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Examining Mode 4 Commitments in India and the EU's Agreements: Implication for the India-EU BTIA

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CARIM-India
Developing a knowledge base for policymaking on India-EU migration

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Examining Mode 4 Commitments in India
and the EU's Agreements:
Implication for the India-EU BTIA

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CARIM-India – Developing a knowledge base for policymaking on India-EU migration

This project is co-financed by the European Union and carried out by the EUI in partnership with the Indian Council of Overseas Employment, (ICOE), the Indian Institute of Management Bangalore Association, (IIMB), and Maastricht University (Faculty of Law).

The proposed action is aimed at consolidating a constructive dialogue between the EU and India on migration covering all migration-related aspects. The objectives of the proposed action are aimed at:

- Assembling high-level Indian-EU expertise in major disciplines that deal with migration (demography, economics, law, sociology and politics) with a view to building up migration studies in India. This is an inherently international exercise in which experts will use standardised concepts and instruments that allow for aggregation and comparison. These experts will belong to all major disciplines that deal with migration, ranging from demography to law and from economics to sociology and political science.
- Providing the Government of India as well as the European Union, its Member States, the academia and civil society, with:
 1. Reliable, updated and comparative information on migration
 2. In-depth analyses on India-EU highly-skilled and circular migration, but also on low-skilled and irregular migration.
- Making research serve action by connecting experts with both policy-makers and the wider public through respectively policy-oriented research, training courses, and outreach programmes.

These three objectives will be pursued with a view to developing a knowledge base addressed to policy-makers and migration stakeholders in both the EU and India.

Results of the above activities are made available for public consultation through the website of the project: <http://www.india-eu-migration.eu/>

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Abstract

India and the European Union (EU) are currently negotiating a Broadbased Trade and Investment Agreement (BTIA) and Mode 4 liberalisation is a key component of the negotiations. India and the EU have different negotiating positions under Mode 4 in the World Trade Organization (WTO) and in their bilateral agreements. The objective of this paper is to examine India and the EU's offer in the WTO and their existing commitments in bilateral agreements and draw implications for the India-EU BTIA. The paper found that India and the EU have trade complementarities in the temporary movement of people. In the Doha Round, India is a demandeur of liberalisation in Mode 4 while the EU is a recipient. Though the EU's coverage of services under Mode 4 in the WTO Revised Offer is wider, India has offered more liberal commitments in terms of the definition of service suppliers and duration of stay. In their bilateral agreements, India and the EU follow different approaches for scheduling commitments and India's commitments and coverage under Mode 4 are more liberal. Drawing from their existing trade negotiations the paper concludes that broader sectoral definitions, wider coverage, longer duration of stay, flexibility of movement within the EU markets and removal of restrictions such as economic needs tests, nationality and residency requirements under Mode 4 will help to facilitate movement of people between India and EU through the BTIA. Such movement will help to meet the demand-supply gaps and will benefit the economies of India and the EU Member States. However, Mode 4 is a sensitive issue and to get commitments in this mode, India has to meet the EU's demands in other modes such as Mode 3. The paper argues that while commitments can be WTO plus and can cover both skilled and unskilled movement, there is unlikely to be much progress on regulatory issues such as mutual recognition of qualifications unless there are reforms in India and the EU.

Introduction

With globalisation, cross-country movement of people has become a crucial part of trade in services. Demand-supply imbalance in the skilled workforce and demographic changes in the global market resulting in changing age profiles, among others, are leading to labour shortages in developed countries. This is particularly true in the case of the European Union (EU) Member States such as Spain, Italy, Belgium and Germany (for details see *European Migration Network (EMN) 2011*). Since a long time, the EU Member countries have been importing low-skilled labour like childcare and home-care workers from developing economies. With technological developments, the demand for high-skilled workers has also increased in sectors like information technology, engineering and health services (*EMN 2011*). The EU Member countries are now facilitating the inflow of foreign workers into their markets through bilateral labour agreements and Foreign Employment Acts. Developing countries like India, on the contrary, have a comparative advantage due to their large supplies of inexpensive labour (Ostrovsky 2006). The workforce from India has been migrating to developed countries. While high-skilled workers have been moving to countries such as the United Kingdom (UK) and the United States (US), lower skilled workers go to countries in the Middle East. This inherent trade complementarity in the cross-country movement of labour makes movement of natural persons a critical issue in services trade negotiations.

Trade in services was brought under the multilateral trading system in the Uruguay Round of the World Trade Organization (WTO) through the General Agreement on Trade in Services (GATS). The GATS classifies trade in services under four modes and within the four modes; movement of people or Mode 4 is a key mode of services delivery.¹ It is defined as:

‘The supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member’²

The Annex on Mode 4 states that it applies to

‘measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service’

This definition extends to independent service providers, self-employed and foreign individuals employed by foreign companies established in the territory of a WTO Member State. However, the agreement does not apply to measures affecting natural persons seeking access to the employment market or to measures regarding citizenship, residence or employment on a permanent basis. Thus, Mode 4 under GATS only covers the ‘temporary’ movement of natural persons. Countries do have the right to regulate the entry and stay of temporary service providers but such measures should be applied in such a manner that they do not nullify the benefits accruing to any WTO Member under the terms of specific commitments.

Although foreign labour contributes significantly to the workforce of developed countries including the EU, a majority of the countries has maintained a restrictive stance in trade agreements with respect to labour movement. Movement of natural persons or Mode 4 is one of the least liberalised modes of service delivery in the WTO. The limited commitments that have been made refer mostly to higher-level personnel, whose mobility is sometimes related to Mode 3 or establishment of commercial

¹ Under GATS services are traded through four different modes. *Mode 1: ‘Cross-border supply of services’* refers to the delivery of services across countries such as the cross-country movement of passengers, electronic delivery of information. *Mode 2: ‘Consumption abroad’* refers to the physical movement of the consumer of the service to the location where the service is provided and consumed. *Mode 3: ‘Commercial presence’* refers to the establishment of foreign affiliates and subsidiaries of foreign service companies, joint ventures, partnerships, representative offices and branches. It is analogous to FDI in services. *Mode 4: ‘Presence of natural persons’* refers to natural persons who are themselves service suppliers, as well as natural persons who are employees of service suppliers, temporarily present in the other member’s market to provide services.

