

How Do People in Asia and the Pacific Migrate Legally for Work?

An Overview of Legal Frameworks: GATS Mode 4, PTAs and Bilateral Labour Agreements

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Abstract:

The movement of goods and services across borders has gradually been liberalized over the past few decades, thanks in large part to multilateral legal frameworks negotiated in global fora such as the World Trade Organization. In contrast, the movement of people across borders remains severely restricted worldwide. To date, there is no multilateral framework, nor is there an international negotiating forum tasked to regulate global migration flows, despite ever increasing numbers of international migrants and a keener understanding of the contribution that migration and remittances can make to the prospects of developing countries.

This paper will examine the patchwork of multilateral, regional and bilateral legal instruments through which migrants from Asia and the Pacific currently legally cross borders in search of employment. It concludes that the existing frameworks are very inadequate: in almost all the multilateral and preferential agreements focusing predominantly on trade (GATS Mode 4 and Preferential Trade Agreements), countries have made binding commitments only with respect to the temporary entry of high-skilled service providers.

Given the regulatory vacuum at multilateral and regional levels, countries in Asia and the Pacific have entered into dozens of bilateral agreements in the area of labour and migration. While these agreements do typically cover semi- and unskilled labour migrants, they rarely provide binding market access commitments or enforceable protections for migrants. As a result, most semi- and unskilled labour migrants today still cross borders through unilateral guest and seasonal worker schemes which provide the migrant-sending country with no leverage and the migrant with little protection. In conclusion, there is significant scope for further cooperation among nations in the area of labour migration, which could result in greater global welfare gains and distributive justice.

Keywords: International Migration, Trade in Services, GATS Mode 4, Preferential Trade Agreements, Bilateral Labour Agreements.

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I. Legal migration for employment: the missing part of globalization?

Globalization is commonly understood to refer to the increased movement of goods and services, capital and people across international borders. Increased international flows in all four categories are often inter-related, yet they are largely perceived and treated as separate by policy-makers, resulting in very different legal frameworks for each of them. Indeed, over the past few decades, policy-makers have made great strides in liberalizing first the movement of goods and later that of services. However, to date, the one significant exception to the general trend of freer markets is legal international migration for employment.

The many legal obstacles to migration that we take for granted today are actually a relatively new phenomenon. Throughout the colonial period, it was first and foremost the trade in goods that was impeded by high tariffs, whereas few restrictions applied to capital mobility, services (which were largely considered nontradable and thus were not regulated) and the movement of natural persons across borders. These liberal immigration policies can be explained first by the fact that immigration was in many cases viewed as a desirable remedy for labour shortages in particular in new colonies, and second, that social welfare systems were not yet well developed and thus the cost of absorbing new immigrant arrivals was limited.

From the Second World War onwards, most developed countries inversed their policies: they liberalized their trade in goods and services but adopted increasingly restrictive migration policies. Cheaper communication technologies and air travel meant that larger numbers of people could gain information on and access to foreign countries in search of employment opportunities. At the same time, concerns about high unemployment rates in many countries and the rise of the social welfare state created a wariness of migrants who are often willing to work for less pay and may be costly in terms of social benefits such as schooling and health care. As a result, in the first decade of the 21st century, international migration for employment is still strictly controlled by almost all of the world's countries.²

Based on the theory of comparative advantage, classical economists have argued for decades that where productive factors (capital and labour) are allowed to flow freely across borders to where they are most productive, global welfare is maximized because of the optimal allocation of resources. Policy-makers were gradually convinced by this argument in connection with trade in goods, resulting in the adoption of the General Agreement on Tariffs and Trade (GATT) in 1948, followed by the General Agreement on Trade in Services (GATS) in 1995. The course of recent economic history seems to confirm the earlier prediction of global welfare gains, with export-led growth contributing to rising standards of living in many developing countries in the world.

Such a paradigm shift has yet to occur in the area of migration. Many economists have made arguments calling for freer migration policies similar to those in favor of the free movement of goods. Some researchers have even argued that the potential gains from more open labour migration may dwarf those from freer trade. One model predicts that a relatively small increase in world migration would generate US\$52 billion more in world income than the removal of all remaining restrictions on trade in goods.³ Similarly, the World Bank estimated in 2006 that if developed countries permitted labour migration to increase their labour force by 3%, the global welfare gains would be US\$356 billion by 2025.⁴

² Gordon (2010), p. 1121.

³ Walmsley and Winters (2005), p. 690.

⁴ The World Bank (2006), p. 35.

Economic modeling of this type has led many to believe that the public discourse focusing on official development assistance and preferential or duty-free, quota-free tariff schemes for least developed countries is misguided. It is now increasingly being recognized that liberalizing migration, in particular for semi-skilled or unskilled labour, could be the single most effective global development policy to reach poverty-reduction goals in low-income countries.⁵

It may then appear surprising that as will be examined in this paper, there is at present no comprehensive global regime for migration, nor is there a global negotiating forum for migration-related policies, as is the case for trade in goods and services with the World Trade Organization (WTO). Indeed, the role of organizations such as the International Organization for Migration (IOM) and the International Labour Organization (ILO) is to advocate for fairer rules for migrants and workers, rather than to serve as a negotiating forum.

In order to set the topic of migration in its proper context, this paper will first provide a snapshot of the migration patterns and their economic impact in Asia and the Pacific (Part II). It will then briefly examine the various legal frameworks that currently exist for legal migration for employment in the Asia-Pacific region, namely the partial multilateral framework for the temporary provision of services which exists under the GATS (Part III), regional and bilateral frameworks under preferential *trade* agreements (or PTAs) (Part IV), and *labour* agreements entered into on a bilateral basis (Part V).⁶

II. Labour migration patterns in Asia and the Pacific

1. South-South migration is on the rise

At the start of the 21st century, one in every 35 people is an international migrant, a number of people equivalent to the population of the fifth most populous country in the world, Brazil.⁷ The number of international migrants has doubled over the past 25 years, suggesting that the lower cost of transportation and communication makes international migration an increasingly accessible and attractive option.⁸ Migration is furthermore of particular relevance for Asia: as home to half the world's population, developing Asia is the source of a large portion of the world's migrants.⁹

Of the total migrant population of around 200 million individuals, about half are thought to be migrants primarily seeking employment, while the remainder is believed to migrate in order to study or reunite with family, or are refugees or asylum-seekers.¹⁰ Some of these migrants cross borders only temporarily, while others stay in their country of adoption for many years. Also, it is important for policymakers to be aware that more and more women are seeking work opportunities abroad and often become the primary breadwinners for the families they leave behind: today, 48.6% of all migrants are women.¹¹

It is often mistakenly assumed that most migrants, both legal and illegal, originate from least developed countries and head to developed countries, however distant. In fact, as illustrated in Figure 1, of the ten largest migrant-sending countries in the Asia-Pacific region, only two are least developed countries

⁵ The World Bank (2006), pp. 25-26; Stiglitz (2006), p. 9, WTO (2009), paras. 48-49.

