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Advancing labour mobility in trade agreements

The lost opportunity in the Trans-Pacific Partnership

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Abstract

Purpose – Labour mobility is increasingly recognized as an important component of a globalized international trading system. This paper aims to examine the role of temporary entry commitments in international trade agreements toward facilitating global labour mobility.

Design/methodology/approach – This paper traces three decades of temporary entry provisions in international trade agreements signed by the USA and Canada, beginning with their bilateral Canada–US Free Trade Agreement and culminating in the Trans-Pacific Partnership (TPP).

Findings – The paper finds that while many countries have continued to liberalize their temporary entry commitments in various trade agreements, the USA has reversed course in the previous decade, hampering international progress. Meanwhile, Canada has pursued ever greater labour mobility provisions with most of its trading partners.

Practical implications – The unique roles played by the USA, Canada and other trading partners in advancing a coherent international labour mobility agenda are considered. To continue to advance labour mobility in trade agreements moving forward, policy alternatives to the "all" or "nothing" approaches pursued by Canada and the USA are suggested.

Originality/value – To the author's knowledge, this paper is the first to formally evaluate labour mobility in the TPP and the only paper to outline the evolution of temporary entry in the US vs Canadian trade agreements over three decades.

Keywords Canada, US, GATS Mode 4, Labour mobility, Temporary entry, Trans-Pacific Partnership

Paper type Research paper

Introduction

Labour mobility is increasingly recognized as an important component of the international trading system. While the past century has seen an enormous liberalization of the rules governing the movement of goods and capital through various international trade agreements, the other major factor of production – labour – has not liberalized to nearly the same degree (Hugo, 2008). Global companies and investors regard the ability to move senior employees and knowledge specialists around the world as essential to their business

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processes (Richardson, 2016). Services trade is heavily reliant on such skilled labour, making the advancement of labour mobility in trade policy imperative moving forward.

Despite this, facilitating labour mobility through trade and immigration policy remains one of the most controversial and resisted aspects of global integration (Hufbauer and Stephenson, 2007; Hugo, 2008). Since the 2008 global financial crisis, this resistance has become further entrenched by rising anti-globalization and anti-immigration sentiment in parts of the Western world. Advocating for greater labour mobility is difficult for political leaders in such a context, who view their primary obligations as protecting domestic jobs for their citizens rather than furthering the interests of foreign workers or their employers.

Nevertheless, many of these same Western economies are facing demographic pressures, which compel them to consider the role of immigration in addressing future labour market shortages. Population aging in countries such as the USA, Canada and much of Western Europe will result in high old-age dependency ratios (number of persons aged 65 or over, per 100 working-aged persons), which will challenge the capacity of governments to finance social programs. Although increasing automation of routine tasks may eventually reduce pressure to attract low-skilled immigrants, it is likely that these countries will work to attract large numbers of high-skilled immigrants over the long-term (Chanda, 2016; Edmonston, 2016; UN, 2016).

Although the importance of international labour mobility in addressing such labour shortages is widely acknowledged, less is known about labour mobility provisions in international trade agreements. This paper explores the evolution of temporary entry chapters in trade agreements over time and culminating in the Trans-Pacific Partnership (TPP). Canada and the USA offer interesting case studies for the exploration of these issues. Since agreeing to a single set of rules in this regard via the Canada–US Free Trade Agreement nearly 30 years ago, the two countries have followed divergent paths toward temporary entry in subsequent trade agreements. In total, more than 45 countries have finalized temporary entry provisions in their trade agreements with either the USA or Canada. In the absence of meaningful multilateral progress under broader international frameworks such as the General Agreement on Trade in Services (GATS), this series of modern trade agreements heavily influence international standards for temporary entry for the twenty-first century.

I argue that both in its original 12-country form and the subsequent 11-country pact that was ultimately finalized without the USA, the TPP represents a missed opportunity to advance global labour mobility for the twenty-first century. As demonstrated, this failure is largely due to the intractable position of US negotiators over the TPP's labour migration chapter, Temporary Entry for Business Persons, provisions that were never revisited, following the USA's exit from the agreement.

To better understand the dynamics involved, this paper evaluates the temporary entry commitments undertaken by each TPP partner including the USA. The history of temporary entry commitments by the USA vs Canada in previous trade agreements is then evaluated and exemplifies how the two countries have diverged in their approaches over time. To my knowledge, this paper is the first to consider these issues for the TPP and to offer a complete review of the evolution of temporary entry in Canadian vs US trade agreements to better understand the broader consequences for the international trading system.

Previous literature on temporary entry provisions in trade agreements

Workers covered by temporary entry provisions in trade agreements include high-skilled workers with advanced training and education, normally at the post-secondary level.

Provisions can also often cover business visitors and investors seeking temporary entry to engage in sales and services or to set up new businesses, as well as intra-corporate transferees at the senior management level. Nielson (2003) and Dawson (2013) have offered comprehensive assessments of temporary entry provisions in various international trade agreements.