² For details see GATS Article 1 and Annex on Movement of Natural Persons Supplying Services Under the Agreement, accessible at http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm#Article1 (last accessed on December 25, 2012)

presence. Studies have shown that both the developed (receiving) country and the developing (sending) country have gained from short-term labour mobility. For instance, Winters *et al.* 2003 found that an increase in inward movement equivalent to 3 percent of the developed countries' skilled and unskilled workforce would generate an estimated increase in world welfare of \$156 billion, shared fairly equally between developing and developed countries. Despite these studies, the level of openness remains limited.³

Due to slow progress in the Doha Round of WTO negotiations, a number of trading nations are negotiating bilateral and regional trade agreements, which encompass services (Marchetti and Roy 2008). The US and the EU have been in the forefront of these bilateral agreements. More recently, the bilateral engagements of developing countries in Asia, including India, have also increased. India and the EU have signed comprehensive bilateral agreements (including services) with countries such as Korea. They are currently negotiating a bilateral Broadbased Trade and Investment Agreement (BTIA), which will cover trade in services. Mode 4 is an important issue for discussion under this agreement. Given this background, the objective of this paper is to examine the offers made by India and the EU in the WTO and their commitments in existing bilateral agreements so as to draw implications for the ongoing India-EU BTIA, particularly with respect to Mode 4 discussions.

This paper is divided in four sections. Section 1 analyses the offers made by India and the EU in their WTO Revised Offers. This gives an idea of the extent to which India and the EU are willing to take multilateral commitments in Mode 4. There has not been much progress in the Doha Round and there have been changes in the EU market due to internal integration, global slowdown, etc. Given this, Section 2 presents an overview of the reforms and transformations in the EU market over the past few years, highlighting the changes that may affect Mode 4 negotiations. Section 3 examines the commitments made by India and the EU under Mode 4 in their selected bilateral agreements. Based on this, the last section draws some key implications for the India-EU BTIA. It is important to note that this paper does not focus on domestic regulations in the two markets. The focus is on what India and the EU are willing to bind in trade agreements. In addition, the paper largely focuses on market access issues and temporary movement of people from India to the EU.

1. Mode 4 Liberalisation and the WTO Revised Offers

India and the EU are founding members of the WTO and are actively participating in the ongoing Doha Round of WTO negotiations. The two economies submitted their Revised Offers in 2005.⁴ Both India and the EU are proponents of liberalising trade in services in the Doha Round. However, their interest varies across different sectors and modes of services delivery (for details see Mukherjee and Goswami 2011). The EU is a major proponent of liberalising Mode 3 or foreign direct investment (FDI) in major markets such as India and in sectors such as telecommunications, financial services, transport and energy services. Its interest lies in not only securing the autonomously liberalised regime but also ensuring regulatory certainty.⁵

Since the beginning of the Doha Round, India wanted liberalisation commitments in knowledge-based services such as computer-related services and in Modes 1 and 4.⁶ Precisely in Mode 4, India wants commitments from its trading partners for temporary movement of high-skilled professionals in

³ All dollar values are in US Dollar

⁴ India submitted its Initial Offer (WTO Document No. TN/S/O/IND) on January 12, 2004; and Revised Offer (WTO Document No. TN/S/O/IND/Rev.1) on August 24, 2005. The EU submitted its Initial Offer (WTO Document No. TN/S/O/EEC) in June 10, 2003; and Revised Offer (WTO Document No. TN/S/O/EEC/Rev.1) on June 29, 2005

⁵ Mukherjee and Goswami 2011

⁶ In Mode 1, India wants full liberalisation in a broad range of sectors, which will enable Indian information technology (IT) and business process outsourcing (BPO) companies to provide services to their clients

four categories – namely business visitors (BV)⁷, intra-corporate transferees (ICT)⁸, independent professionals (IP)⁹ and contractual service suppliers (CSS)¹⁰. India also wants commitments in Mode 4 delinked from the requirement to establish commercial presence or Mode 3, particularly in categories such as BV and ICT, removal of citizenship and residency conditions, reduction in cumbersome procedures for work permits and visas and removal of requirement for economic needs tests (ENT), among others.¹¹

The negotiating position of India and the EU has changed overtime. In the Uruguay Round, India, along with other developing countries like Brazil, protested against the inclusion of services in the multilateral trading system. However, since the beginning of the Doha Round, India has been a proponent of services negotiations and has been pushing for better Mode 4 commitments. Since the Uruguay Round, the EU has expanded with the joining of new Member States of Eastern Europe. These Member States are trying to integrate into the EU and some of them have surplus labour, which can be absorbed in the EU Member States that have labour shortages. The differences in labour endowments and requirements across Member States have made it difficult for the EU to have a common negotiating position.

The Doha Ministerial Declaration of November 2001 stated that negotiations will be based on a request-offer approach, that is, each country would make bilateral requests to its trading partners to remove barriers in areas of its export interest, but offers will be multilateral. Members agreed to submit the initial requests by 30 June 2002 and initial offers by 31 March 2003. India has received requests from around 25 countries (including all major developed and developing countries) and some of these requests were on Mode 4. Among them, the EU has made requests to India in Mode 4 to expand the scope and coverage to include more categories of high-skilled service providers and eliminate economic needs tests.

India, too, made a request to the EU on Mode 4. In its request, India asked for full commitment in respect of independent professionals, delinked from commercial presence. It has also requested its trading partners, including the EU, to put in place a visa system to ensure fulfilment of the horizontal and sectoral commitments undertaken and to grant multiple-entry visa for professionals. In addition, it requested inter-firm labour mobility, removal of economic needs tests and other necessity tests, extending the duration of stay, removal of discriminatory taxes on foreign service providers and removal of quantitative restrictions or quotas on the movement of professionals. In fact, India even pushed for a special visa category under Mode 4 known as *GATS visa*. Overall, there are some similarities in the Mode 4 demands made by India and the EU, but India's demands are more extensive.

