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Migrant Workers and the Trans-Pacific Partnership

A regulatory impact analysis of the TPP's temporary entry provisions

Hadrian Mertins-Kirkwood

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A regulatory impact analysis of the TPP's temporary entry provisions

Introduction

It is increasingly common for international free trade agreements (FTAs) to contain a chapter on temporary entry for business persons. These provisions, which are included in the pending Trans-Pacific Partnership Agreement (TPP), allow certain categories of workers to cross borders on a temporary basis without going through the usual immigration process.

In theory, temporary entry provisions are designed to help executives and investors move capital into a trading party or to manage their investments in other countries. In practice, these provisions allow employers to move an unlimited number of certain types of workers between countries regardless of local labour market conditions. Their potential negative impact on the domestic labour force is concerning because FTAs give employers an opportunity to import migrant labour rather than hire and train locally, even where unemployment is high and qualified local workers are available.

Unfortunately, past FTAs such as the North American Free Trade Agreement (NAFTA) have had precisely this negative effect.[1] Employers are finding ways to game the FTA system in order to import workers with little regulatory oversight. To make matters worse, the migrant workers themselves are at risk of abuse and have limited pathways to permanent residency in the places where they are employed.

In a December 2015 interview, U.S. Trade Representative Michael Froman assured critics of the Trans-Pacific Partnership that "whatever your position is on NAFTA, this isn't NAFTA."[2] For the U.S., at least when it comes to the issue of temporary entry, this may be true. In the TPP's chapter on temporary entry for business persons (Chapter 12), the U.S. secured unique terms that differ from past deals. In fact, the U.S. government explicitly prohibited its negotiators from making any temporary entry commitments in the TPP, so the U.S. alone of all TPP countries made no meaningful promises with respect to migrant workers.

The previous Canadian government had no such qualms. As a result, for Canada, the TPP is a NAFTA redux, despite the flaws in that agreement's labour mobility rules, which would now be extended to all TPP countries.[3] Curiously, Chapter 12 of the TPP diverges in important ways from another new Canadian FTA, the Canada–European Union Comprehensive Economic and Trade Agreement (CETA), which contains new language designed to address some of NAFTA's biggest problems.

This paper identifies the most important provisions in the TPP's temporary entry chapter from the Canadian perspective and discusses how these differ from Canada's existing and potential future commitments in NAFTA and CETA respectively. The first section breaks down the general obligations in Chapter 12, which apply to all TPP parties. The second section investigates Canada's specific commitments as expressed in its country-specific annex to Chapter 12, including the range of occupations and sectors that are covered by or excluded from the deal.

Recognizing that the implications of any FTA are uncertain and difficult to predict, the paper concludes by considering the policy consequences and possible labour market impacts of these commitments if the agreement is ever ratified. While it is possible the economic impacts of the TPP's temporary entry chapter will be small — at least in the short term — it is clear the TPP will limit the democratic and legislative capacity of governments to shape migration and labour policy into the future.

Chapter 12: Temporary Entry for Business Persons

At just five pages, the temporary entry chapter in the TPP is among the shortest of the agreement's 30 chapters. The 10 articles in Chapter 12 are generally recycled from NAFTA and consistent with past Canadian FTAs. In short, the chapter requires governments to create a framework for the free movement of workers between TPP countries where various general and party-specific conditions are met. Crucially, access to the temporary entry provisions is contingent on employment, so the deal does not create opportunities for unemployed or underemployed workers directly. Instead, the chapter primarily benefits the investors and corporations who can use the temporary entry provisions to more easily hire and transfer employees across borders.

Compared with the temporary entry provisions in Canada's existing FTAs, the most consequential new obligations in the TPP relate to transparency and accountability in the application process. These new obligations on governments further restrict policy flexibility and may pose an administrative burden on immigration officials. Although it is notable that Chapter 12 of the TPP omits any mention of labour standards, it is also not unusual for a Canadian FTA.