Guidance on the qualification of workers for temporary entry under international agreements is provided by the GATS section on Movement of Natural Persons (Mode 4), in which all TPP countries participate as members (WTO Secretariat, 2017). Since 1995, GATS provisions allow "essential personnel" in the services sector (normally executives and senior managers) to transfer within their company to a GATS member country as intra-corporate transferees, provided that the employee's responsibilities are linked to a commercial presence in the destination country. GATS provisions also allow for the movement of business visitors, who enter a member country to conduct short-term business but are not used in that country (WTO Secretariat, 2017). Separately, some GATS member countries provide temporary access to specific categories of qualified professionals and commitments vary by country (Nielson, 2003). Pritchett (2006) and Sáez(2013) provide important overviews of GATS Mode 4 provisions as they relate to labour mobility more generally.

GATS language is important because it frequently forms the basis for more expansive temporary entry provisions in various trade agreements (Hufbauer and Stephenson, 2007). Despite attempts to kick-start further liberalization of GATS temporary entry provisions in 2000 and 2004, negotiations have not advanced, perhaps highlighting the difficulties inherent in this area of trade policy. In the absence of any progress, major regional agreements such as the TPP can increasingly be regarded as setting modern international standards in this area (Hoekman, 2006).

There is limited evidence regarding the economic impact of GATS temporary entry commitments on services trade flows. In addition, Winters (2007) has detailed the difficulties of measuring these impacts reliably and many estimates are quite dated. For instance, World Trade Organization (WTO) estimates from 2000 suggest that only 1 per cent of global trade services flows at that time were attributable to temporary movement under GATS Mode 4 (Karsenty, 2000). Similarly, in their quantification of services commitments among European Union (EU) countries, Eschenbach and Hoekman (2006) found that temporary entry commitments represented the lowest level of trade liberalization at only 3.5 per cent. They attributed this to political resistance and government regulations at the national level.

Others have studied the extent of temporary entry liberalization in various other multilateral trade pacts, including the EU, the European Free Trade Area (EFTA), the Association of Southeast Asian Nations (ASEAN) and among Asia Pacific Economic Cooperation (APEC) countries (Sáez and Goswami, 2013; Huelser and Heal, 2014). Sáez and Goswami (2013) note that European countries have achieved almost complete labour mobility, whereas ASEAN and APEC countries have largely followed the GATS model. They suggest that countries at similar levels of economic development tend to adopt more open labour mobility provisions with one another (as per the EU and EFTA), while trade partners at very different levels of development tend to sign more restrictive provisions in their free trade pacts.

Unlike some other forms of labour migration that have been fiercely opposed, temporary entry by high-skilled workers has generally been non-controversial due to a perceived shortage of skilled workers in specific sectors and the suggested positive benefits for the host country (Edmonston, 2016; Hainmueller *et al.*, 2015; Lofstrom and Hayes, 2011). Yet, recently, several researchers have questioned the true extent of these labour shortages in countries such as the USA and the need for foreign labour to fill these gaps. For example,

Matloff (2013) has documented in the US computer science sector how foreign high-skilled workers entering the country temporarily had lower qualifications and received lower pay than Americans. Similarly, Bound *et al.* (2017) have found that foreign workers were also reducing opportunities for American workers in the sector. Pritchett (2006) has situated the debates influencing the entry of such workers within a broader framework that assesses the economic imperative for encouraging further mobility against the political factors that constrain progress in various countries.

As a result of such political sensitivity, a major driver for developing temporary entry chapters in trade agreements is to create certainty for employers and investors by allowing them to by-pass economic needs tests in host countries. In theory, such tests are designed to ensure job vacancies in the domestic labour context exist before foreign workers are permitted to fill positions. In practice, such tests give countries great latitude to apply both political and bureaucratic processes to either restrict or ease temporary entry by prospective foreign workers. In effect, such tests ensure that labour mobility remains the purview of a state's sovereign immigration policies rather than subject to globalized international trade policy (Mattoo, 2003). Entrenching the labour mobility provisions in international trade agreements can be an important method to address such rules (Winters *et al.*, 2003; Sáez, 2013).

The role of the TPP negotiations in advancing this area of trade policy offers an important case study in this respect. Concluded in 2015, the TPP was a 12-country trade agreement that originally included the USA. However, the Obama Administration was unable to push the agreement through Congress, leaving the agreement unratified during the 2016 US Presidential race. Both Republican and Democratic candidates in the 2016 race campaigned against TPP and much of the negative rhetoric associated with the agreement targeted fears around job losses for American workers. Just days following his inauguration, Republican President Donald Trump signed an executive order to withdraw the USA from the agreement (Lilly, 2018).

In 2017, the 11 remaining TPP countries returned to the negotiating table to salvage the agreement, which was concluded early in 2018 as the renamed Comprehensive and Progressive TPP (CPTPP). While some provisions of the broader agreement were suspended following the USA's withdrawal, no changes were made to the temporary entry chapter. Given American influence over the chapter during negotiations, it is important to examine the actual policy commitments related to the temporary entry in the TPP. The next section presents the author's analysis of the complete text and annexes of the TPP agreement pertaining to temporary entry, comparing and evaluating the relative commitments made by each TPP country to liberalize this area of trade. I find that the US's protectionist stance during the original negotiations served to stymie meaningful international progress, reducing the overall level of liberalization achieved among partners in the final CPTPP.