⁶ This paper will not cover the significant area of illegal migration, which is a research topic in itself.

⁷ Global Commission on International Migration (2005), p. 83.

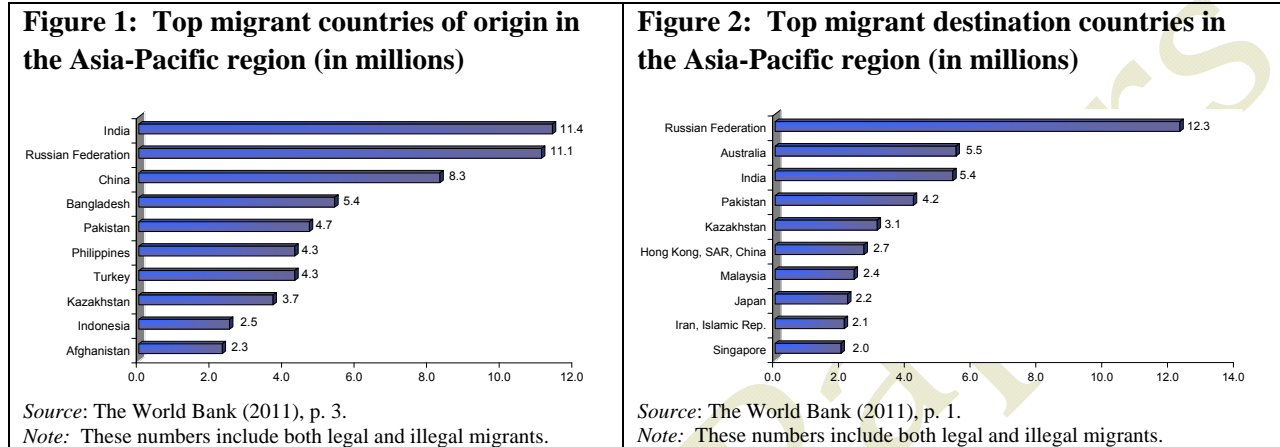
⁸ Commission on International Migration (2005), pp. 5, 11-12.

⁹ Asian Development Bank (2008), p. 77.

¹⁰ Global Commission on International Migration (2005), pp. 1, 84.

¹¹ Global Commission on International Migration (2005), p. 14.

(Afghanistan and Bangladesh). In terms of destination countries, while it is true that worldwide, the top destination countries in order of migrant arrivals are higher-income countries - the United States, the Russian Federation, Germany, Saudi Arabia and Canada¹² - statistics also reveal that half of all international migrants from developing countries settle in other developing countries in their same region (a phenomenon known as South-South migration).¹³ Indeed, geographical proximity is thought to be one of the three primary factors driving international migration, together with income differences across countries and networks.¹⁴



Another commonly held misconception is that countries are either primarily migrant-receiving or migrant-sending countries. In fact, many countries simultaneously send and receive migrants, as the comparison of Figures 1 and 2 illustrates. Countries such as India, Pakistan and the Russian Federation are both top migrant-receiving and migrant-sending countries. For example, India receives a large number of migrants from Bangladesh and Nepal but also sends a large number of migrants to Gulf Countries and to North America.

The United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) conducted a detailed analysis of the origin and destination of migrants for the five sub-regions of ESCAP, as replicated in Table 1 below. The data shows that in the case of two sub-regions, North and Central Asia, and the Pacific (Oceania), the preferred destination of migrants by far is within their sub-region of origin (e.g. migration from Central Asian countries to Russia or from Pacific Islands to Australia and New Zealand).

For the remaining three sub-regions, the main destination of migrants is a different region: for South and South-West Asia it is the Middle East and North Africa (e.g. Sri Lankans who migrate to Gulf Countries), and for South-East, East and North-East Asia it is North America (e.g. Chinese migrating to Canada). However, in each of these three sub-regions, the number of intra-subregion migrants is only slightly smaller than the number of migrants heading for the Middle East or North America.

¹² The World Bank (2011), p. 1.
¹³ The World Bank (2011), p. 12.
¹⁴ Ratha and Shaw (2007), p. 15.

Table 1. Bilateral migrant stocks, by Asia-Pacific sub-regions and selected regions in the world, 2010 (in millions)

Origin \ Destination	East and North East-Asia	North and Central Asia	Pacific	South and South-West Asia	South-East Asia	Middle East and North Africa	EU 15	North America
East and North East-Asia	4.09	0.00	0.68	0.04	1.24	0.08	1.17	4.59
North and Central Asia	0.02	11.06	0.03	0.07	0.00	1.04	0.88	0.67
Pacific	0.02	0.00	0.91	0.01	0.03	0.00	0.26	0.35
South and South-West Asia	0.09	0.13	0.50	9.28	0.62	9.66	6.56	3.70
South-East Asia	0.46	0.00	0.82	0.07	3.97	1.38	1.37	4.32
Middle East and North Africa	0.00	0.01	0.26	0.43	0.01	9.91	5.27	1.32
EU 15	0.05	0.19	2.35	0.49	0.10	0.22	10.31	4.63
North America	0.11	0.00	0.19	0.02	0.07	0.12	0.84	13.35

Source: ESCAP (2011), Table 3.3, p. 142.

Note: EU15 = Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and United Kingdom.