Based on the requests received by the trading partners, the EU and India submitted their Initial Offers in June 2003 and January 2004, respectively, and their Revised Offers in June 2005 and August 2005, respectively. Compared to their Initial Offers, both India and the EU made improvements in their Revised Offers in Mode 4. India's Revised Offer was regarded as one of the best Revised Offers submitted to the WTO. India has given the most comprehensive proposal on Mode 4, providing not only concrete suggestions for further liberalisation but also for detailed administrative procedures (Winters *et al.* 2003). A comparison of India and the EU's horizontal offers in Mode 4 along with the definitions of different types of service providers, duration of stay, etc. is given in Table 1.¹²

⁷ A person who visits another country specifically for business negotiations and/or for preparatory work for establishing presence for short duration

⁸ Employee of a company who transferred from originating country's office to office of the same company in another country

⁹ A self-employed person who entered another country to perform a service on contract basis

¹⁰ Employee of a foreign company who enters another country temporarily in order to perform a service pursuant to a contract

¹¹ The term economic needs test has no definite definition under the GATS. However, it is referred to as a test using economic criteria to decide whether the entry into the market of a foreign firm or service provider is warranted or not

¹² Offers and commitments can be horizontal, which cuts across all sectors or they can be sector-specific

Table 1. Comparison of India and the EU's Offers and Definition of Different Categories of Service Suppliers

Category of Service Supplier	India's Revised Offer	EU's Revised Offer	Comparison of Definition(s)
Business Visitors	180 days	90 days ¹³	The definitions followed by India and the EU are similar in terms of coverage.
Intra-corporate Transferees	Five years (includes managers, specialists and executives)	Three years for managers and specialists and 12 months for graduate trainees ¹⁴	India covers managers, executives and specialists while the EU covers managers, specialists and graduate trainees. There are two key differences in the definition. First, India allows for decision-making powers and representation in board to foreign service providers. This is not offered by the EU. Second, while in the case of India, specialists are defined as persons possessing 'knowledge at an advanced level,' the EU defines them as persons with 'uncommon knowledge.' The word 'uncommon' could implicitly mean an economic needs test. While India wants movement of high-skilled professionals, the EU allows for graduate trainees.
Independent Professionals	One year	Six months in any 12-month period	<p>The EU mentions that the natural person has to be self-employed while India does not explicitly mention this. India allows temporary entry to those who have fulfilled qualification and licensing requirements in India. The EU Offer states more stringent requirements than India. The EU Offer specifies that a person must possess professional qualifications where this is required to exercise an activity pursuant to the laws, regulations or requirements of the EC or the Member State where the service is supplied and at least six years professional experience in the sector.</p> <p>The EU has offered access in more number of services compared to India. For instance, legal services, management-consulting services and services related to management-consulting and translation services are covered in addition to services that are covered by India. The only service where IP are allowed by India and not by the EU is accounting and bookkeeping services. In addition, in the EU, commitments are subject to numerical ceiling in some EU Member States.</p>

¹³ This is subject to an economic needs test. Entry and temporary stay is permitted for a period of up to 90 days in any 12 months and in case of Estonia, it is for any six months

¹⁴ In Estonia, for managers and specialists, the period of stay may be extended for up to two additional years for a total term not exceeding five years. In Latvia, for manager the stay may be extended

Contractual Service Suppliers	One year	Six months in any 12 month period	India allows temporary entry to those who fulfil qualification and licensing requirements in India. The EU has imposed more stringent conditions on movement of CSSs than those imposed by India. It states that a natural person seeking access should be offering such services as an employee of the company supplying the service for at least the year immediately preceding such movement and should have at least three years professional experience in the sector. In addition, in the EU, commitments are subject to numerical ceiling. However, the coverage of sectors is much wider in case of the EU, compared to India. The EU allows access to CSSs in legal services, accounting and bookkeeping services, taxation advisory services, advertising, technical testing and analysis services, related scientific and technical consulting services, maintenance and repair of equipment in the context of an after-sales or after-lease services contract and translation services. These are not allowed in India. The only service where CSSs are allowed by India and not by the EU is hotel and restaurant services.
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Source: Author's compilation from the WTO (2005a) and WTO (2005b)

Table 1 shows that both India and the EU have offered to take commitments under all four categories of service suppliers. However, India has offered a longer duration of stay compared to the EU. In case of ICT, India has covered largely high-skilled professionals and has offered greater autonomy to foreign ICTs. The EU, on the contrary, has offered to make commitments for graduate trainees but not offered market access to executives. Though the EU has been in favour of a ban on economic needs test in the WTO, its definition of certain professional categories suggest application of an ENT. In case of specialists, the EU has defined the category as persons with 'uncommon knowledge,' which is difficult to define and prove. Moreover, while the EU has offered greater coverage under CSS and IP, it has also imposed conditions such as experience requirements. There is a numerical ceiling for CSSs and IP in the EU's Revised Offer.

As regards sector-specific commitments, in the Revised Offer, India has offered more liberal commitments compared to the EU. In the Revised Offer, most EU Member States have imposed additional conditions in their sector-specific offers, over and above those listed in their horizontal schedule in Mode 4. For instance, countries like France, Denmark and Spain have nationality requirements and a local language knowledge requirement. Member States such as Cyprus, Latvia and Lithuania did not offer any commitments under Mode 4 in some sectors of interest to India. For instance, in Cyprus, the computer and related services sector (CPC 84), management consultancy services and related services (CPC 865 and CPC 866) are kept unbound (no commitments) for all four categories of service suppliers. In Lithuania, computer and related services sector (CPC 84) is kept unbound for CSS and IP while in Latvia it is unbound for CSS. Overall, in the Revised Offer, Mode 4 is kept unbound in the case of services such as Research and Development (R&D) services (CPC 851 and CPC 853) by most EU Member States.

