

CIRCUMVENTION OF THE OBLIGATIONS CONCERNING MOVEMENT OF NATURAL PERSONS IN FREE TRADE AGREEMENTS

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This report is a doctrinal analysis of the mechanisms adopted by countries to circumvent their commitments under trade in services regarding Mode 4 (Movement of Natural Persons) services. Article XVI, GATS stipulates the types of market access restrictions that a Member can maintain. Since restrictions under the Free Trade Agreement (FTA) cannot be higher than the WTO restrictions, countries circumvent their commitments by excluding the Mode 4 services from the 'Trade in Services' chapter of the FTA, and cover it in a separate chapter.

This report seeks to review the various mechanisms used by the countries under the FTAs, that aim at circumventing their commitments under Mode 4 Services. It analyses 377 FTAs which are presently in force, out of which only 182 FTAs contain a provision on Mode 4 services. These 182 FTAs were analysed with the objective of understanding how FTAs have circumvented GATS obligations, specifically National Treatment and Market Access provisions, in respect of Mode 4 Services.

Further, the report assesses the role of immigration policies in circumventing commitments under Mode 4 Services. The report focuses on the immigration caveat in the GATS' Annex of Movement of Natural Persons (MONP) that exclude visa relaxations or eliminations, residency permits, passport and border controls, readmission and repatriation of migrants, and "associated enforcement actions" from the scope of GATS. The report also discusses the issue of misalignment of visa coverage and service provider categories, which results in difficulty for foreign service suppliers to get market access. The report, further analyses, the stance adopted by India at the WTO, with specific focus on DS503: United States - Measures Concerning Non-Immigrant Visas.

Further, the report undertakes an in-depth analysis of the FTAs, in order to ascertain the methods used by various countries for circumventing their commitments undertaken in the GATS. The analysis divides the circumvention into three models viz. total, partial and complete circumvention. The report presents the detailed findings by analysing the clauses from the 182 FTAs, with respect to their National Treatment and Market Access commitments relating to MONP.

The Report concludes with recommendations aimed at improving the GATS scheduling structure in order to ensure compliance with regulatory obligations to mitigate the risk of skill depletion in migrant source countries as well as a shared responsibility principle with regard to migrant workers overstays. It also suggests the restructuring of bilateral non-trade migration agreements, in order to avoid any conflicts with the GATS obligations.