Article 12.2: Scope

Chapter 12 of the TPP does not include an overarching objective comparable to those found in the temporary entry chapters of NAFTA (Chapter 16) or CETA (Chapter 10). For example, CETA highlights the "mutual objective to facilitate trade in services and investment by allowing temporary entry"[4] while NAFTA recognizes the need for parties "to protect the domestic labor force and permanent employment in their respective territories."[5] Instead, the temporary entry chapter in the TPP jumps straight into the scope, or limits, of the temporary entry provisions. Importantly, it clarifies that the provisions of the chapter do not apply to measures "affecting natural persons seeking access to the employment market of another Party, nor shall it apply to measures regarding citizenship, nationality, residence or employment on a permanent basis." The TPP does not create any new labour mobility rights for workers; the temporary entry provisions are explicitly restricted to employers hiring internationally or moving employees across borders.

Paragraph 12.2(3) affirms a state's right to regulate immigration measures, but that protection is negated by the caveat that those measures cannot be "applied in a manner as to nullify or impair the benefits accruing to

Temporary entry: Who decides who gets in?

Immigration, Refugees and Citizenship Canada (formerly Citizenship and Immigration Canada) is the federal department responsible for the movement of immigrants and migrant workers into the country. When Canada implements an international treaty with temporary entry commitments, IRCC becomes bound by those provisions and is obligated to enforce and report on them.

The Canada Border Services Agency (CBSA) is responsible for "[screening] foreign workers at Canadian border crossings and airports to ensure that they meet admissibility requirements before issuing work permits and allowing their entry into Canada."[9] Both IRCC and CBSA can process work permit applications, but only CBSA can issue work permits at the border and make final decisions about temporary entry.

In deciding whether to authorize migrant workers, IRCC and CBSA officials refer to the FW 1 (foreign worker manual).[10] The document describes the eligibility criteria for workers covered by Canada's FTAs who apply for a temporary work permit. It includes significant interpretive detail that does not appear in the legal texts of the treaties themselves. CBSA uses another operational manual, the ENF 4 (port of entry examinations), to determine which workers are let into Canada when they arrive at the border.[11]

An employer who wishes to hire a migrant worker can apply for a work permit in advance through IRCC and early approval streamlines the temporary entry process. However, for professionals and intra-company transferees covered by an FTA (visas T23 and T24 respectively), an advance work permit is not necessarily required. Provided a worker meets the criteria laid out in the FTA and has the required documentation—i.e., identification, evidence of employment, and evidence of credentials—they can simply arrive at a border and be issued a work permit on the spot.[12] In those cases, the decision to approve a work permit is not made by an IRCC immigration officer but by a CBSA officer alone.[13]

any Party under this Chapter." Generally speaking, this (lack of) protection for the right to regulate is consistent with past FTAs.

The TPP, like NAFTA, makes no mention of minimum wages or other labour standards in its temporary entry chapter. CETA, on the other hand, contains some weak language with respect to minimum wages and collective bargaining in its Article 10.2(5), which states:

> Notwithstanding the provisions of this Chapter, all requirements of the Parties' laws regarding employment and social security measures shall continue to apply, including regulations concerning minimum wages as well as collective wage agreements.[6]

Although the TPP's labour chapter (Chapter 19) protects minimum wages and the right to bargain collectively, it contains no meaningful obligations

directly related to migrant workers or temporary entry.[7] At best, it includes a commitment for parties to "co-operate" on the "protection of vulnerable workers, including migrant workers, and low-waged, casual or contingent workers,"[8] but co-operation is voluntary and therefore unenforceable.

Article 12.3: Application Procedures

While the scope of the temporary entry chapter is similar to past Canadian FTAs, the TPP introduces new obligations for transparency and accountability. It requires governments to process applications for temporary entry "as expeditiously as possible" and to respond to applicant inquiries "promptly." Since timelines are not defined it would be difficult to enforce these provisions, but they may still pose an administrative burden to Immigration, Refugees and Citizenship Canada (IRCC), the federal department responsible for administering the temporary entry rules (see box).

The TPP's obligation regarding processing fees is less clear than in past deals. In the TPP, fees must only be "reasonable," whereas under NAFTA fees must be limited to "the approximate cost of services rendered."[14] This looser language may give some TPP governments slightly more flexibility in setting processing fees for applicants, although Canada remains bound by the stricter NAFTA language.

Article 12.4: Grant of Temporary Entry

The TPP includes a protection for domestic licensing requirements in Article 12.4(3), which reads as follows:

> The sole fact that a Party grants temporary entry to a business person of another Party pursuant to this Chapter shall not be construed to exempt that business person from meeting any applicable licensing or other requirements, including any mandatory codes of conduct, to practise a profession or otherwise engage in business activities.