Due to the slow progress of the WTO negotiations and widespread dissatisfaction with the coverage and quality of offers, WTO Member countries decided to enter into plurilateral negotiations at the Hong Kong Ministerial in December 2005. India and the EU were actively engaged in these negotiations. India was the coordinator of the Mode 4 plurilateral request and the EU was the target market. The plurilateral request in Mode 4 sought new improved commitments in CSS and IP,

delinked from commercial presence or Mode 3. It also clarified definitions and categories of CSS/IP for which commitments have been requested. The target group of developed countries including the EU were asked to remove/substantially reduce ENTs. It stated that wage parity should not be a precondition for entry and the duration of stay should be one year or for the duration of contract (if longer) with the provision of renewal. It referred to transparency in Mode 4 commitments. In Mode 4, India has also pushed for developing disciplines on domestic regulations.

An analysis of the plurilateral requests shows that the level of ambition has been reduced in Mode 4 liberalisation compared to that in the bilateral-request offer process and from what Indian envisaged at the beginning of the Doha Round. For instance, in Mode 4 there is no request for a service providers' visa or GATS visa. An analysis of the WTO commitments and offers also shows that over time, the EU has become more receptive to undertaking commitments in categories such as CSS and IP but its offers have become complex due to variations across its Member States and expansion of the EU.

The Doha Round of negotiations has not progressed much. Developed countries including the EU are exploring the possibility of an International Services Agreement, which is similar to plurilateral negotiations on services. India has not shown willingness for such plurilateral negotiations. While such talks are ongoing, there are several developments within the EU domestic market, which are discussed in the next section.

2. Developments in the EU Market

During the first round of WTO negotiations – the Uruguay Round – the EU had 15 Member States and the EU (15) showed interest in liberalising certain services but had a defensive position in others.¹⁵ By 2000, many EU Member States underwent autonomous liberalisation and since the beginning of the Doha Round, the EU has been a major proponent of services liberalisation. The domestic markets in some of the major EU Member States such as France, Germany and the UK are getting saturated, and companies from the EU Member States are now exploring opportunities in emerging markets such as India. They are also facing skill shortages and are trying to fill their own demand-supply skill gaps. In the meanwhile, new Member States with labour surplus have joined the EU. This has resulted in more scope for intra-EU labour mobility.

It is worth noting that work permits and visas are under the jurisdiction of individual Member States. Nevertheless, the European Commission (EC) has undertaken several initiatives to facilitate entry and intra-EU mobility of foreign nationals. These include the provision of Schengen Visa (SV), the EU Blue Card Directive (2009/50/EC) and the EU Single Permit Directive (2011/98/EU). The SV allows foreign nationals to enter the EU for a short term for business purposes. The Blue Card system allows a high-skilled third-country national to enter, re-enter and reside (for more than three months) in the territory of an EU Member State. The Single Permit Directive seeks to establish a simplified and harmonised procedure for non-EU nationals in order to obtain a work and residence permit in the EU Member States. In order to attract high-skilled professionals, in July 2010, the EC proposed implementation of a Directive on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer. The aim of the proposed Directive is to remove barriers to entry and movement of ICT into and within the EU Member States. While some of these measures have already been implemented, others are underway.

There has been a change in the economic situation of the EU after the global slowdown. The EU is said to be adversely affected by the slowdown but the data show that in the past decade there have been fluctuations in the level of unemployment. For instance, in the year 2000, the level of unemployment was 8.5 percent, which increased to 9.1 percent in 2005; it then declined to 7.1 percent

¹⁵ Defensive position in a particular sector means that the country is not willing to undertake commitments because the sector is politically sensitive, or it is not liberalised, or the regulations are evolving.

in 2008 and again increased to 9.7 percent in 2011.¹⁶ Due to such fluctuations, some EU Member States are adopting a restrictive position with respect to entry of foreign labour and labour movement.

It is also important to note that the EU market is not fully integrated in terms of labour mobility and there are restrictions on intra-EU mobility of natural persons. For instance, in Ireland, Italy, the Netherlands and the UK, there is a restriction on workers from Bulgaria and Romania.¹⁷ The Member States also have to meet their EU obligations and, therefore, they have to facilitate intra-EU mobility before opening up their markets to third-country nationals. Most of the EU (15) countries have bilateral agreements with the individual new Member States that allow specific labour migration (seasonal work, contingencies for specific industries, etc.).

As discussed earlier, unlike goods, the EU internal market for services is not fully integrated. Regulating labour mobility in the EU is a Member State-specific subject and each Member State imposes different conditions on labour movement. This restricts movement of non-EU professionals/nationals across different EU Member States. Although the EU is trying to integrate the services market through various Directives, this is complex since the EU has expanded to 27 Member States and the interests of these Member States and their levels of development and regulatory maturity vary. The regulatory regime in some of the new Member States is evolving. The EU has a 'Directive on Services in the Internal Market (2006/123/EC) that aims to remove obstacles and ensure the freedom of establishment of nationals/companies of a Member State in another Member State, and the free movement of services providers across all Member States.¹⁸ Professional services are covered under the Services Directive. Although the Services Directives aims to integrate the services market, it does not affect/interfere with national laws of the individual Member States such as labour laws. As of August 2012, the Services Directive was fully transposed by all Member States, but its implementation varies across different EU Member States.¹⁹

Thus, while the EU is trying to facilitate labour mobility, intra-EU mobility is restricted. This, coupled with the global slowdown and unemployment in Member States, is likely to impact the EU's negotiating position in trade agreements.

3. Commitments in Bilateral Agreements

Economic and political reasons, along with the slow progress of the WTO, have led to a proliferation of bilateral and regional trade agreements. India has signed comprehensive agreements (including services) with Singapore, Korea, Japan and Malaysia. However, compared to India, the EU's free trade agreements (FTAs)²⁰ are more comprehensive. The EU's FTAs go beyond the scope of the GATS market access negotiations. This is because the EU wants to ensure regulatory certainty through its FTAs (Horn *et al.* 2010; Marchetti and Roy 2008). The EU seeks WTO plus commitments in areas such as labour standards.