Temporary entry commitments in the Trans-Pacific Partnership

Presented below is the author's evaluation of the temporary entry commitments made by each TPP country. This analysis was completed through a detailed review of the TPP legal text and associated annexes as referenced in Table I. Each commitment was subsequently matched to existing categories of temporary entry in treaties such as the GATS (for example, business visitors and intra-corporate transferees) and the level of ambition displayed by each TPP country was then assessed. The contradictory approach adopted by the USA is then presented, through an analysis of statements made by the US Administration when the TPP agreement was announced.

TPP provision	Duration of stay	TPP participants
Business visitors selling goods and services; or attending meetings and trade conventions	3-12 months	Australia*; Brunei; Canada*; Chile*; Japan; Malaysia; Mexico*; New Zealand (NZ)*; Peru*; Singapore (very limited and 30 days only); and Vietnam* (limited to sales)
Equipment and machinery service and installers	3-12 months	Australia*; Brunei; Canada*; Chile*; Mexico*; Malaysia; NZ*; Peru*; and Vietnam*
Intra-corporate transferee of managers, executives and specialists; (+ management trainees)	1-5 years	Australia*; Brunei; Canada*,+; Chile*, +; Japan; Mexico*; Malaysia; NZ*; Peru*; and Vietnam*
Investors	3 months-5 years	Australia*; Brunei; Canada*; Chile*; Japan; Mexico*; Peru*; Singapore (very limited and 30 days only); and Vietnam*
Service professionals (a) Broad contractual service suppliers; (b) legal, accounting or taxation service supplier; science and humanities professionals; researchers and professors	12 months-5 years	Australia*; Brunei (2 years for energy sector); Canada*; Chile*; Malaysia; Mexico*; NZ*; Peru*; and Vietnam* Japan
Independent executives and persons responsible for setting up a new business	1-2 years	Australia*; Canada*; Chile*; Mexico*; Peru*; and Vietnam*
Spouses and dependents for ICTs and professionals	Linked to spouse	Australia*; Brunei *; Canada* (spouses only); Chile*; Japan; Malaysia (ICTs only); Mexico* (spouses only); Peru* (ICT and spouses only); and Vietnam*
Spouses and dependents of investors, independent executives and persons setting up new business TPP	Linked to spouse	Australia*; Canada* (spouses only); Chile*; Mexico* (spouses only); Peru* (spouses only); and Vietnam*

Note: *Country extends offer reciprocally business
Source: Author's analysis of TPP text, 2018

Table I.
Temporary entry commitments by each TPP country

Overall, the TPP's approach to temporary entry was twofold. First, it synthesized existing commitments by all 12 original parties such as expeditious processing of temporary entry applications and reaffirming the commitment of ten TPP countries to visa-free travel for pre-cleared business visitors via the APEC Business Travel Card (Canada and the USA are transitional participants). Second, the TPP created new temporary entry commitments for 11 partners: all countries except the USA. Table I outlines in detail the temporary entry commitments made by the remaining 11 TPP countries. Four liberalizing trends emerge from the analysis.

First, TPP commitments reconfirm provisions contained in the 1995 GATS agreement including temporary entry for business visitors and intra-corporate transferees. Thus, it is no surprise that 11 TPP members extended commitments to business visitors; although, the commitment by some countries to extend the duration of stay to one year represents an incremental gain beyond GATS. Similarly, ten TPP countries extended commitments to intra-corporate transferees through TPP (Singapore did not extend any commitments).

Second, most countries also extended commitments to investors, which represent liberalization beyond GATS. Several countries created further incentives for foreign investment from TPP partners by also extending commitments to independent executives and staff responsible for setting up branch locations in TPP countries (Australia, Canada, Chile, Mexico, Peru and Vietnam).

Third, nine TPP countries extended temporary entry to family members of intra-corporate transferees, professionals and investors, who already qualify for temporary entry: New Zealand and Singapore did not participate. Countries varied in their treatment of family members in the chapter, with Canada, Mexico and Peru extending commitments to spouses only and the six other countries also offering entry to dependents. Most countries also offered family members the right to work either automatically or through additional application processes. Entrenching these provisions in TPP represented a major advance for labour mobility among participants. For example, Florida *et al.* (2009) and Richardson(2016) have described the importance of extending temporary entry to family members (and also allowing them to work) to encourage foreign employees to relocate.

Finally, ten TPP countries (excluding Singapore) offered temporary entry to categories of professionals, enabling workers to move to host countries without the need for economic needs tests. All of these countries committed to relatively broad lists and categories of professionals, genuinely improving the potential for high-skilled worker mobility via the agreement. In most cases, entry was limited to 12 months; however, Japan extended entry to five years to professionals admitted under its categories and Brunei extended entry to two years to energy sector professionals.

The overall level of liberalization undertaken by each TPP country is summarized in Table II, according to the following four categories:

(1) no liberalization beyond status quo GATS commitments;

(2) minimal levels of liberalization beyond GATS;

(3) moderate new commitments beyond GATS, including extending temporary entry for family members of workers; and

(4) liberalization across every category of temporary entry in the TPP, including for family members.