Under this provision domestic licensing and certification bodies retain the right to decide who can practise a profession in their jurisdiction. However, this is not the same as saying a party retains the right to make licensing or certification criteria a requirement for entering the country. In fact, Canada's country-specific commitments specifically prohibit any form of labour certification test at the point of entry (discussed below). Therefore, while the TPP preserves a country's right to regulate professionals once they

are inside the country, it does not necessarily insulate regulated professions in Canada from an uncontrolled inflow of foreign workers. The burden of regulatory enforcement is simply devolved from IRCC immigration officers to occupational licensing bodies and government employment inspections.

Similar language appears in CETA but not in NAFTA. None of these FTAs require mutual recognition of qualifications, although they do encourage licensing bodies to undertake mutual recognition initiatives. Article 12.4 also obligates parties to notify applicants if they are refused entry, which is similar to NAFTA but not an obligation under CETA.

Article 12.6: Provision of Information

Like the other transparency provisions in Chapter 12, Article 12.6 introduces new obligations on governments, which in Canada's case may be an administrative burden on IRCC. The parties commit to "promptly publish online" not only information about the application process (consistent with NAFTA and CETA), but also "the typical timeframe within which an application for an immigration formality is processed." Furthermore, the TPP requires parties to establish a mechanism for receiving and responding to inquiries from business persons.

Article 12.8: Co-operation

The TPP encourages regulatory co-operation on migration issues, which is a provision absent from CETA and significantly expanded from NAFTA. Article 12.8 recommends the parties work together on electronic processing systems for visas, border security, and processes for expediting entry of certain categories of workers. This article is not binding and no tangible process for co-operation is created. The parties merely promise to "consider undertaking mutually agreed co-operation activities, subject to available resources."

Article 12.9: Relation to Other Chapters

The provisions of the TPP's chapter on cross-border trade in services (Chapter 10) apply to workers granted temporary entry under Chapter 12 once they have entered the territory of another party. Chapter 10 does not directly apply to measures affecting the entry of foreign workers into a party, whether or not entry is granted under Chapter 12.[15] In other words, the TPP's trade-in-services rules — most notably the provisions on national treatment, most-

favoured-nation treatment, and market access — *do not apply* to temporary entry decisions but they *do apply* to the treatment of foreign service suppliers once they have crossed the border.

This language is broadly consistent with Canada's other FTAs, including CETA, which states that the most-favoured-nation obligations apply "to treatment of natural persons for business purposes present in the territory of the other Party," but "[do not] apply to measures relating to the granting of temporary entry to natural persons of a Party or of a third country."[16] This provision in CETA, as in Canada's other FTAs, means the terms of the TPP temporary entry chapter are not automatically extended to Canada's existing FTA partners. Likewise, the temporary entry provisions in any future Canadian FTAs will not automatically extend to TPP parties.

Article 12.10: Dispute Settlement

Business persons who believe they have been unfairly denied temporary entry under Chapter 12 cannot directly bring a case against the state under the TPP's dispute settlement rules in Chapter 28. Instead, their government must bring a state-to-state case on their behalf. The matter must involve a "pattern of practice" and all other administrative processes must first be exhausted.

Whether a state would ever initiate such a claim on behalf of its residents is uncertain. CETA's temporary entry chapter does not contain recourse to dispute settlement and there are no documented cases of states violating their NAFTA temporary entry obligations, so the comparable provisions in NAFTA have not yet been tested. Nevertheless, the possibility of a Chapter 28 case means trade sanctions are on the table if the provisions of TPP Chapter 12 are violated.

Annex 12-A: Canada's Schedule of Commitments for Temporary Entry of Business Persons

Perhaps more interesting than the main text of Chapter 12 — and more significant for the purposes of this analysis — are the individual party annexes, which total 78 pages and include each country's specific commitments. The most notable provisions in Canada's annex to Chapter 12 are discussed here.