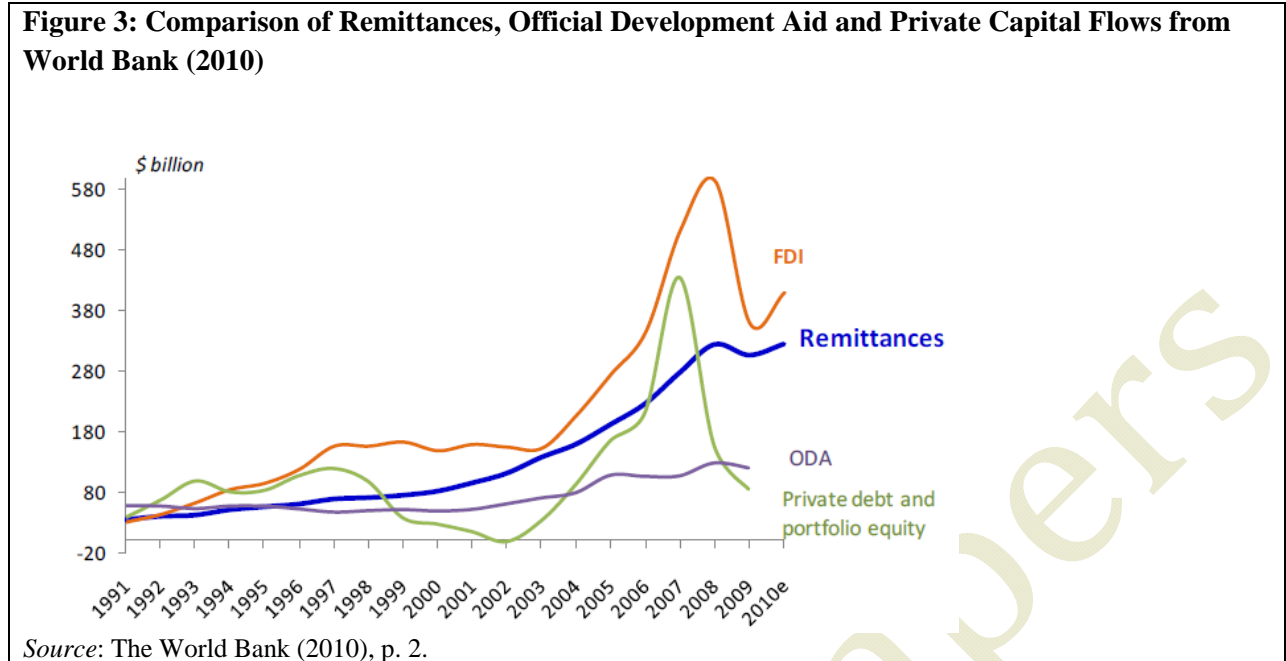
Finally, when reviewing the patterns of migration originating from countries in Asia and the Pacific, it is interesting to note that contrary to the widely held belief that developing countries of the region export only unskilled workers, in reality most developing countries also export many skilled workers. For example in the case of the Philippines, migrants in the 1970s were mainly low-skilled construction workers, whereas today they also represent a significant number of higher skilled service workers in hospitals and commercial centers: in 2010, 13.7% of Filipino emigrants was tertiary educated. The comparable number is even higher for countries such as Afghanistan (23.3%) and Sri Lanka (29.7%), which probably reflects the fact that tertiary educated individuals from such countries have more opportunities and resources to migrate than their less-educated peers.¹⁵

2. Labour migration has significant economic impacts through remittances

International labour migration has extensive economic, social and cultural impacts in both countries of origin and destination. Advocates of labour migration often associate international migration with a wide range of benefits such as easing labour shortages, facilitating knowledge exchanges, building business networks, and creating political ties.

While the above mentioned benefits can be hard to measure and thus remain controversial, there is one more readily quantifiable economic impact of international migration: the impact of remittances – the money sent home by migrants. As shown in Figure 3 replicated from the World Bank, remittance flows have tripled over the past decade and are now more than twice the level of official development assistance (ODA) to developing countries, and almost as high as foreign direct investment (FDI). For many developing countries, such remittances constitute a large source of foreign exchange earnings, sometimes even exceeding export revenues, aid, or other private capital flows.

¹⁵ The World Bank (2011), pages 228, 53 and 205.

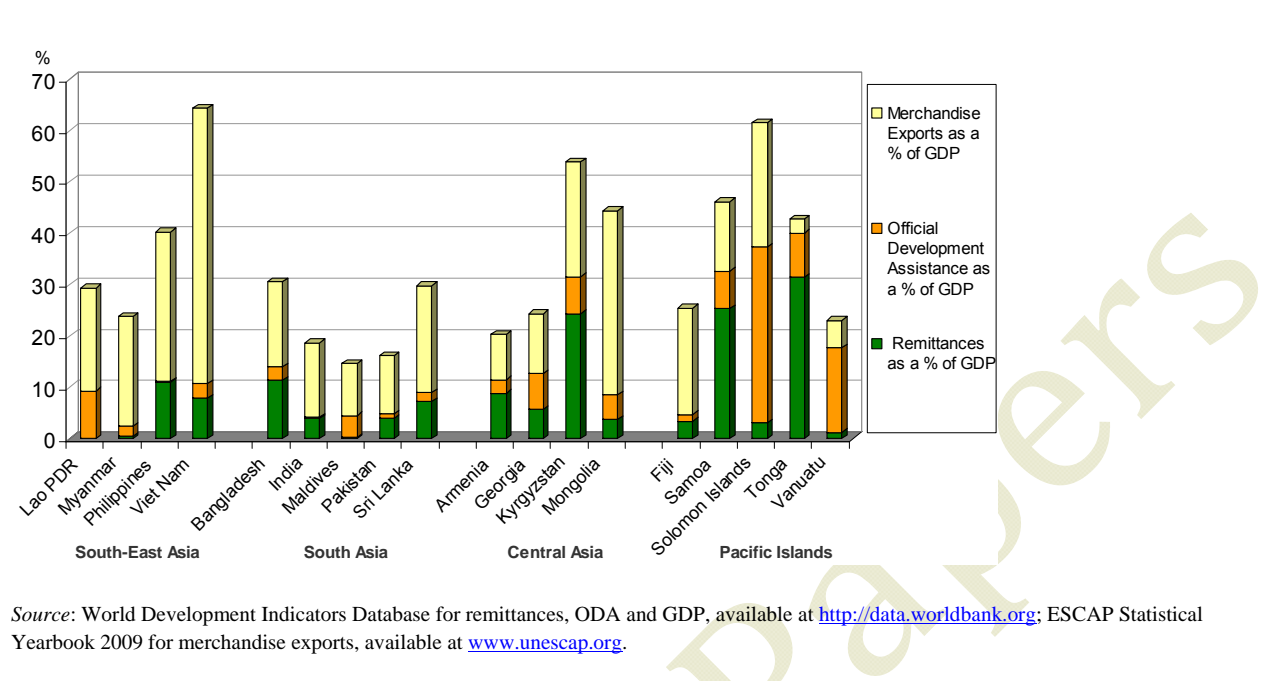


The Asia-Pacific region receives the largest portion – about 42% – of the world’s remittances. The five countries that received the largest amount of remittances in the region were India, China, Philippines, Bangladesh and Pakistan.¹⁶

Furthermore, the impact of remittances as a percentage of a country’s GDP is very significant, particularly in smaller economies of the Asia-Pacific region. As illustrated in Figure 4, remittances represent a significantly higher portion of the GDP than aid in many developing economies of the region, and in the case of countries such as Armenia, Kyrgyzstan, Samoa and Tonga, surpass other important source of revenues such as merchandise exports.

¹⁶ The World Bank (2011), page 13.