In total, 6 of the 11 remaining TPP countries undertook broad commitments in every category covered by the chapter: Australia, Canada, Chile, Mexico, Peru and Vietnam. While these countries have a history of including temporary entry chapters into bilateral trade agreements, in all cases, TPP represents further liberalization. These six countries also adopted a reciprocal framework: workers can only benefit from temporary entry provisions if both home and destination countries offer similar access. Canada and Chile adhered more stringently to the reciprocity principle, extending commitments for broad lists of qualifying professional and technician occupations only to TPP partners, who offered matching occupational lists in return (Peru reserves the right to apply the same logic). Australia, on the other hand, extended the entire category of service supplier commitments to TPP countries, which made any offer in the category, even if the lists of qualifying occupations were quite different[1].

None GATS status quo	Minimal GATS+	Moderate GATS + family members	High Liberalization in every category
USA	Singapore New Zealand	Brunei Japan Malaysia	Australia Canada Chile Mexico Peru Vietnam

Table II.
Level of temporary entry liberalization by TPP countries

Three countries made moderate commitments in the chapter – Brunei, Japan and Malaysia – while New Zealand and Singapore undertook minor incremental obligations. Japan's commitments were more ambitious than in past regional trade agreements, extending commitments to all TPP partners without reciprocity requirements. This may reflect Japan's awareness of its changing demographics and the known labour shortages the country is now facing. In addition, while most of the criticism on TPP's temporary entry chapter has been directed at the USA, Singapore's commitments were also marginal.

Nielson (2003) has noted that it can be difficult to quantify how much new trade agreements liberalize temporary entry beyond the original GATS agreement, as individual countries made different commitments under the GATS itself, echoing constraints articulated by Hoekman (1995) a decade earlier. In the case of the TPP, such quantification efforts are further complicated by the fact that some TPP partners already have bilateral or multilateral agreements in place with each other, meaning that the temporary entry commitments outlined in TPP may not have a liberalizing effect on temporary entry flows between two partners. For example, Chile is the only TPP country to have pre-existing bilateral agreements in force with all TPP partners. Similarly, many TPP members are also members of ASEAN and have made separate commitments via that agreement (Sáez and Goswami, 2013; Huelser and Heal, 2014). By contrast, Canada has no other trade agreements in place with seven TPP countries: Australia, Brunei, Japan, Malaysia, New Zealand, Singapore and Vietnam. Thus, new temporary entry commitments offered by Canada to those seven countries would have a liberalizing effect in all cases, while Chile's commitments would need to be individually compared to pre-existing bilateral agreements with each TPP country.

The US approach to temporary entry in Trans-Pacific Partnership

Despite strong efforts by some TPP members to gain greater access to the American job market, the USA made no incremental commitments in the original TPP temporary entry chapter. In fact, domestic political sensitivity toward the issue was perceived to be so high that the US Trade Representative's public outreach materials proactively highlighted the USA's opposing position:

> While the other 11 TPP Parties have agreed upon country-specific reciprocal commitments on access for each other's business persons, the United States is not undertaking any commitments in this area. Nor will any TPP provision require changes to US immigration law, regulations, policy, or practice, as our system already operates in a manner consistent with the temporary entry chapter. In addition, TPP will explicitly affirm the ability of TPP Parties to regulate the entry of foreign nationals into their territory (USTR, 2015, p. 3).

To better understand how the US's unique position on a temporary entry in the TPP developed to influence this plurilateral agreement so strongly, it is worthwhile to trace the history of American commitments to labour mobility in previous trade agreements.

History of temporary entry commitments by the USA vs Canada

Among TPP countries, the USA and Canada rank highest for overall migration trends (UN, 2016). Canada and the USA were also the architects of temporary entry in the original Canada–US free trade agreement (CUSFTA), finalized in 1987 and brought into force in 1989. Those provisions were subsequently entrenched in NAFTA (1994), which in turn became the blueprint for international trade arrangements globally for a generation. The shared Canada/USA origins on temporary entry in their first bilateral trade agreement; also, it is useful to compare Canada's position on temporary entry over time.

This section presents the author's evaluation of all temporary entry commitments undertaken by each of the USA and Canada in trade agreements finalized over three decades. Temporary entry provisions contained in the texts of all American and Canadian bilateral and multilateral free trade agreements were evaluated, and their 1995 GATS commitments, as referenced in Table III. It is important to point out that both Canada and the USA have agreements which include multiple members (for example, the US agreement with Central American states and Canada's agreement with the EU); therefore, the number of agreements analyzed is less than the total number of countries involved.

Table III presents the temporary entry commitments made by Canada and the USA in free trade agreements (FTAs) historically. Initial commitments by both countries in CUSFTA facilitated temporary entry for business visitors, intra-company transferees, traders and investors, and a moderate list of 49 professional categories. Provisions were then subsumed by NAFTA in 1994 and extended to Mexico. During the NAFTA negotiation process, more than a dozen occupations were added to the CUSFTA list of professionals for a total of 63; journalists were dropped from the list and 15 new occupations were added in NAFTA, primarily in the land management, health and science sectors [2]. The USA also imposed a ten-year cap of 5,500 on the number of Mexican professionals who could enter the USA to work via NAFTA's temporary entry provisions. The cap was lifted in 2004[3], while Canada did not impose any unique restrictions on Mexico. During implementation, the USA created a dedicated TN visa for Canadian and Mexican workers entering the USA via NAFTA's provisions.