Canada offers commitments for the same four categories of workers (and their spouses) found in NAFTA: business visitors, intra-corporate transfer-

TABLE 1 Main Categories of Covered Business Persons under Canada's TPP Commitments

	Business Visitors	Intra-Corporate Transferees (ICTs)	Investors	Professionals and Technicians
Work permit required	No	Yes	Yes	Yes
Economic needs tests or quotas permitted	No	No	No	No
Maximum length of stay	Six months*	Three years*	One year*	One year*
Spouses permitted (with open work permit)	No	Yes	Yes	Yes

* Permits can be extended indefinitely

ees (ICTs), investors, and professionals and technicians (see *Table 1*; see also this paper's appendices for detailed summaries of Canada's commitments).

Each of the four categories has a specific definition and raises specific concerns, but they have several things in common. Firstly, Canada is not allowed to use labour certification tests or quotas to limit the inflow of foreign workers in any category. See, for example, this commitment for ICTs:

> Canada shall grant temporary entry and provide a work permit or work authorization to Intra-Corporate Transferees, and will not:
>
> (a) require labour certification tests or other procedures of similar intent as a condition for temporary entry; or
>
> (b) impose or maintain any numerical restriction relating to temporary entry.[17]

The prohibitions on labour certification tests and numerical limits stop Canada from applying its Labour Market Impact Assessment (LMIA) for workers entering Canada under the temporary entry provisions of the TPP. The LMIA process, which is administered by Employment and Social Development Canada (ESDC), requires employers to prove "there is a need for a foreign worker to fill the job and that no Canadian worker is available to do the job" before they can hire internationally.[18] Without it, employers could choose to bring in migrant workers even where unemployment is high and/or qualified domestic labour is available.[19] Under CETA, these tests are expressly prohibited.[20] In the TPP, the language is less clear but the effect is the same.[21]

As noted above, Article 12.4 allows Canada to require that a business person meet domestic licensing requirements to work in the country, but Canada did not explicitly reserve the right to make domestic licensing requirements a condition for entering the country and/or receiving a work permit.

The United States and Temporary Entry in the TPP

In 2003, the United States Trade Representative (USTR) made temporary entry commitments in two new treaties — the U.S.–Chile FTA and the U.S.–Singapore FTA — without first seeking congressional approval. Congress eventually ratified both deals, but it sparked a debate over whether unelected trade negotiators should be reforming U.S. immigration law without democratic oversight. Opposition culminated in the Congressional Responsibility for Immigration Act of 2003, which had bipartisan support but was never voted on.

Although the act never became law, the USTR has refrained from making new temporary entry commitments in U.S. FTAs ever since, largely due to continued pressure from Congress.[22] This informal policy was codified through the Trade Facilitation and Trade Enforcement Act of 2015 (H.R. 644) that amended the USTR's negotiating objectives as described in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015. The USTR must now "ensure that trade agreements do not require changes to the immigration laws of the United States or obligate the United States to grant access or expand access to visas."[23]

The USTR's inability to make temporary entry commitments put it in a unique position in the TPP negotiations. Although the U.S. remains bound by the general obligations of Chapter 12, the USTR did not make any country-specific commitments and therefore offers no tangible access to its labour market for workers from other countries. In response, most other countries made no temporary entry commitments to the U.S in the TPP.

Secondly, with one exception, all of Canada's commitments for temporary entry are reciprocal: covered workers from TPP countries can only enter Canada under the terms of Chapter 12 if the same types of Canadian workers can enter that other TPP country. The occupations covered for each country are discussed below, although it is worth noting that the United States is the only TPP country to make *no country-specific commitments* under Chapter 12 (see box). Consequently, U.S. workers gain no temporary entry access to Canada under the TPP that does not already exist under NAFTA.

Thirdly, with the exception of business visitors, Canada offers temporary entry to the spouses of all workers who enter Canada under the terms of Chapter 12. The commitments for spouses are also provided on a reciprocal basis and are exempt from labour certification tests and quotas. For example, the text reads as follows with respect to ICTs:

> Canada shall grant temporary entry and provide a work permit or work authorization to spouses of Intra-Corporate Transferees of another Party where that Party has also made a commitment in its schedule for spouses of Intra-Corporate Transferees, and will not:

(a) require labour certification tests or other procedures of similar intent as a condition for temporary entry; or

(b) impose or maintain any numerical restriction relating to temporary entry.[24]

Importantly, a spouse who enters Canada under the TPP can receive an "open" work permit that is not restricted to any one employer, industry, or region. Therefore, even though an ICT, investor, or professional or technician can only work for the employer that brought them into Canada, their spouse can work in any field anywhere in the country. Open work permits have an unpredictable labour market impact that is difficult to track and often overlooked.