Figure 4: Remittances, Official Development Assistance and Merchandise Exports as a share of GDP in Selected Countries of Asia and the Pacific (2008)



Another interesting characteristic of remittances is that they are a relatively reliable source of income in times of economic crisis (though they may also have an inflationary effect on the receiving country economies). Several studies have shown that remittance flows stay relatively stable despite economic turmoil for a number of reasons: more people may migrate overall in response to job losses in their country of origin, increasing the total amount of remittances; migrants abroad may send more money home to compensate for tougher economic times in their country of origin; and those migrants who lose their jobs abroad may return to their country of origin, bringing their savings with them.¹⁷

Finally, while the question of the poverty-reduction impact of remittances is still debated in the literature, several studies do suggest that remittances can have a significant poverty reduction effect, possibly greater than official development assistance. For example, one comprehensive study of 74 developing countries conducted by World Bank researchers found that a 10 percent increase in the share of international emigrants in a country’s population will lead to a 1.9 percent decline in the share of people living in poverty.¹⁸

3. Why is there no multilateral negotiating body or treaty relating to access to labour markets for migrants?

As mentioned above, the number of international migrants is large and growing and the economic impact of remittances is significant. Much time has been spent by governments, international organizations and non-governmental organizations on finding ways to reduce global poverty and inequality, and yet the past decades focused on aid and preferential market access for exports from developing countries have yielded only limited results.

¹⁷ The World Bank (2011), page 17.

¹⁸ Adams and Page (2003), p. 1; see also Asian Development Bank (2008), p. 83, box. 2.3.1.

Against this backdrop, one would expect that a comprehensive legal framework would be in place to regulate labour migration or at the very least that a global forum would exist in which such issues could be raised at the multilateral level. However, to date, neither practical considerations nor economic efficiency arguments have swayed the world's policy-makers. Instead, migration policies continue to be firmly rooted in considerations of history, demography (population pressures), politics (considerations of state sovereignty) and sociology (assimilative and cultural concerns). Migration is also routinely considered undesirable both in receiving countries – a drain on public services – and in sending countries – migration as brain drain.

As a result, to this day, there is no international migration regime or multilateral negotiation forum for issues relating to migration. Instead, as will be examined in the next sections of this paper, the access for legal labour migrants to their countries of destination is at present regulated through a patchwork of various multilateral, regional and bilateral legal frameworks. The next section, Part III, will examine the partial multilateral legal framework provided by GATS Mode 4. Part IV will then examine the relevant provisions of some of the preferential *trade* agreements entered into by countries in the Asia-Pacific region, and Part V will review some of the applicable bilateral *labour* agreements.

III. The multilateral framework: temporary movement of service providers under GATS Mode 4

At the multilateral level, frameworks for managing cross-border movements of people are few and remain highly fragmented.¹⁹ In fact, such movements are the focus of only two multilateral treaties: the first is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), which seeks to create protections for migrants but does not provide enhanced access to labour markets for them. It has so far been ratified by only 44 countries, none of which is a developed country.²⁰

The second relevant multilateral treaty is the WTO's General Agreement on Trade in Services (GATS) which includes provisions relating to the temporary movement of natural persons as service providers, also known as GATS Mode 4.²¹ The scope of GATS Mode 4 is limited to the cross-border movement of *service providers* (as opposed to individuals seeking access to a WTO member's employment market), and on a *temporary* basis (although the GATS effectively defines temporary as any "non-permanent" cross-border movement, WTO members usually construe the term to mean a period of between three months and five years). In fact, the GATS explicitly states that it shall not apply to measures affecting "*natural persons seeking access to the employment market*" of a party to the agreement, nor to "*measures regarding [...] residence or employment on a permanent basis.*"²²

Furthermore, WTO members limit the applicability of the GATS provisions through their individual binding commitments under the agreement. An analysis of the horizontal commitments under GATS Mode 4 (not taking into account sector-specific variations) reveals that only few horizontal commitments

¹⁹ Panizzon (2010), p. 5, see also Betts (2008), p.2.

²⁰ The list of parties to the treaty can be viewed at <http://treaties.un.org>.

²¹ Developing countries originally negotiated the inclusion of Mode 4 as a GATS mode of supply for the Uruguay Round of trade negotiations in order to balance developed country interests in supplying services through Mode 3 "commercial presence" (i.e. foreign investment in service sectors) and labour service providers (Mode 4).

²² GATS, Annex on Movement of Natural Persons Supplying Services under the Agreement, para. 2.

have been made at all under GATS Mode 4, fewer than in any of the other three modes of services supply.²³ Paradoxically, the more important the temporary provision of services is for a particular services sector (e.g. professional and health services), the fewer the commitments made by WTO members under the GATS.

Finally, while the wording of GATS Mode 4 provisions does not restrict its applicability to any particular profession or skill level, in practice, the commitments made by WTO members relate almost exclusively to movements of professionals and skilled workers linked to business and investment.²⁴ To date, commitments are worded narrowly so as to exclude any semi-skilled or unskilled workers.²⁵ As is also the case for Modes 1 and 3, Mode 4 commitments are also often subject to other restrictions such as economic needs tests or licensing requirements.

Table 2 illustrates the limited market access provided by GATS Mode 4 by outlining the commitments of some of the top destination countries for service providers from Asia-Pacific countries. The table shows that the commitments of primarily migration destination countries such as the Australia, Japan, the Republic of Korea, Singapore and the United States restrict their commitments under GATS Mode 4 to intra-corporate transferees (i.e. employees of foreign companies who have a presence in the host country), business visitors (i.e. individuals who visit a country to attend trade fairs or negotiate contracts), and, in a few cases, contractual service suppliers (i.e. employees of a foreign company which does not have a presence in the host country).

Interestingly, the commitments undertaken by developed and developing countries are equally shallow.²⁶ Table 2 shows that countries such as India, Indonesia, the Philippines and Thailand which are both migrant-sending and migrant-receiving countries do not make broader commitments under GATS Mode 4 than countries that are predominantly migrant-receiving countries.

²³ WTO (2009), para. 35.

²⁴ Commitments under GATS Mode 4 are often linked to those under GATS Mode 3 which relates to the establishment of a commercial presence, meaning that if a company decides to establish a presence in a member country, it may also bring executives to supply services related to their investment for a limited amount of time.

²⁵ WTO (2009), paras. 74-77; Marchetti (2004), p. 31.

²⁶ WTO (2009), para. 95.

Table 2: Overview of GATS Mode 4 commitments of selected countries

GATS Mode 4 Commitments					
List of Countries	Intra-Corporate Transferees	Business Visitors	Contractual Service Suppliers	Indep. Professionals	Others
Countries of migration destination					
Australia	up to 4 years (no labour market test)	6 months (no labour market test)	x	x	(I) Executives who will set up a new business of a service supplier in Australia (no labour market test) up to 2 years. (II) Specialists with trade, technical or professional skills, subject to labour market testing, up to 4 years
Japan	up to 5 years	90 days	restricted to legal, tax and accounting services, for up to 5 years	x	Legal, accounting and tax specialists, up to 5 years
Republic of Korea	3 years (extendable)	90 days	x	x	Executives who will set up a new business of a service supplier in RoK, up to 90 days.
Singapore	up to 5 years	x	x	x	x
USA	up to 5 years	90 days	x	x	(I) Executives engaged in the establishment of a company in the USA, up to 1 year. (II) Specialists under H1-B program- up to 65,000 visas annually, for up to 3 years (conditions apply).
Countries of migration origin, or both of origin and of destination					
India	up to 5 years	90 days	x	x	Professionals in engineering or natural sciences to be hired by an Indian company, 1 year extendable for a max of 3 months.
Indonesia	up to 2 years (a labour market test applies)	x	x	x	x
Philippines	subject to labour market test.	subject to labour market test.	subject to labour market test.	subject to labour market test.	x
Thailand	up to 3 years	90 days	x	x	x

Source: See scheduled commitments by the listed countries in the WTO Trade in Services Database accessible at <http://tsdb.wto.org/default.aspx>.