Four bilateral agreements – two of India and two of the EU – are analysed in this paper to compare the negotiating strategy of India and the EU with their trading partners. These include the India-Singapore Comprehensive Economic Cooperation Agreement (CECA) (August 1, 2005), India-Korea

¹⁶ http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsa_urgan&lang=en (last accessed on January 3, 2013)

¹⁷ <http://www.cesifo-group.de/ifoHome/facts/DICE/Labour-Market-and-Migration/Migration/Labour-Migration/dice-rep-free-mov-labour/fileBinary/dice-rep-free-mov-labour.pdf> (last accessed on December 28, 2012)

¹⁸ The full text of the Directive is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0036:0068:en:PDF> (last accessed on August 17, 2012).

¹⁹ Monteagudo *et al.* (2012).

²⁰ Throughout this chapter, the term FTA is used for comprehensive agreements covering goods, services, investments and economic cooperation.

Comprehensive Economic Partnership Agreement (CEPA) (January 1, 2010), the EU-Korea Free Trade Agreement (July 1, 2011) and the EU-CARIFORUM Economic Partnership Agreement (EPA) (provisional applied).²¹ The rationale for selecting these agreements is that the EU-Korea FTA is one of the most comprehensive agreements signed by the EU in the recent years. Among India's FTAs, the India-Singapore CECA and the India-Korea CECA have the most comprehensive coverage under Mode 4. These could be regarded as India's best offers under Mode 4 and, therefore, are good benchmarks for the trade agreement. In the EU-CARIFORUM agreement, the EU has made commitments on both skilled and high-skilled movement of personnel.

In all the agreements, both India and the EU have followed the GATS-style definition (Article I and Article XXVIII) for defining services and the different modes of service delivery, including the definition of Mode 4.²² India and the EU also have certain other similarities. In the bilateral agreements, India has a separate chapter on movement of natural persons while the EU has a separate section on temporary presence of natural persons highlighting the scope, definition and duration of stay for different categories of service suppliers. Both India and the EU have also covered movement of natural persons under Mode 4 in the trade in services chapter. This implies that there is dual coverage for movement of natural persons in India and EU's bilateral agreements.

In the trade in services chapter, India follows a GATS-type hybrid approach, with a positive list of sectors and a negative list of commitments for scheduling its commitments. India has a single schedule of commitments for Mode 1, 2, 3 and 4. It specifies the list of restrictions in terms of market access (access to the domestic market) and national treatment (non-discriminatory treatment for foreign service provider) limitations. The EU has followed a mixed approach for listing its commitments. In case of Modes 1, 2 and 3, the EU, too, follows a GATS-style hybrid approach, giving a positive list of sectors and a negative list of commitments. However, it has separate chapters for commitments in Modes 1 and 2 and Mode 3. The EU does not follow a GATS-style hybrid approach under Mode 4 where it has a negative list, specifying the list of sectors in which the reservations apply and the applicable reservation. In addition, the EU has a separate schedule of commitments for different categories of service suppliers. This implies that, the EU lists its commitments on the basis of the categories of service suppliers while India lists its commitments based on sectors. In terms of the definition of service providers, India and the EU have again followed a different approach. While both countries have covered all the four categories of service suppliers, their compositions are different compared to their WTO Revised Offers. A comparison of the definitions in the bilateral agreements and the WTO Revised Offer of India and the EU is given in Table 2.

²¹ The CARIFORUM members are Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Haiti, Jamaica, St Lucia, St Vincent, St Kitts and Nevis, Surinam, Trinidad and Tobago.

²² http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm#ArticleI (last accessed on September 25, 2012)

Table 2. Comparison of the Definition and Coverage of Categories of Service Suppliers in Bilateral Agreements with the WTO Revised Offers

Trade Agreement	Comparison with WTO Revised Offers
India-Singapore CEPA	<p>Movement of natural persons is divided as short-term temporary entry and long-term temporary entry. The agreement covers all the four categories of service suppliers however; their definition is different from the WTO Revised Offer.</p> <p>The definition of BV is extended to include temporary entry for negotiating sale of goods, where such goods does not involve direct sales to general public. It also includes temporary entry of advisor to the BV, which does not include any direct dealing with public.</p> <p>In case of ICT, there is a requirement that the person has to be employed for a period of not less than six months in company and one-year industry experience or three years industry experience immediately preceding the date of application for temporary entry. These requirements are not specified in the WTO Revised Offer.</p> <p>CSSs are covered under short-term service suppliers with an experience of not less three months in relevant industry immediately preceding the date of application for temporary entry and are managers, executive and specialists. These specifications are not in the WTO Revised Offer.</p> <p>In case of an independent professional, India allows for temporary entry for 127 professional categories. However, there is a need for post secondary degree in the specialty requiring three or more years of study (or the equivalent of such a degree) as a minimum condition for entry into the occupation. The degree can be attained in India and Singapore.</p>
India-Korea CECA	<p>India has granted temporary entry for all four categories of service suppliers however, the composition and definitions are different from the WTO Revised Offer.</p> <p>The definition of BV is extended to include temporary entry for negotiating sale of goods, where such goods does not involve direct sales to general public.</p> <p>In case of ICT, there is a requirement that the person has been employed for a period of not less than one year. This was not applied in the WTO Revised Offer.</p> <p>CSSs and IP are clubbed under professional category. India allows temporary entry under 163 professional categories. There is a need for post secondary degree in the specialty requiring three or more years of study (or the equivalent of such a degree) as a minimum condition for entry into the occupation. The degree can be attained in India or Korea.</p>
EU-Korea FTA	<p>Under this FTA, key personnel, graduate trainees and business service sellers are covered. Key personnel include BV and ICT. The agreement mentions CSSs and IP. However, no commitments are taken under these two categories.</p> <p>Compared to the WTO Revised Offer, the EU has broken the definition of BV into business visitors under key personnel and business service sellers. The broad definitions of the two are similar to that in the WTO Revised Offer.</p> <p>The definition of ICT is same as the WTO Revised Offer; however, graduate trainees are covered separately from ICT. In the EU-Korea FTA, the definition of graduate trainees is similar as the WTO Revised Offer but there is a requirement that the person must be employed by a company for at least one year. This was not specified in the WTO Revised Offer.</p>