In the 1995 GATS agreement, both Canada and the USA offered comparable commitments: entry for business visitors and intra-corporate transferees. The USA allowed for the temporary entry of some professionals, but had already set a cap of 65,000, who would be eligible for H-1B visas under a congressional decision that pre-dated GATS. Canada, on the other hand, extended offers to a limited list of occupational groups, with no caps. GATS undertakings by both countries were more modest than the ones made in NAFTA, likely because GATS commitments would have required non-discriminatory (most-favored nation) treatment for all WTO members.

Over the next decade, the USA then signed additional temporary entry provisions in agreements with three other countries: Jordan, Singapore and Chile[4]. The Jordanian agreement of 2000 was modest, restating GATS commitments and extending entry to treaty traders and investors, plus a small list of individuals. Commitments made to Singapore and Chile in 2004 were more robust and included temporary entry for professionals with caps of 5,400 for Singapore and 1,400 for Chile. However, unlike NAFTA, the USA adopted the position that professionals admitted to the USA under these new bilateral agreements must be absorbed within the USA's existing 65,000 H-1B visa quota (during this period, the USA also established an additional 20,000 H-1B visas beyond the 65,000 cap to be allocated to master's and PhD graduates of US universities with offers of employment. For this reason, some of the literature references a cap of 85,000). In this way, the American position offered preferential access to temporary entrants from Singapore and Chile at the expense of entrants from other GATS countries seeking to access the shrinking pool of H-1B visas.

What led to this shift? It appears that the rationale for the carve-out from the 65,000 H-1B allocation resulted from US Congressional intervention after the Singapore and Chile agreements were negotiated. In 2003, the implementation bills were referred to the US House of Representative's Committee on the Judiciary. The committee concluded that Congress had not authorized the inclusion of temporary entry chapters in the two agreements, as enacted in the Trade Act of 2002. Republican Committee Chairman James Sensenbrenner stated the following about the temporary entry provisions:

Table III. Temporary entry provisions in US vs Canada FTAs

Trade agreement	USA					Canada				
	Business visitors	Investors	ICTs	List of professionals	Spouse/Family	Business visitors	Investors	ICTs	List of professionals	Spouse/Family
Israel	x	x	x	x	x	x	x	x	x	x
NAFTA* (CA/MEX/US)	✓	✓	✓	5,500 Mexican	x	✓	✓	✓	Moderate	x
GATS	✓	x	✓	65,000	x	✓	✓	✓	Limited	x
Jordan	✓	✓	✓	Short	x	x	x	x	x	x
Chile	✓	✓	✓	1,400	x	✓	✓	✓	Broad	x
Singapore	✓	✓	✓	5,400	x			No FTA		
Costa Rica**	x	x	x	x	x	✓	x	✓	Limited	✓
Morocco	x	x	x	x	x			No FTA		
Bahrain	x	x	x	x	x			No FTA		
Australia (side agreement)	x	x	x	10,500	x			No FTA		
EFTA***			No FTA			x	x	x	x	x
Oman	x	x	x	x	x			No FTA		
Peru	x	x	x	x	x	✓	✓	✓	Broad	✓
Colombia	x	x	x	x	x	✓	✓	✓	Broad	✓
Panama	x	x	x	x	x	✓	✓	✓	Limited	x
Honduras**	x	x	x	x	x	✓	x	✓	x	✓
CAFTA**	x	x	x	x	x			No FTA		
Korea	x	x	x	x	x	✓	✓	✓	Broad	x
Ukraine			No FTA			x	x	x	x	x
European Union (n = 28)			No FTA			✓	✓	✓	Broad	✓
CPTPP (n = 11)****			No FTA			✓	✓	✓	Broad	✓
Totals	14 FTAs with 20 countries: TE provisions with 6 countries					14 FTAs with 51 countries: TE provisions with 44 countries				

