 4, it will be necessary to tailor the GATS scheduling structure so that regulatory obligations to reduce the risk of skill depletion to migrant source countries can be accommodated as well as a principle of shared responsibility with respect to migrant overstays inscribed.

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