These three issues with respect to temporary entry — the prohibition on economic needs tests, reciprocity, and spousal work permits — are common to Canada's other FTAs, including NAFTA and CETA. There are further implications for Canada that are specific to each category of business person covered by the TPP.

Section A: Business Visitors

Unique among the four categories of covered business persons, business visitors do not require a work permit or "an equivalent requirement" to enter Canada.[25] For a worker to qualify, their business must not be based in Canada, their "primary source" of remuneration must be outside Canada, and they must be engaged in a specific list of approved activities, including meetings and consultations, research and design, manufacture and production, marketing, sales, distribution, general service, and, for some countries, after-sales or after-lease service. CBSA determines whether a business visitor meets the criteria at the point of entry.

This definition of business visitor is slightly more flexible than in CETA, which prohibits business visitors from receiving *any* remuneration from inside Canada. Business visitors can stay in Canada up to six months under the TPP, with the possibility of extension, compared to 90 days under CETA. The spouses of business visitors are not covered by any Canadian FTA.

Section B: Intra-Corporate Transferees

Intra-corporate transferees (ICTs) are employees of a multinational corporation (MNC) of one TPP country who "seek to render services to that enterprise's parent entity, subsidiary or affiliate" in another TPP country. This

category is ostensibly designed to facilitate the small-scale, short-term movement of senior managers and workers with unique skills into a company's foreign branch. In practice, these provisions allow MNCs to move a wide range of regular workers (and their spouses) into a country for years at a time, effectively sidestepping the need to hire and train local workers.

Canada's commitments for ICTs in the TPP include four sub-categories: specialists, executives, managers, and management trainees on professional development. Workers in each of these categories are eligible for a three-year work permit with the possibility of extension (as are their spouses). To be eligible, a worker must have been continuously employed by the company for "one year within the three-year period immediately preceding the date of the application for admission," while also meeting the definition of one of the ICT sub-categories. There are no occupational restrictions on ICTs; every industry and profession is covered, including such sensitive sectors as health, education, and culture.

The most important sub-category of ICT in the TPP, as in NAFTA and other deals, is the specialist. In the TPP, Canada defines a specialist as "an employee possessing specialized knowledge of the company's products or services and their application in international markets, or an advanced level of expertise or knowledge of the company's processes and procedures." This definition is, in practice, extremely vague. Neither "specialized knowledge" nor "advanced level of expertise" are further defined, which means workers with even limited experience in the organization may legitimately qualify as specialists. The decision to grant temporary entry on these grounds is ultimately made by IRCC or CBSA.

Canada's definition of specialist in the TPP is pulled directly from NAFTA and differs significantly from CETA, which requires that a specialist have "uncommon" rather than "specialized" knowledge of an organization's products or services. By definition, "uncommon" restricts coverage to a minority of workers. Furthermore, CETA specifically clarifies what counts as an "advanced level of expertise" in the following clause:

> In assessing such expertise or knowledge, the Parties will consider abilities that are unusual and different from those generally found in a particular industry and that cannot be easily transferred to another natural person in the short-term. Those abilities would have been obtained through specific academic qualifications or extensive experience with the enterprise.[26]

The CETA definition of specialist is far more rigorous than the one found in NAFTA or the TPP and therefore less open to interpretation and abuse.

Under the TPP, MNCs have significant leeway to move workers across borders with few conditions. Curiously, given the backseat role U.S. negotiators would have taken in the temporary entry chapter (see box above), Canada appears to have made no effort to include CETA-like language in the TPP.

Specialist ICTs are the only category of business person in the TPP for which Canada's commitments are not reciprocal. Canada has instead specified that specialist coverage is only extended to Australia, Brunei, Chile, Japan, Mexico, New Zealand, and Peru. Among those countries, Canada has existing ICT commitments, through FTAs, with Chile, Mexico, and Peru.