Notes: Author's analysis of FTA texts. *NAFTA superseded the original Canada–US FTA; **Members of CAFTA: US Central American FTA (Costa Rica; El Salvador; Guatemala; Honduras; Nicaragua; and Dominican Republic); ***European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland); and ****11 CPTPP member countries including Canada. Of those, Canada has bilateral agreements in force with three: Mexico, Peru and Chile. *US data source documents analyzed*: Nielson (2003); Agreement on the Establishment of a free trade area between the Government of Israel and the Government of the USA (US–Israel FTA), entered into force 19 August 1985, TIAS; Agreement between the USA and the Hashemite Kingdom of Jordan on the establishment of a free trade area (US–Jordan Free Trade Agreement), entered into force 17 December 2001, TIAS. "Services Schedule A in Annex 3.1. Schedule of Specific Commitments"; US–Singapore Free Trade Agreement. Entered into force 1 January 2004, TIAS, "Chapter 11: Temporary Entry of Business Persons"; US–Chile free trade agreement. Entered into force 1 January 2004, TIAS, "Chapter 14. Temporary Entry for Business Persons."; Agreement relating to the Dominican Republic–Central America–US Free Trade Agreement of 5 August 2004 (CAFTA). Entered into force 1 December 2006, TIAS; The US–Morocco Free Trade Agreement (US–Morocco FTA). Entered into force 1 January 2006, TIAS; Agreement on the establishment of a free trade area (US–Bahrain FTA). Entered into force 1 August 2006. TIAS; US–Australia Free Trade Agreement. Entered into force 1 January 2005, TIAS; US–Oman Free Trade Agreement. Entered into force 1 January 2009, TIAS; US–Peru trade promotion agreement. Entered into force 1 February 2009. US–Colombia Trade Promotion Agreement. Entered into force 15 May 2012; US–Panama Trade Promotion Agreement. Entered into force 31 October 2012; US–Korea Free Trade Agreement (KORUS). Entered into force 15 March 2012. *Canada Data Source Documents Analyzed*: North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the US. Entered into force 1 January 1994, TIAS, "Chapter 16: Temporary Entry for Business Persons"; Canada–Chile Free Trade Agreement. Entered into force 5 July 1997. "Chapter K – Temporary Entry for Business Persons"; Canada–Costa Rica Free Trade Agreement. Entered into force 1 November 2002, "Chapter 10: Temporary Entry."; Canada-Peru free trade agreement. Entered into force 1 August 2009, "Chapter 12 – Temporary Entry for Business Persons"; Agreement between Canada and the States of the European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland), Entered into force 30 April 2009; Canada–Colombia Free Trade Agreement. Entered into force 15 August 2011, "Chapter 12 - Temporary Entry for Business Persons"; Canada–Panama Free Trade Agreement. Entered into force 1 April 2013, "Chapter 13 – Temporary Entry for Business Persons"; Canada–Honduras Free Trade Agreement. Entered into force 1 October 2014. "Chapter 14: Temporary Entry for Business Persons"; Canada–Korea Free Trade Agreement. Entered into force 1 January 2015. "Chapter 12: Temporary Entry for Business Persons"; Comprehensive Economic and Trade Agreement between Canada and the European Union and its member states (CETA). Entered into force 21 September 2017. "Chapter 10 – Temporary Entry and Stay of Natural Persons for Business Purposes"; Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), signed at Santiago, 8 March 2018. "Consolidated TPP Text – Chapter 12 – Temporary Entry for Business Persons"

> I have long expressed concern about substantive changes to U.S. law contained in free trade agreements. Before passage of Trade Promotion Authority, immigration provisions were included in earlier free trade agreements such as NAFTA, without any consultation with this Committee. This practice unfortunately created precedent for subsequent trade agreements, such as those we consider today, and immigration provisions were included in the Chile and Singapore Free Trade Agreements before passage of TPA last year. At last week's mock markup, Members of this Committee spoke with a united bipartisan voice that immigration provisions in future free trade agreements will not receive the support of this Committee. In addition, the implementing legislation we consider today contains a number of modifications recommended by the Committee at last week's mock markup. While the draft implementing legislation created a separate visa category for skilled workers from Chile and Singapore, the bills we consider today amend the Immigration and Nationality Act to ensure that these visas–6,800 in total–are deducted from the national H-1B cap when they are issued or when a Chilean or Singaporean citizen is granted an extension after five or more consecutive prior extensions[5].

Although Congress ultimately approved the Chile and Singapore agreements under the "fast-track" Trade Promotion Authority legislation described above, this achievement also signified the last time temporary entry provisions were negotiated in any US trade agreement. Instead, analysis of new bilateral trade agreements reached subsequently with Central American countries, Morocco, Bahrain, Oman and others, reveals that the texts included provisions or side letters explicitly stating that nothing contained therein should be construed as applying to immigration measures or the right to work in the other party's country[6]. Thus, of the 20 countries with which the USA has trade agreements in force, only four agreements implemented between 1994 and 2004 include temporary entry commitments: NAFTA, Jordan, Chile and Singapore.

Despite the USA's shift away from temporary entry chapters after 2004, a unique arrangement was reached with Australia shortly after the Singapore and Chile agreements came into force. Just as the two countries concluded their bilateral trade agreement, the US Congress introduced and passed legislative provisions in 2004-2005 that would grant temporary work visas to Australian nationals. Section 501 of the US Congress's Real ID Act of 2005 approved a new class of visas to admit up to 10,500 Australian nationals annually who would otherwise enter the USA under an H-1B visa (professionals with job offers to be paid prevailing US wages)[7]. The E-3 visa for Australian nationals is widely believed to have emerged as a *quid pro quo* compromise between President George W. Bush and Australian Prime Minister John Howard to conclude the Australia–US Free Trade Agreement. Excerpts from speeches given by former diplomats for both sides support the view that separate visa legislation was passed to coax the Australians into accepting a free trade agreement without a temporary entry chapter (Tidwell, 2016; Endelman, 2005). Although a side arrangement subject to American unilateral withdrawal offered Australia considerably less certainty than a temporary entry chapter entrenched in a trade agreement, implementation of the E-3 visa over the past decade appears to have satisfied the interests of both countries.

The Canadian contrast

Following the negotiation of CUSFTA, NAFTA and GATS, Canada, together with its trading partners, charted a very different course than the USA, further liberalizing temporary entry in most Canadian trade agreements over the next two decades (Table III). NAFTA-comparable provisions of extending entry to business visitors, traders and investors and intra-corporate transferees became standard beginning with the Canada–Chile agreement in 1997. Next, Canada routinized the extension of spousal admission for workers

who already qualified for temporary entry beginning in 2002. Panama was the only country with a temporary entry chapter not to receive spousal access from Canada.