EU-CARIFORUM FTA	<p>Under this FTA, key personnel, graduate trainees, business service sellers, CSSs and IP are covered.</p> <p>The definitions of key personnel and ICT are same as the EU-Korea FTA. In the EU-CARIFORUM agreement, the EU has offered commitments under CSSs in 29 sub-sectors and for IP in 11 sub-sectors. Under CSSs, the EU allows for both high skilled and specialised skilled workers such as midwives, chefs, and fashion models. Unlike the WTO, the requirement of ‘uncommon knowledge’ is not there in the FTA.</p>
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Source: Compiled by the authors from India and EU’s bilateral agreements accessible at: <http://commerce.nic.in/> and <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/agreements/> (last accessed on October 3, 2012)

As shown in Table 2, compared to the WTO, India has a broader definition under certain categories like BV. India has given commitments under all four categories of service suppliers in all its bilateral agreements. It also has a much wider coverage of skilled professional categories in its bilateral agreements compared to the EU, which includes movement of high-skilled professionals such as architects, engineers, researchers and doctors, among others. India has allowed access under 127 professional categories for Singapore and 163 categories for Korea. In fact, it is the first time that Korea has agreed to commit on such a wide range of professional categories in a bilateral agreement.

India has made significant progress in its Mode 4 commitments under the India-Korea agreement compared to its earlier bilateral agreements. In the sector-specific commitments, India has removed a number of conditions that were applicable in the India-Singapore agreement. However, India has imposed certain requirements on service suppliers in its bilateral agreements. These include experience requirements that are similar to those that have been imposed by the EU in its WTO Revised Offer. India has adopted some of these conditions from the EU’s Revised Offer, though these are less stringent. In addition, India’s commitments reflect that India is keener on movement of its high-skilled professionals compared to the EU.

In the EU-Korea FTA, the EU has not given any commitments for independent professional and CSSs. Article 7.20 (2) of the agreement specifies that,

‘No later than two years after the conclusion of the negotiations pursuant to Article XIX of GATS and to the Ministerial Declaration of the WTO Ministerial Conference adopted on 14 November 2001, the Trade Committee shall adopt a decision containing a list of commitments concerning the access of contractual service suppliers and independent professionals of a Party to the territory of the other Party. Taking into account the results of those GATS negotiations, the commitments shall be mutually beneficial and commercially meaningful’

Although it has covered these categories under the EU-CARIFORUM agreement, the coverage of independent professions and CSSs in the EU-CARIFORUM Agreement is much narrower than under India’s agreements. However, the EU-CARIFORUM agreement includes liberalisation of movement of specialised skilled workers such as midwives, chefs and fashion models, which is not covered in the WTO or in any of India’s bilateral agreements. These are GATS plus commitments on movement of skilled workers.

In terms of duration of stay, India has offered more liberal commitments than the EU in its bilateral agreement (See Table 3).

Table 3. Duration of Stay Permitted to Different Categories of Service Supplier by India and the EU in Their Bilateral Agreements

Type of Service Supplier	EU-Korea FTA	India-Korea CEPA	India-Singapore CECA	EU-CARIFORUM EPA
Business Visitor	90 days ²³	180 days ²⁴	Two months which can be extended to one month with a five-year multiple entry visa ²⁵	90 days
Independent Professional	No commitments	One year	One year	Six months ²⁶
Contractual Service Supplier	No commitments	One year	Initial period 90 days extendable for a period of 90 days	Six months ²⁷
Intra-corporate Transferees	Three years for managers and specialists and 12 months for graduate trainees	One year extendable till five years	Initial period two years extendable for periods of up to three years for a total term not exceeding eight years	Three years for managers and specialists and 12 months for graduate trainees

Source: Compiled by the authors from India and EU's bilateral agreements accessible at: <http://commerce.nic.in/> and <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/agreements/> (last accessed on October 3, 2012)

In the trade in services chapter, compared to India, the EU has imposed more horizontal limitations on foreign service suppliers under Mode 4. In the EU-Korea FTA and the EU-CARIFORUM EPA, there is a requirement of ENT in some EU Member States like Bulgaria and Hungary. There is a quota restriction on ICT. For instance, the number of ICTs cannot exceed 10 percent of the average annual

²³ In every twelve months

²⁴ For a maximum period of five years

²⁵ The business visitor has to meet certain criterions, one of which is a letter of recommendation from a governmental economic agency of the Party to whom the application is made, giving an indication of his business activities/interests. In the event that it is not available, the Party shall consider a letter of recommendation from reputed Chambers of Commerce, Export Promotion Councils or similar organisations in his own country. If that business visitor does not meet the aforesaid criteria, he or she may still be granted a multiple journey visa for a period of less than five years, as the Party granting the immigration visa deems fit. Each Party shall grant a business visitor of the other Party the right to temporary entry for a period of up to two months, which may be extended by a period of up to one month upon request, for holders of five-year multiple journey visas and up to one month for holders of multiple journey visas with a validity period of less than five years.

²⁶ In any twelve month period. In Luxembourg, it is for 25 weeks and in Latvia it is for 3 months. Commitments are subject to numerical ceiling.

²⁷ In any twelve month period. In Luxembourg, it is for 25 weeks and in Latvia it is for 3 months. Commitments are subject to numerical ceiling.

number of the EC citizens employed by the respective Bulgarian juridical person.²⁸ Bulgaria, Austria, Finland, France, Romania and Sweden have imposed nationality and residency requirements for managing directors and auditors.