Section C: Investors

The investors category covers business persons who enter Canada to set up or develop an investment. The definition is short and hinges on the requirement that the business person or their enterprise "has committed, or is in the process of committing, a substantial amount of capital." No definition for "substantial" is provided. In fact, in the context of NAFTA, IRCC's foreign worker manual clarifies "there is no minimum dollar figure established for meeting the requirement of 'substantial' investment."[27] Approval is thus left to the discretion of an immigration official.

Investors are eligible for a stay of one year under the TPP with the possibility of extension. Unlike CETA and NAFTA, the spouses of investors are also covered by the TPP's temporary entry commitments for the same length of stay.

Section D: Professionals and Technicians

Professionals and technicians — also known as contractual service suppliers — are business persons of one TPP country who are contracted to supply a service in another TPP country. Whereas an ICT works for the same employer in both countries and is transferred across the border, a professional or technician is brought in by a domestic employer for the duration of a specific contract (up to a maximum of one year with the possibility of extension) either independently as a self-employed contractor or as the employee of a contracted company. Their spouses are also covered for the length of the contract.

The definitions for professionals and technicians are more specific than for other categories of business persons in Chapter 12. Firstly, to be eligible for temporary entry, workers must be engaged in a "specialty occupation,"

which means any work covered by Canada's National Occupation Classification (NOC) levels 0 (management occupations), A (occupations usually requiring university education), or B (occupations usually requiring college education or apprenticeship training).

The inclusion of skill level B is significant because most of Canada's other FTAs, including CETA, are limited to skill levels 0 and A. Skill level B includes a wide variety of occupations that might not intuitively be considered business persons, such as administrative assistants, photographers, retail sales supervisors, and carpenters, to name just a few.[28] That said, in practice most of these occupations are excluded from Canada's country-specific list of commitments (see next section).

Secondly, a professional must meet the following requirements to be eligible for temporary entry under the TPP:

> (a) theoretical and practical application of a body of specialized knowledge, and
>
> (b) a post-secondary degree of four or more years of study, unless otherwise provided in this schedule, and any additional requirement defined in the National Occupation Classification, and
>
> (c) two years of paid work experience in the sector of activity of the contract, and
>
> (d) remuneration at a level commensurate with other similarly-qualified professionals within the industry in the region where the work is performed. Such remuneration shall be deemed to not include non-monetary elements such as, *inter alia*, housing costs and travel expenses.

The requirements for technicians are slightly different and are described as follows:

> (a) theoretical and practical application of a body of specialized knowledge, and
>
> (b) a post-secondary or technical degree requiring two or more years of study as a minimum for entry into the occupation, unless otherwise provided in this Schedule, as well as any other minimum requirements for entry defined in the National Occupation Classification, and
>
> (c) four years of paid work experience in the sector of activity of the contract, and

(d) remuneration at a level commensurate with other similarly-qualified technicians within the industry in the region where the work is performed. Such remuneration shall be deemed to not include non-monetary elements such as, *inter alia*, housing costs and travel expenses.

These definitions are more exclusive than in NAFTA but more inclusive than in CETA. Under CETA, professionals must have six years of relevant professional experience compared to two years under the TPP. Technicians under CETA require a university degree compared to a two-year technical degree under the TPP. Additionally, unlike the TPP, technicians under CETA cannot be self-employed (they must be employed by a contracted company). Moreover, as noted above, the CETA commitments only extend to NOC skill levels 0 and A by default.

Overall, Canada's general commitments for professionals and technicians under the TPP are broader than in other FTAs, although they are limited by Canada's country-by-country schedule of commitments. That is to say, to be eligible for temporary entry into Canada a professional or technician from another TPP party must not only meet the general criteria outlined above, but they must also be covered by Canada's country-specific lists of occupational categories outlined below.

Canada's Country-Specific Schedules to Section D

To start, Canada has not made any temporary entry commitments for professionals or technicians from New Zealand, Singapore, the United States, or Vietnam. (Canada's commitments are meant to be reciprocal and none of these countries offered comparable new access to Canada in this category.) Brunei is also fully excluded with the sole exception of petroleum engineers. Malaysian technicians are fully excluded and only Malaysian professionals in a limited list of occupations are included.