In light of the limited scope of GATS Mode 4 – limited to temporary service providers – and the high-skills bias of commitments, the GATS currently has limited practical economic relevance for least developed countries (LDCs). LDCs have tried to include broader commitments under GATS Mode 4 as part of the Doha Development Round of WTO trade negotiations. They succeeded in obtaining the adoption of “Special Modalities of Negotiations on Services Trade Liberalization for LDCs” by the Special Session of the Council for Trade in Services on 3 September 2003. These Special Modalities state that

“it is recognized that the temporary movement of natural persons supplying services (Mode 4) provides potential benefits to the sending and recipient Members. LDCs have indicated that this is one of the most important means of supplying services internationally. Members shall, to the extent possible [...] consider undertaking commitments to provide access in Mode 4, taking into account all categories of natural

persons identified by LDCs in their request.”²⁷

The general “development” character of the current round of negotiations notwithstanding, the “best efforts” nature of such statements and the actual offers submitted in the ongoing negotiations suggest that there is limited potential for improvement on Mode 4 commitments generally and next to none on semi- or unskilled service suppliers.

Furthermore, when looking even beyond the current round of negotiations, it seems unlikely that countries will significantly deepen their GATS Mode 4 commitments to include semi- and unskilled service providers. The main reason is that while labour market conditions and migration needs fluctuate with world events, GATS commitments do not. Indeed, GATS commitments are binding and enforceable, so that commitments in the area of access for service providers would significantly restrict a country’s flexibility to respond quickly and unilaterally to labour market needs and immigration influxes. In addition, a WTO member seeking to modify or withdraw commitments must negotiate compensatory adjustment with potentially affected members if requested to do so.²⁸

A second reason is that the GATS’ Most Favoured Nation principle (MFN), which requires concessions made by a WTO member to be extended to all WTO members equally on a non-discriminatory basis (including any compensatory adjustment as discussed above) renders the commitments taken under GATS blind to history, politics and culture. While this is a desirable feature from the point of view of economic efficiency, the area of immigration policy has long been an instrument for policymakers to favour certain countries with historical or cultural ties, such as ex-colonies, over other countries. Although members may take MFN exemptions,²⁹ such exemptions are understood to be “one-off” and temporary (typically lasting no more than 10 years).³⁰

The missed regulatory opportunities of GATS outlined above have led to a rise of other types of agreements to address migration issues which shall be examined in the following parts, in particular regional and bilateral trade agreements (Part IV) and bilateral labour agreements (Part V).

IV. The regional and bilateral trade framework: preferential trade agreements

Considering the slow progress of the multilateral trade negotiations over the past decade, the recent trend in many parts of the world, and in particular in the Asia-Pacific region, has been a move toward preferential trade agreements (PTAs) between two or more countries. Such agreements are quicker to negotiate and easier to amend than multilateral treaties. The enthusiasm of governments for these agreements is greeted with caution by researchers who contend that these agreements do not provide for significantly broader trade liberalization than what the WTO agreements had already achieved, while however undermining the multilateral trading system which is both more cost-efficient and equitable for its 153 members.³¹

²⁷ Special Session of the Council for Trade in Services, 3 September 2003, Modalities for the special treatment for least-developed country members in the negotiations on trade in services, at paragraph 9; available at http://www.wto.org/english/news_e/pres03_e/pr351_e.htm.

²⁸ GATS Article XXI: Modification of Schedules.

²⁹ GATS Article II: MFN Treatment.

³⁰ See Understanding the WTO – Services at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm (explaining how “in order to protect the general MFN principle, the exemptions could only be made once; nothing can be added to the lists . . . and will normally last no more than ten years”).

³¹ See Understanding the WTO - Members and Observers at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

In the area of regulating labour mobility, it could be argued that PTAs may in fact be a more appropriate instrument than multilateral treaties. As seen above, the GATS never aimed to comprehensively regulate labour migration. Furthermore, regional and bilateral trade agreements can be tailored to reflect regional migration patterns as well as the historical, cultural and political ties between countries. The 1994 North American Free Trade Agreement (NAFTA) in fact was the first regional trade agreement to prove that such instruments can be efficient in regulating labor flows. What about PTAs in the Asia-Pacific region? Do they provide for broader market liberalization for temporary service providers, including in particular less skilled service providers?

Of the 120 PTAs currently in force in the Asia-Pacific region, 41 cover trade in services to some degree and of those, 39 include within their scope the temporary movement of natural persons as service providers (see list in Annex I).³² However, all of these PTAs follow the same approach to labour mobility as the GATS: they relate to the temporary movement of service providers rather than a broader range of individuals, and country commitments are biased towards high-skilled professionals.³³ They also usually use GATS-identical carve-outs, for example the exclusion of permanent migration and access to the labour market.

Table 3 provides an overview of the concessions of countries under some selected PTAs, examining only the horizontal concessions which apply to the entire economy (disregarding sectoral variations). Overall, the review of the region's PTAs reveals that none provide for full mobility of labour (full market access and full national treatment) as does for example the European Union. The broadest concessions are typically found in bilateral trade agreements between two high-income countries (e.g. Australia-New Zealand, Singapore-USA, Singapore-Japan), or, to a lesser extent, in Economic Partnership Agreements which usually cover a wider range of commitments beyond labour mobility.

Larger regional groupings such as the Association of Southeast Asian Nations (ASEAN) have had only limited success in addressing labour mobility, despite an acknowledgement that migration and in particular irregular low-skilled migration is in fact very substantial among its members. The ASEAN Framework Agreement on Services (AFAS) was signed in 1995 and is being implemented in successive packages of commitments with a goal of moving towards "achieving free flow, with flexibility, of services by 2015." In addition, ASEAN leaders resolved that an ASEAN "economic community" should be established by 2020 and adopted the ASEAN Economic Community Blueprint in 2007 as the master plan towards achieving an ASEAN region with free movement of goods, services, investment, skilled labour, and freer flow of capital.³⁴ Notwithstanding these resolutions, the large economic disparities between ASEAN members have impeded any groundbreaking progress in the area of labor mobility: the level of commitments by ASEAN members has followed the general pattern of GATS commitments and have been very modest overall; to date, no commitments have been made in relation to semi- or unskilled labour.³⁵

³² Asia-Pacific Trade and Investment Agreements Database [www. http://www.unescap.org/tid/aptiad/](http://www.unescap.org/tid/aptiad/), accessed on 11 April 2011.