In terms of sector-wise commitments, in the India-Singapore CECA, there are some differences from the WTO Revised Offer. First, in a large number of sectors, such as advisory taxation service, real estate services, certain rental and leasing services, distribution services and hospital services, India has not offered any commitments under Mode 4. A majority of the business services are subject to licensing requirements and a numerical ceiling while market access in services such as construction services is subject to a contract. In case of the India-Korea CEPA, no sector-specific limitations or requirements are imposed under Mode 4. The Mode 4 offer in the India-Korea CEPA is one of India's best offers in Mode 4.

For sector-wise commitments, the EU has listed a schedule of reservations in both its agreements, specifying the list of sectors in which reservations apply. In the EU-CARIFORUM agreement, in case of key personnel and graduates, the EU has applied an ENT in all the sectors and recognition requirements for all regulated professions across the EU Member States. In case of some categories and countries, there are specific requirements such as residency and nationality conditions and numerical ceilings. Similar conditions are applicable in case of key personnel, graduate trainees and business service sellers in the EU-Korea agreement. In the EU-CARIFORUM agreement, the EU also gave commitments for CSS and IP. Some EU Member States, for instance, Belgium, Czech Republic, Denmark, Finland, Hungary, Latvia, Romania, Slovenia and Slovakia, have imposed an ENT for most professional services.

One of the key issues in Mode 4 negotiations is recognition of professional qualifications by the trading partner. Most bilateral agreements have a provision for mutual recognition agreements (MRAs) between the trading partners. MRAs enable professional service suppliers who are certified or registered by the relevant authorities in their home country to be mutually recognised by other signatory countries. For this, there is a requirement for developing disciplines on domestic regulation. This can be facilitated by the professional bodies of the trading partners through information-sharing and transparency, developing disciplines on qualification requirements, mutually approved accreditation processes and having some guidelines for procedures and registration requirements.

Both India and the EU have provisions for the mutual recognition of qualifications in their trade agreements to support Mode 4 commitments. However, they have not concluded any MRAs with their trading partners. There is a requirement in trade agreements to finalise an MRA within a stipulated timeframe. India has started negotiations with Singapore for mutual recognition of qualifications under key professional categories such as dentistry, nursing, architecture, accountancy and company secretary. Regulatory authorities in the two countries are having discussions for establishing common standards for recognition. In case of the EU, there has to be first mutual recognition of qualifications within the EU Member States. Each EU Member State has different regulators regulating professional services. The EU, through its Services Directive and its Directive 2005/36/EC on the recognition of professional qualifications, is trying to implement a common procedure for qualification recognition among Member States. However, this has not been fully achieved for all professional categories. There are still gaps in the implementation of the services directive, particularly with respect to professional services. For instance, in some Member States such as Sweden, Austria and France, a foreign candidate has to obtain authorisation from lawyers who already have a good reputation in the Member State. The established lawyers are competitors for the new entrants and, therefore, there is a possibility that vested interests would result in non-approval of the foreign applicant. In Greece, accountants and architects/engineers are required to have experience in order to be promoted to higher positions. This is true for accountants in Denmark. In addition, establishment requirements exist in a

²⁸ Where less than 100 persons are employed, the number of intra-corporate transferees may, subject to authorisation, exceed 10 percent

number of professions in Member States such as Belgium, Cyprus, Romania, Lithuania, Slovakia and Sweden.²⁹ As regards Directive 2005/36/EC, some Member States such as Austria, Belgium, Greece, France and Luxembourg have not adopted measures to implement the Directive.³⁰

One key point of difference between the Indian and the EU trade agreements is that both of India's agreements, which have been examined in this section, have provisions for allowing spouses and dependents to work in the partner country. The EU agreements do not have such provisions.

In general, a negative list for scheduling is considered better than a positive list (Fink and Molinuevo 2008). However, in the case of Mode 4 commitments, in the existing bilateral, India's commitments are far more liberal than those of the EU. Moreover, the EU has imposed an ENT horizontally in all sectors for certain categories of service suppliers in its bilateral agreements, which is not explicitly included in its WTO Revised Offer.

The above analysis provides certain key takeaways for the India-EU BTIA, which is currently under negotiation. Commitments by both India and the EU in their existing bilateral agreements and in their Offers under the Doha Round of WTO negotiations can be useful for inferring the likely outcomes on Mode 4 under the India-EU BTIA. The next section discusses these implications and likely outcomes.

4. Implications for the India-EU Broadbased Trade and Investment Agreement

India and the EU are negotiating a comprehensive FTA (known as the BTIA), which is likely to be signed soon. The negotiations began after the European Commission released its policy document *Global Europe: Competing in the World* in 2006 that identified India as a key FTA partner and, subsequently in 2007, a High-Level Trade Group established by India and the EU in 2005, recommended that a BTIA would be beneficial for both economies. The India-EU BTIA is India's first bilateral agreement (including services) with a large trading partner and the EU's first comprehensive agreement with a large emerging country. As of December 2012, 11 rounds of negotiations have been concluded.³¹ Mode 4 negotiations are a key component of the BTIA talks.

It is expected that the India-EU BTIA is likely to further strengthen the economic relationship between India and the EU and will enhance trade, investment and cooperation by removing the existing barriers. Studies show that the agreement will be mutually beneficial for both economies (CARIS and CUTS 2007; Mukherjee and Goswami 2011). It is likely to lead to welfare gains and increases in production, trade, wages and productivity (ECORYS *et al.* 2009). Existing studies have argued that the BTIA will generate employment and reduce poverty. The studies highlight that the BTIA is likely to reduce some of the barriers and thereby enhance bilateral trade and investment flows. For instance, opening up the education sector can make foreign education/certification more accessible to Indian students and can improve quality, efficiency and accountability in the educational institutes (CARIS and CUTS 2007). It can also lead to more acceptability of professional qualifications and enhance Mode 4 trade. Specifically, all the studies highlight that the agreement will help to remove barriers to Mode 4 trade. The studies also highlight that there are several concerns for India in the India-EU BTIA. These include the lack of a common policy across EU Member States for