Beginning in 2009, under Prime Minister Stephen Harper, Canada dramatically liberalized the list of occupations qualifying for temporary entry, offering broad lists to Peru, Colombia, Korea and the 28 countries of the European Union. The 2016 Canada–Europe Comprehensive Economic Trade Agreement (CETA) includes a comprehensive temporary entry chapter that closely resembles Canada's TPP commitments[8]. CETA's temporary entry provisions enjoy broad bipartisan political support in Canada: upon its 2015 Canadian election victory, the new liberal government adopted and ratified without amendment CETA's temporary entry chapter negotiated by the previous Conservative government (Lilly, 2018).

Canada also viewed the TPP as an important opportunity to further liberalize temporary entry with the USA itself. Since NAFTA's implementation in the mid-1990s, the list of occupations that qualify for NAFTA professional visas has never been modernized, meaning that two decades of emerging job categories remain excluded. Canada has long wanted to address this gap and regarded TPP as an important opportunity to make gains. However, the Obama Administration was adamant that modernization of labour mobility with Canada and Mexico would not occur via TPP. Repeated efforts by Canada to open this area to renegotiation via NAFTA were also rebuffed by the Trump Administration. Furthermore, US Trade Representative Robert Lighthizer did not reference any intention to address temporary entry in his letters to Congress outlining his negotiating objectives (USTR, 2017a, 2017b), despite awareness of the importance to both Canada and Mexico. Ultimately, the new US Mexico Canada Agreement (USMCA) finalized in September 2018, included the same temporary entry provisions as the original NAFTA, with no modernization to the list of professionals covered[9].

By fall of 2018, Canada had 13 free trade agreements in force with 44 countries, with preferential temporary entry commitments in place for 37. Once CPTPP is implemented in 2019, Canada will have 14 agreements with 51 countries, of which 44 will include temporary entry chapters. The seven countries with no temporary entry chapters in place with Canada are Ukraine, Israel, Jordan and the four European countries of the European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland).

The future of temporary entry in international trade law

How does the differential treatment of temporary entry provisions by these two countries influence the future prospects for temporary entry in international trade law? Although there is no indication that GATS Mode 4 developments are likely in the coming years, any new multilateral efforts will inevitably be influenced by this "spaghetti bowl" effect of overlapping trade commitments by more than 50 of the world's advanced economies. Will the US approach prevail or the one advanced by Canada, Europe and other TPP partners?

Certainly, any further development of temporary entry provisions in major plurilateral trade agreements or broader multilateral initiatives must consider the growing importance of India and China, two countries supplying more temporary high-skilled workers to the global market than any other. For example, presented below are the author's calculations of visas issued by the US State Department to high-skilled Indian and Chinese nationals seeking to work in the USA under H-1B and L-1 intra-corporate transferee visas. These are then compared to the total visas issued under various temporary entry provisions linked to US trade agreements that have been the subject of this paper. In 2016 alone, the US State Department issued more than 150,000 H-1B and L-1 intra-corporate transferee visas to Indian nationals and a further 26,000 to Chinese nationals. These figures dwarf the combined 24,000 trade-specific visas issued by the USA for Singapore, Chile, Australia and

Mexico under bilateral trade agreements (Canada is excluded due to data limitations whereby most Canadians are issued NAFTA TN visas immediately upon presentation at the US border. Thus, data on Canadians entering the US is unreliable and NAFTA TN visas issued to Canadians by the State Department capture only a tiny percentage of Canadians, who enter the USA to work. Even if the estimated 30,000-40,000 Canadians who are working in the USA under NAFTA provisions were added to the 24,000 figure, India continues to dominate).

Thus, the USA may have been seeking to avoid further entrenching the precedent of temporary entry chapters in the TPP to avoid problems in future negotiations with partners such as India. Additional growth of India's high-tech sector largely depends on immigration policies in target market countries, including Canada and the USA. India has also become more aggressive about this issue and even filed a WTO case over changes to procedures for H-1B visas. India has claimed that fees associated with the visas and the USA's action to carve out protections within the 65,000 quota for American trade partners such as Chile and Singapore violate the US's GATS commitments[10].

Ultimately, if the USA is to be involved in future plurilateral trade pacts or broader multilateral frameworks to further liberalize temporary entry, the country's intransigence on the file must be confronted. As it stands, many lawmakers in the USA view the country's trade agreements signed prior to 2004 as linking trade agreements to domestic immigration policy, and as a failure to protect US sovereignty. As suggested by Sheila Jackson Lee, Democrat member of Congress's Committee on the Judiciary in 2003:

> Immigration policy is a sensitive, political matter. Changes in immigration policy have traditionally been the result of intense, open negotiations between workers, employers, immigration advocates, and Members of Congress. These issues simply do not belong in fast-tracked trade agreements negotiated by executive agencies. (U.S. Congress, 2003).

Alternately, some would argue that the failure of TPP in the USA highlights a need to eliminate temporary entry from future trade arrangements altogether, as recommended by minority members of the US Congress's Committee on the Judiciary in 2003. Adherents of such a view tend to prefer trade agreements which favor tariff removal over comprehensive agreements such as the TPP, which also encompass rules and governance matters. The difficulty with such a position is that trade in services (rather than goods) represents much of the anticipated growth in the coming decades. Services trade relies more heavily on labour than goods and labour mobility facilitates such trade (Hufbauer and Stephenson, 2007).