³³ The first draft of the GATS was in fact based on the provisions of NAFTA; subsequent PTAs relating to services are typically based on the GATS model.

³⁴ ASEAN Economic Community Factbook, ASEAN Secretariat (2011), pp. xii and 19-20.

³⁵ Manning and Bhatnagar (2004), p. 16.

Table 3: Temporary provision of cross-border services in selected Preferential Trade Agreements of Asia and the Pacific

Name of Preferential Trade Agreement (year in force)	Commitments go beyond the GATS commitments (GATS+)?	Description of commitments under the Preferential Trade Agreement
Preferential Trade Agreements with more than 2 members		
Asia-Pacific Economic Cooperation (APEC) (21 member economies from Asia and the Pacific) (1989)	X	APEC does not contain specific market access commitments on labour mobility. However, it creates the APEC Business Travel Card Scheme which facilitates labour mobility through harmonized immigration standards and stay and departure processing for (high-skilled) business people.
The Association of Southeast Asian Nations (ASEAN) Framework Agreement on Services (AFAS) (1995)	X	Brunei, Cambodia, Malaysia, Philippines, Vietnam: GATS = Singapore, Thailand: increase the allowed duration of stay for temporary service providers. Indonesia: increases the allowed duration of stay for temporary service providers and expands its commitment to include business visitors.
Trans-Pacific Strategic Economic Partnership Agreement (2006) (Brunei Darussalam, Chile, New Zealand, Singapore)	GATS =	No market access commitments. Only reaffirms the GATS commitments and those of the APEC Business Card Operating Framework.
Bilateral Economic Partnership Agreements		
Australia - New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) (Services 1989)	GATS +	The Services Protocol provides both full market access and full national treatment for all service suppliers. (Also note that independently from the trade agreement, the "Trans-Tasman Travel Arrangement" enables Australians and New Zealanders to live and work in each other's countries without any restrictions.)
Japan-Malaysia Economic Partnership Agreement (2006)	GATS +	Japan: broadens access for personal contract suppliers to cover not only engineering services, but also specialists in humanities and international services. Malaysia: Commitments are GATS =
Japan-Philippines Economic Partnership Agreement (2008)	GATS +	Japan: broadens access for personal contract suppliers who are specialists in humanities / international services, as well as nurses and caregivers. A defined number of Filipino nurses and caregivers are permitted to go to Japan to obtain nursing qualifications, professional training, or language training, for periods of up to four years Philippines: grants binding access for Business Visitors, Intra-Corporate Transferees, investors and personal contract suppliers supplying engineering services and services requiring technology or knowledge at an advanced level, as well as nursing services (Philippines has no bound commitments under GATS).
Japan-Thailand Economic Partnership Agreement (2007)	GATS +	Japan: grants access for personal contract suppliers who are specialists in humanities / international services, Thai dance, music, cuisine, boxing, language and spa services. Thailand: expands its commitments on investors and personal contract suppliers for some business and tourism services (subject to quotas) and education services.
Singapore - India Comprehensive Economic Cooperation Agreement (2005)	GATS +	Singapore: binds access for BVs (widely defined), CSS, Ips in 5 sub-sectors, and spouses and dependents in certain cases. Duration of stay for ICTs is increased. India: CSSs, wider range of sectors for Ips, and certain spouses and dependants, as well as more prolonged stay for ICTs.
Bilateral Preferential Trade Agreements		
Australia-USA FTA (2005)	GATS +	The RTA creates new visa category for Australian temporary service suppliers.
Lao PDR - USA Agreement on Trade Relations (2005)	GATS -	Lao PDR is not a WTO member, so GATS commitments do not apply between the parties. The commitments of the USA under the agreement cover only services salespersons and intra-corporate transferees, which is less than the USA GATS commitments, which also cover "specialists."
Singapore - Republic of Korea FTA (2006)	GATS +	Singapore: broadens its commitments to include business visitors, contractual service providers in professional, computer, telecoms, financial and tour operator services, as well as traders and investors. Intra-corporate transferees enjoy a longer period of stay than under GATS. Republic of Korea: grants access for traders and investors and for contractual service providers in a greater range of services sectors and with the guarantee that no quota will apply. Intra-corporate transferees enjoy a longer period of stay than under GATS..
Singapore - USA FTA (2004)	GATS +	United States: increases its commitments by adding "Singaporean business persons" as a covered category, who will be granted up to 4,500 temporary entry visas annually. Singapore: broadens its commitments beyond intra-corporate transferees to include business visitors, traders and investors, and professionals.

Source: PTAs accessible through the Asia-Pacific Trade and Investment Agreements Database, available at <http://www.unescap.org/tid/aptiad/>. Also see Carzaniga (2009), pp. 484-498; OECD (2002).

Generally, the PTAs entered into by countries in Asia and the Pacific typically do provide for some liberalization beyond their members' GATS commitments (so-called "GATS Plus" or "GATS +" agreements), though such liberalization is usually quite modest. As described in the third column of Table 3, such further liberalization is usually achieved through either:

Granting longer stay authorizations for the categories of persons already covered by the GATS; and/or

Broadening the range of professional categories benefiting from temporary entry privileges (for example, the economic partnership agreements entered into by Japan broaden Japan's commitments to service providers such as nurses and "specialists in humanities," whereas its GATS mode 4 commitments include only legal, accounting and tax specialists as noted in Table 2).

It should also be kept in mind that in most cases, the right to labour mobility remains subject to national regulations relating for example to licensing, recognition of qualifications and immigration. Indeed, the majority of agreements do not over-ride general migration legislation and countries thus retain broad discretion to grant, refuse and administer residence permits and visas.³⁶ Only in two studied cases, those of the Singapore-USA Free Trade Agreement and the Australia-USA Free Trade Agreement, do the agreements create a new category of visa to expand the immigration rules to provide greater market access.

The above overview of the region's PTAs leads to the conclusion that while PTAs have achieved some liberalization beyond the GATS, they have had only limited impacts on labour mobility overall, and no impact on the movement of less-skilled workers.³⁷

³⁶ OECD (2002), p. 5.

³⁷ The World Bank (2006), p. 74.