²⁹ Author's compilation from Commission Staff Working Document: Detailed information on the implementation of Directive 2006/123/EC on services in the internal Market, Brussels, 2012, http://ec.europa.eu/internal_market/services/docs/services-dir/implementation/report/SWD_2012_148_en.pdf (last accessed on December 27, 2012)

³⁰ For details see http://ec.europa.eu/internal_market/qualifications/docs/scoreboard_2010_en.pdf (last accessed on January 9, 2012)

³¹ The last round of negotiations was held on February 10, 2012 at New Delhi. For details, see http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (last accessed on December 27, 2012).

movement of third-country nationals and the impact of the global slowdown, among others. In services, the EU has already scheduled the existing market access liberalisation in the WTO Revised Offer (WTO Document No. TN/S/O/EEC/Rev.1) and there is limited scope for improvements in it. While in the early stages of negotiations, the EU had expressed interest in liberalising the movement of people, unemployment and job losses after the recession has made Mode 4 liberalisation a sensitive issue in the BTIA. India needs to be careful about the scope and coverage of the agreement (Mukherjee and Goswami 2011).

As mentioned earlier, the EU seems to trade off Mode 4 commitments for greater Mode 3 access in markets of trading partners. Unless India is able to meet the EU's demands in Mode 3, its ability to seek greater market access in Mode 4 is likely to be limited. There are restrictions in India on foreign investment in a number of sectors of interest to the EU. These include retail, insurance, banking, and even professional services such as legal and accounting services. The reform process in India is slow and it is only in the latter half of 2012 that the Indian government undertook a series of reforms in the services sector, including liberalisation of retail, broadcasting and transport services. The EU also wants regulatory certainty through its trade agreements. Therefore, it is important for trading partners to have a sound regulatory framework in place before negotiating such agreements. The regulatory regime in India is evolving. A number of regulatory reforms are underway. If these reforms are implemented and the FDI regime is liberalised, India's bargaining position with the EU in Mode 4 will certainly improve.

It is likely that the BTIA will have a separate chapter on Mode 4 or movement of personnel between India and the EU. In Mode 4, India wants commitments from its trading partners for high-skilled professionals in four categories, namely, BV, ICT, IP and CSSs. It is likely that India will demand commitments in all the four categories in the BTIA. Unlike its agreement with Singapore and Korea, where the Indian government has listed professional categories in which the country wants liberalisation commitments, it is unlikely that similar demands will be made to the EU. This is because skill requirements in the EU vary across Member States and it is difficult to list the professional categories due to differences in definition across Member States. Moreover, in its agreement with Korea and Singapore, India has not followed the International Standard Classification of Occupation (ISCO) as given by the International Labour Organisation or the WTO classification (W120) or the Indian National Classification of Occupation given by the Directorate General of Employment & Training, Government of India. Thus, in case of a conflict, or a dispute in India's bilateral agreements, the occupational categories are not clear. India wants EU to undertake broad sectoral commitments. Indian industry wants the EU to implement the proposed 2010 *Directive on conditions of entry and residence of third-country nationals in the framework of an intra corporate transfer* which aims to remove barriers to entry and movement of intra-corporate transferees into and within the EU Member States and to undertake commitments for such movement in the BTIA. This will facilitate intra-EU movement of professionals. In the India-EU BTIA, India can also secure commitments in specialised skill categories such as nurses and chefs as the EU has previously made commitments in these categories such as in the EU-CARIFORUM agreement. Thus, the agreement can cover both skilled and high-skilled movement and can be GATS plus. However, the Indian government has not raised this issue with the EU.

To secure commitments in Mode 4 across different services sectors, it is likely that India will ask the EU to remove country-specific Mode 4 barriers, especially those related to ENT and nationality and residency requirements. Although India and the EU are not discussing special visa categories, the two countries are negotiating a numerical quota of approximately 40,000 workers who can enter the EU for up to 12 months to work in around 25 services sectors, including architectural services, engineering services, research and development services and computer and related services. However, the actual quota will be subject to the ongoing negotiations. Given that India has not been very successful in implementing MRAs with its existing bilateral trading partners, it is not pushing for MRAs with the EU. Most likely, the MRAs will be with individual EU Member States. One of the key

demands of Indian industry is the possibility for spouses/dependents to work. While this is possible in some EU Member States, there are restrictions in others. This will be an issue in the negotiations. Commitments made by the EU in certain categories, such as students and trainees, will be beneficial for India.

The European Commission officials and Indian government representatives pointed out that the India-EU BTIA will only cover short-term skill movement and will not cover migration issues. Both sides are not discussing mobility partnership agreements or other bilateral labour agreements. Indian policymakers believe that a sector-wise commitment and a quota for professionals will bring greater benefit to India than a bilateral labour agreement for specific skills. Bilateral agreements can happen but policymakers want to delink them from trade agreements especially in a situation when the EU is going through a global slowdown. Skill requirement in the EU will vary over time and there can be short-term skill requirements for which Member States may be willing to take certain policy measures. For example, in the year 2000, Germany had introduced a 'Green Card Scheme' to attract specialists in the information technology area, which was discontinued in 2004. The EU is already taking several measures through different directives to facilitate entry and stay of foreign nationals and their integration into the workforce. The core purpose of the BTIA is to remove/reduce country-specific entry barriers in Mode 4 across a wide range of services sectors and facilitate trade. Overall, the analysis in this paper highlights that Mode 4 negotiations are complex and that there are differences between India and the EU in terms of definition, agreement design and scope of commitments. Over time, the negotiating positions of India and the EU have changed and they differ across bilateral agreements. Broader sector definitions, wider coverage, longer duration of stay, flexibility of movement within the EU markets and removal of restrictions such as nationality and residency requirements under Mode 4 will help to facilitate the movement of people between India and the EU under the BTIA. Such movement will help to meet demand-supply gaps and will benefit the economies of both India and the EU Member States. There is need for both India and the EU to record and monitor skill movement, to examine the skill shortages across different services sector and to share information on their domestic regimes. This will facilitate bilateral trade in Mode 4.

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