Coverage for the remaining five countries (Australia, Chile, Japan, Mexico, and Peru) varies slightly but follows the same pattern. For professionals, all occupations in NOC levels 0 and A are included *except* for those expressly excluded in Canada's commitments — this is known as a negative list approach. For technicians, all occupations in NOC level B are included *only if* the occupation is listed — this is known as a positive list approach.

The negative list for professionals (i.e., the list of exceptions) excludes the following sensitive occupational sectors:

All health, education, and social services occupations and related occupations,
All professional occupations related to Cultural Industries,
Recreation, Sports and Fitness Program and Service Directors,
Managers in Telecommunications Carriers,
Managers in Postal and Courier Services, and
Judges and Notaries.[29]

Despite these reservations, the list of covered occupations for professionals in the TPP is still more extensive than in CETA or NAFTA, both of which employ a positive list approach. The negative list approach for professionals is consistent with Canada's FTAs with Peru and Colombia, but again the list of exceptions in the TPP is shorter than in both those deals. Under the TPP, for example, Peru gains access for managers in the fields of manufacturing, utilities, construction, and transportation, which are occupations that were carved out of Peru's previous treaty with Canada.

The positive lists for technicians from those five countries vary somewhat from party to party. Australia and Peru receive the longest lists, which each include 39 different occupational categories ranging from construction inspectors to pipefitting contractors to plumbers. Japan receives a nearly identical list with the notable exception that contractors in any field are not included.[30] Chile receives a slightly shorter list of 34 occupations.[31] Mexico receives a much shorter list of 15 occupations.

Under the TPP, Peru receives access for five occupational categories that are not covered in the Canada–Peru FTA.[32] Chile and Mexico receive access for a handful of occupational categories that are not covered in either the Canada–Chile FTA or NAFTA.[33]

Potential consequences of the TPP's temporary entry provisions

The social and economic impacts of any international trade treaty play out over decades and are difficult to forecast with any certainty — in part, this is because states, investors, and arbitrators have some leeway to interpret the treaty text. With that limitation in mind, we can begin to predict the potential impacts of the TPP's temporary entry provisions based on the preceding analysis and on Canada's previous experience with the temporary entry provisions in NAFTA and other FTAs. Past experience suggests the short-term impact of the TPP on the Canadian labour market may be limited. How-

ever, the agreement places real and immediate restrictions on government policy flexibility that may have significant macroeconomic and regulatory consequences in the long term.

The main reason to expect a limited short term labour market impact from the TPP is the presently limited impact of Canadian FTAs on the Canadian workforce. There were 24,879 people working in Canada under the terms of an international trade treaty on December 31, 2014 (our best measure, although it likely underestimates the total).[34] Those workers accounted for approximately 0.14% of the Canadian labour force at that time.[35] Insofar as the TPP covers mostly the same types of workers under the same general conditions as past FTAs, we might expect an incremental increase — but not an upsurge — in the total number of migrant workers entering Canada due to the TPP. It will probably take some time for industries and employers to adjust to the labour market flexibility created by the TPP.

However, there are several reasons to believe the TPP's temporary entry provisions will have a more significant long-term impact on the Canadian workforce.

Firstly, the TPP opens up Canada's temporary entry commitments to some major developed countries that do not already have comparable access. Australia and Japan, in particular, are in a strong position to take advantage of Canada's commitments in the TPP. These populous countries are already top sources of migrant workers to Canada and they share important ties with Canada, including economic integration (i.e., foreign direct investment), linguistic familiarity, cultural connections, and common standards for education and training.[36] They are also sources of highly skilled professional workers who are more likely to be covered by the terms of Chapter 12 than similar workers from countries like Chile and Malaysia. Japanese auto makers, for example, could easily move engineers from Japan into their Canadian operations under the TPP's intra-corporate transferee rules.

Other TPP countries are not as well-positioned to benefit. Under the TPP, Canada makes no new temporary entry commitments to the U.S., which accounts for around 90% of the migrant workers currently in Canada under the terms of an FTA.[37] Chile, Mexico, and Peru already have extensive access to the Canadian labour market under existing FTAs, which has not created a significant inflow of migrant workers from those countries so far. Brunei, Malaysia, New Zealand, Singapore, and Vietnam are excluded from Canada's commitments for key categories in the TPP (and those countries are small-scale investors in Canada anyway). Yet the new access offered to Australia and Japan cannot be overlooked for the reasons listed above.