V. The bilateral labour framework: memoranda of understanding and labour agreements

As seen above, the currently existing rules negotiated in connection with trade agreements at the multilateral, regional and bilateral levels address international labour mobility only very partially, mainly as it relates to high-skilled professionals. Against this backdrop, countries usually rely on other mechanisms to manage their migration flows, in particular:

- Unilateral temporary migration schemes, which exist at either the skilled migration level (such as the U.S. H-1B visa and the temporary skilled migration programs of Australia and Canada), or the semi- or unskilled level (such as seasonal work programs in agriculture, tourism and construction that are open to all applicants who qualify, regardless of their nationality);³⁸ and/or
- Memoranda of understanding or bilateral labor agreements negotiated between two countries.

While unilateral labour migration programmes such as the European *guest worker schemes* have existed for many decades, the last twenty years have seen a proliferation of bilateral agreements in the field of migration. The Organisation for Economic Co-operation and Development (OECD) for example notes that more than 176 bilateral agreements and other forms of labour recruitment schemes are currently in force in its 34 member countries.³⁹

In Asia and the Pacific, dozens of agreements have been concluded, though it is nearly impossible to draw a complete inventory of existing agreements due to the lack of public availability of many of them. The extent of commitments varies considerably among the various agreements. At the highest level of commitment are binding agreements between two countries in which the receiving country commits to accepting a predetermined number of – typically less skilled – workers to specific segments of the labour market, and/or (2) to guarantee the welfare of workers while they are living in the host country. Such labour agreements often also feature a commitment on the part of both countries to encourage the return of workers once their temporary stay permit expires, to help receiving countries manage illegal permit overstays, but also to help sending countries to recapture skills learned abroad and savings accumulated. Examples of such binding bilateral agreements include the agreement between the Philippines and the United Kingdom (Department of Health) for the recruitment of healthcare professionals and the Employment Permit System of the Republic of Korea (see Table 4).

Most bilateral labour agreements entered into by countries in Asia and the Pacific are of a much more limited level of commitment and usually take the form of a non-binding memorandum of understanding.⁴⁰ These agreements typically do not provide any market access commitments, and most of them lack enforcement mechanisms for the guarantees of protection offered. As illustrated in Table 4, bilateral labour agreements typically focus on one or several of the below areas:

- Labour recruitment (the recruitment process is set as either running through private manpower agencies or through governmental agencies) (e.g. Taiwan, Province of China and Philippines); and/or

³⁸ The World Bank (2006), p. 72.

³⁹ Bobeva and Garson (2004), p. 12. Such labour agreements include seasonal worker agreements, guest worker agreements, trainee agreements and sector-based schemes to address shortages in particular sectors.

⁴⁰ Go (2007), p. 1.

- Workers' welfare and protection agreements (e.g. Sri Lanka and several Middle Eastern countries); and/or
- Social security agreements relating to the reciprocity and exportability of benefits (e.g. Philippines and several European countries).

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Table 4: Selected bilateral labour agreements in Asia and the Pacific

Country	Agreement with	Market Access	Migrant Protection	Recruitment	Recognition of Qualifications	Social Security	General Promise of Cooperation	Comments
Migrant-receiving countries								
Republic of Korea	15 sending countries (listed in order of number of migrants): Philippines, Mongolia, Sri Lanka, Viet Nam, Thailand, Indonesia, Uzbekistan, Pakistan, Cambodia, China, Bangladesh, Kyrgyzstan, Nepal, Myanmar, Timor Leste	✓	✓	✓		✓		Since 2004, the Republic of Korea has signed MoUs with 15 countries of origin under its Employment Permit System (EPS), which is a Government-to-Government hiring scheme to regulate worker selection and employment. The EPS guarantees basic rights for foreign workers such as minimum wage, industrial accident compensation insurance and other basic labour rights. Employers unable to find local workers can employ foreign workers under government-to-government agreements up to a set quota and in specific industries. The employment period is for a maximum of 3 years.
Migrant sending countries								
Philippines	United Kingdom (Dep.of Health)	✓	✓	✓	✓	✓		These agreements enable the UK to recruit registered nurses and other healthcare professionals from the Philippines..
	Indonesia (2003)						✓	This agreement is entered into between two migrant sending countries. The agreement identifies the promotion and protection of migrant workers' welfare and rights as priorities for co-operation. The MoU establishes joint working groups through the two countries' embassies in destination countries.
	Austria, Belgium, Canada, France, Netherlands, Spain, Switzerland, United Kingdom		✓			✓		These Agreements enable beneficiaries to lodge social security claims in the respective agencies in the other country, and provide continuation of benefits regardless of where the Filipino worker resides. They also add periods of participation in the social security system in both countries to calculate the eligibility for benefits.
	Taiwan, Province of China		✓	✓				MoU which creates a special hiring facility that allows employers in Taiwan to directly hire Filipino workers without the intervention of manpower agencies.
Sri Lanka	Jordan, Libya, Qatar, United Arab Emirates, Bahrain ¹⁰		✓				✓	All of these MoUs for the regulation of Sri Lankan labour in the countries of destination stipulate the type of information to be included in the employment contract, including accommodation, salary, conditions of work, and responsibility for travel expenses.

Sources: Government websites (Philippines: www.poea.gov.ph/Imi_kiosk/labor_agreements.htm; Japan: www.mofa.go.jp; Republic of Korea: www.eps.go.kr/en/view/view_01.jsp); also see Go (2007); OECD (2004)

Overall, it can be concluded that while many bilateral trade agreements have been adopted in Asia and the Pacific, the depth of the agreements remains shallow. One specificity of Asian bilateral labour agreements seems to be that with the exception of the Korean Employment Permit System and the Japanese trainee system, Asia's migration infrastructure is largely in the hands of private recruitment agencies,⁴¹ whereas in other regions, the public administration (national or local labour offices) tends to control the process.⁴²

The migrant-sending country with the most bilateral agreements is the Philippines, which entered into 13 agreements, 12 with labour-receiving countries and one with a labor-sending country, Indonesia. Paradoxically, the Philippines has not succeeded in entering into bilateral agreements with many of the principal destination countries for overseas Filipino workers such as Singapore, Japan and Saudi Arabia.⁴³ Indeed, a general observation is that the more immigrants a country receives, the less it is willing to enter into any type of formal labour agreements (e.g. United States, Saudi Arabia).⁴⁴

Several labour-sending countries have sought to redress the imbalance of bargaining power between sending and receiving countries through enhanced regional cooperation. These regional processes include the Colombo Process on "the management of overseas employment and contractual labor for countries of origin in Asia,"⁴⁵ another is the ASEAN-led Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007), which commits migrant-receiving states to draw up charters that ensure decent working conditions, protection from abuse and a minimum wage for migrant workers. Similarly, the Philippines took the initiative to bring together several sending countries in Asia to coordinate their policies on bilateral agreements and to work together with receiving country governments. The Philippines also entered into a formal agreement with a sending country, Indonesia, in an attempt to promote workers' rights and provide them with legal guarantees.