Panizzon (2010) has suggested that the failure of the GATS to include an emergency safeguard mechanism which would allow countries to close their borders is one reason that greater advances have not taken place. The suggestion that such a "snapback" provision would garner the political support necessary to further liberalize trade in temporary entry is worth further consideration. Similarly, perhaps if the USA had been able to maintain its cap on Mexican TN visa holders permanently or retain greater autonomy over caps moving forward, temporary entry would continue to enjoy greater political support in the USA. Of course, opponents would challenge the uncertainty created for both employers and workers by such limits. Nevertheless, the arguments appear to parallel current debates in Europe on investor-state dispute and the right of states to regulate in the public interest. As it is increasingly accepted that states should have the right to protect their sovereign interests through such regulation (Lilly, 2018), presumably, transference of this principle to temporary entry could enable states to close borders temporarily to protect national interests and combat abuses to the program as warranted. Further research in this area is recommended.

Conclusion

The temporary entry chapter of the TPP had the potential to modernize approaches to labour mobility for a new generation of trade agreements. Yet, lack of ambition by the USA resulted in a TPP chapter that offers only modest gains in the final pact. Nevertheless, half of all TPP countries made major efforts to liberalize labour mobility and the remaining five countries offered modest improvements. Had the USA been more ambitious in its own approach, those five countries would have been more likely to follow suit. Ironically, and despite the USA's withdrawal from the agreement, the new 11-country CPTPP has been deeply impacted by American intransigence toward labour mobility.

The CPTPP has now been fully ratified and will be implemented in 2019. The extent to which the temporary entry chapter has a truly liberalizing effect on labour mobility among partner countries will be an important area of future research. In addition, success depends upon the alignment of domestic policies and laws governing temporary entry in each TPP country. Nevertheless, due to the number of countries involved and the overall economic importance represented by the trading bloc, the TPP is positioned to have a greater influence on global standard setting in this area than are bilateral agreements that are narrowly applied between two partners.

For the USA, temporary entry provisions should be revisited for potential inclusion in future trade agreements. Given the relatively small influence of temporary entry measures on overall US migration flows relative to the potential gains for businesses and foreign investment, it seems surprising that American governments across the political spectrum continue to so strongly resist their inclusion in trade policy. Certainty around a major factor of production – high-skilled labour can positively influence the location decisions of global companies. For example, in 2014, Microsoft established a major facility in Canada rather than the US partly due to challenges associated with US immigration and temporary entry policies for Microsoft's target workforce (US House of Representatives Committee on Science and Technology, 2008).

As the demographic profiles of Western economies continue to age, it will be increasingly necessary for countries to develop pragmatic solutions to the labour mobility challenge. Creative ideas surrounding the treatment of temporary entry in trade agreements may offer important avenues for progress. To be successful, solutions must satisfy the interests of both global trade advocates and skeptics, who resist further integration. Greater attention to sovereignty concerns through the development of snapback provisions and numerical visa caps may be warranted.

Notes

1. Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), signed at Santiago, March 8, 2018. "Consolidated TPP Text – Chapter 12 – Temporary Entry for Business Persons".
2. Free Trade Agreement between the Government of Canada and the Government of the USA (CUSFTA), entry into force 1 January 1989.
3. US Department of Homeland Security 2004, "Eliminating the Numerical Cap on Mexican TN Nonimmigrants." Federal Register 69, no. 47. (10 March 2004), 11287, available at: www.justice.gov/sites/default/files/eoir/legacy/2004/03/12/fr10mar04.pdf (accessed 3 January 2018).
4. Agreement between the USA and the Hashemite Kingdom of Jordan on the establishment of a free trade area (US–Jordan Free Trade Agreement), entered into force 17 December 2001, TIAS; US–Singapore Free Trade Agreement. Entered into force 1 January 2004, TIAS; US–Chile Free Trade Agreement. Entered into force 1 January 2004, TIAS.

5. US Congress, House Committee on the Judiciary, US–Singapore Free Trade Agreement Implementation Act *(to accompany H. Report 2739)*. 108th Congress. 22 July 2003, R. Report 108-225.
6. Agreement relating to the Dominican Republic–Central America–US free trade agreement of 5 August 2004 (CAFTA). Entered into force 1 December 2006, TIAS; The US–Morocco free trade agreement (US–Morocco FTA). Entered into force 1 January 2006, TIAS; Agreement on the establishment of a free trade area (US–Bahrain FTA). Entered into force 1 August 2006. TIAS; US–Oman Free trade agreement. Entered into force 1 January 2009, TIAS.
7. US House of Representatives, *REAL ID Act of 2005.* Public Law 109-13, U.S. Statutes at Large, 109 (2005), available at: www.uscis.gov/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-30238.html
8. Comprehensive Economic and Trade Agreement Between Canada and the European Union and its member states (CETA). Entered into force 21 September 2017. "Chapter 10 – Temporary Entry and Stay of Natural Persons for Business Purposes".
9. Canada–US–Mexico Agreement (CUSMA). Signed at Buenes Aires, 30 November 2018 "Chapter 16 – Temporary Entry for Business Persons".
10. WTO, *US – Measures Concerning Non-Immigrant Visas* (March 8, 2016). WT/DS503/1 and S/L/410.

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