While these regional initiatives are important to draw attention to labour migration issues, the goals pursued remain relatively modest. Even if fully successful, these processes will not result in actual legal frameworks which would help to regulate migration flows and provide broader market access in particular to lower-skilled labor.

VI. Conclusions and policy recommendations

This brief overview of existing legal frameworks for labour migration suggests that one of the reasons why market liberalization has yet to occur in the area of migration is that migration has much broader implications for society than does merchandise trade. Contrary to the area of trade in goods, policy-makers must consider both the behavior and welfare of people who cross borders, and how these will affect domestic residents. As a result, labour migration does not fit naturally as part of trade negotiations and perhaps for that reason has seen only limited liberalization in that area.

With respect to legal frameworks, this brief overview of existing regimes suggests that migrant labour is nowhere dealt with satisfactorily: not as part of trade negotiations, and not as part of labour negotiations; neither at multilateral, regional or bilateral levels. Policy-makers have achieved some limited liberalization of skilled labour migration in the multilateral negotiations (GATS Mode 4) and under some preferential trade agreements, but hardly any for the movement of unskilled workers. This conclusion suggests that the political resistance to liberalizing labour hardly decreases at bilateral or regional levels.

⁴¹ Martin (2008), p. 6

⁴² Bobeva and Garson (2004), p. 18.

⁴³ Go (2004), p. 192.

⁴⁴ Gordon (2010), p. 1125; Go (2004), p. 188 and 192.

⁴⁵ See <http://www.colomboprocess.org/>

Many researchers argue that the key underlying problem in the area of migration is the lack of a satisfactory quid pro quo between sending and receiving countries. Some researchers suggest that destination countries have little incentive to enter into binding agreements on migration due to the fact that unlike in the area of trade in goods, the benefits from labor migration are available to them through unilateral action.⁴⁶ Others underline that multilateral, nondiscriminatory approaches are less relevant for migration than for trade in goods because the economic implications of nondiscrimination are different. In trade, nondiscrimination maximizes economic efficiency by allowing the lowest-cost supplier to compete, thus reducing prices. But labor markets in high-income countries are generally not permitted to adjust fully to the lowest-cost supplier (through minimum-wage laws and social-insurance schemes), thus the benefits of nondiscrimination are weaker in migration than in trade.⁴⁷

These economic arguments suggest that the best hope for a regulatory framework for migration, including unskilled migration, is that negotiations on migration be coupled to other areas so that a meaningful quid pro quo can be established. While the Doha Development Round is often criticized as being too large of a package to be concluded as a single undertaking, its multi-faceted approach does enable countries to make trade-offs among a broader set of issues, from agriculture over services to intellectual property protection, which increases the likelihood that a mutually beneficial agreement may be reached among nations.

Finally, this paper concludes that given the magnitude of labour migration flows and the power imbalances between migrant-sending and receiving countries, a stronger regulatory framework continues to be highly desirable. Such a framework could serve both to address labour shortages in migrant-receiving countries and to better control irregular migration flows, as well as serve migrant-sending countries by providing a valve for high national unemployment and an opportunity to increase earnings. Ultimately, better regulation of international migration could result in global welfare gains and contribute significantly to distributive justice between high-income and lower-income countries.

⁴⁶ Gordon (2010), p. 1111.

⁴⁷ The World Bank (2006), p. 74.

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Asia-Pacific Trade and Investment Agreements Database: <http://www.unescap.org/tid/aptiad/>

Annex 1: Preferential Trade Agreements of the Asia-Pacific region which cover trade in services

	Name of Trade Agreement	Year in force	Provisions relating to the Movement of Natural persons?
1	Association of Southeast Asian Nations (ASEAN) - Australia - New Zealand Free Trade Agreement (AANZFTA) (Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar)	2010	√
2	Association of Southeast Asian Nations (ASEAN) - China Framework Agreement on Comprehensive Economic Co-operation	2005	√
3	Association of Southeast Asian Nations (ASEAN) - Republic of Korea Framework Agreement on Comprehensive Economic Co-operation	2007	√
4	Australia - New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)	1983	√
5	Association of Southeast Asian Nations (ASEAN) Free Trade Area and Framework Agreement of Services (AFAS)	1993	√
6	Australia - Chile Free Trade Agreement	2009	√
7	Australia-Thailand Free Trade Agreement	2005	√
8	Australia - United States Free Trade Agreement	2005	√
9	Bay of Bengal Initiative for Multi-Sectorial Technical and Economic Cooperation (BIMSTEC) (Bangladesh, Bhutan, India, Myanmar, Nepal, Sri Lanka, Thailand)	2004	*
10	China-Chile FTA	2006	*
11	China-Hong Kong Closer Economic Partnership Agreement	2004	√
12	China-Macao Closer Economic Partnership Agreement	2004	√
13	China-Pakistan Agreement on Trade in Services	2009	√
14	China-Singapore FTA	2009	√
15	European Free Trade Area (EFTA) - Republic of Korea FTA	2006	√
16	European Free Trade Area (EFTA) - Singapore FTA	2003	√
17	India-Singapore Comprehensive Economic Cooperation Agreement	2005	√
18	Japan - Brunei Economic Partnership Agreement	2008	√
19	Japan-Chile Strategic Economic Partnership Agreement	2007	√
20	Japan-Indonesia Economic Partnership Agreement	2008	√
21	Japan-Malaysia Economic Partnership Agreement	2006	√
22	Japan-Mexico Agreement for the Strengthening of Economic Partnership	2005	√
23	Japan-Philippines Economic Partnership Agreement	2008	√
24	Japan-Singapore Economic Partnership Agreement	2002	√
25	Japan-Switzerland Free Trade and Economic Partnership Agreement	2009	√
26	Japan - Thailand Economic Partnership Agreement	2007	√
27	Japan - Viet Nam Economic Partnership Agreement	2009	√
28	Republic of Korea - Chile FTA	2004	√
29	Republic of Korea - Singapore FTA	2006	√
30	Malaysia-Pakistan Closer Economic Partnership Agreement	2008	√
31	New Zealand-China FTA	2008	√
32	New Zealand - Singapore Closer Economic Partnership Agreement	2001	√
33	South Asian FTA (SAFTA) (Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, Sri Lanka)	2006	√
34	Singapore - Panama FTA	2006	√
35	Singapore - Australia FTA	2003	√
36	Singapore - Jordan FTA	2005	√
37	Singapore - Peru FTA	2009	√
38	Trans-Pacific Strategic Economic Partnership Agreement (Brunei, Singapore, New Zealand and Chile)	2006	√
39	United States - Lao PDR Trade Relations Agreement	2005	√
40	United States - Singapore Free Trade Agreement	2004	√
41	United States - Viet Nam Trade Relations Agreement	2001	√

Source: Asia-Pacific Trade and Investment Agreements Database, available at <http://www.unescap.org/tid/aptiad/>, accessed on 11 April 2011.