Secondly, the TPP offers broader occupational coverage for professionals and technicians than in any existing Canadian FTA. A variety of lower-skill occupations are included in Canada's temporary entry commitments in the TPP, such as mechanics, carpenters, and other construction tradespeople, that do not appear in deals like NAFTA. Whereas most Canadian FTAs require a university degree to be considered an eligible professional, the TPP lowers the bar to include technicians with apprenticeship training. The quantitative impact on the Canadian labour market from this qualitative change is difficult to predict, but it nonetheless represents a departure from the status quo for Canada's temporary entry commitments, especially with our developed country partners.

Thirdly, the TPP comes at an opportune time for Canadian employers trying bypass the domestic labour market and hire internationally. If the Temporary Foreign Worker Program and the rest of Canada's International Mobility Programs are included, migrant workers make up as much as 2% of the Canadian workforce today, twice the share from a decade ago.[38] The share of migrant workers specifically covered by FTAs as a proportion of the overall workforce has also doubled in the past decade.[39]

The deleterious effects of this precarious, temporary workforce on wages and unemployment in some sectors and regions are well-documented, and cases of migrant workers being abused by employers are widespread.[40] FTAs currently play a minor role in these labour market problems at the macro level, as noted above, but at the sectoral level the effects can be severe. Under NAFTA, some Canadian construction workers have been directly displaced by U.S. intra-corporate transferees.[41] Banks and other white-collar employers have also been caught abusing the temporary entry rules under Canada's FTAs. In one particularly egregious case, RBC forced its Canadian staff to train the intra-corporate transferees who were brought in to replace them.[42]

The TPP does nothing to address employer abuse of Canada's migrant worker programs. We can expect more of it in certain sectors under the TPP, especially as companies become more familiar with the rules for transferring and hiring foreign workers. Indeed, as the Canadian government cracks down on abuses of the more transparent Temporary Foreign Worker Program, employers may seek out other, less-regulated pipelines for migrant workers. There are no institutional measures to prevent an employer banned from the TFWP from turning to the terms of an FTA to hire the same migrant worker, provided they meet the FTA's requirements.

Moreover, even if the TPP did not significantly *worsen* the situation created by the temporary entry provisions in past FTAs, that would not mean

the present situation is desirable. Canada's entire international mobility regime is a troubled model that does little to address the long-term needs of either workers or employers.[43] If Canada has genuine labour shortages, then greater training and greater permanent immigration are necessary. Opening the door to more migrant labour is a stop-gap solution with negative knock-on effects for domestic workers and the broader economy.

Conclusion

Consistent with other aspects of the TPP and other Canadian FTAs, the TPP's temporary entry provisions perpetuate a model of global economic integration that privileges investors and corporations without empowering workers. Specifically, Chapter 12 cedes public authority over the movement of migrant workers to private employers while failing to address the long-term needs of the Canadian labour market. This outcome reflects a closed negotiation process that allowed unelected bureaucrats and Canada's trade minister to make important public policy decisions outside of an open public or parliamentary dialogue.

We may not see large-scale labour market disruptions in the short term as a result of the TPP. However, the risks over time are significant largely due to the constraints placed by the TPP on the government's ability to regulate the domestic labour market. Because Canada forgoes the right to restrict the total number of foreign workers that can be brought into the country under the terms of the TPP, the potential impact on the labour force is substantial. Multinational and domestic companies have been slow to adopt the use of ICTs and foreign professionals so far, but these temporary entry provisions may become more attractive in the future as investment continues to globalize and industry continues to consolidate.[44] Canadian employers are increasingly turning to migrant workers through existing programs and pathways, and the TPP will give them another tool for importing migrant workers rather than hiring and training domestic workers.

If a future Canadian government decides that the temporary entry provisions in the TPP are not serving national interests — due to significant distortions in the Canadian labour market, for example — that government will be prohibited from taking key regulatory measures, such as imposing numerical limits or economic needs tests, to address those problems. The TPP's temporary entry provisions entrench Canada's past policy decisions without attempting to resolve any of the outstanding issues. Unfortunate-

ly, once the TPP is ratified, it cannot be changed outside of a complicated and unprecedented 12-country renegotiation. As such, if a future Canadian government decided to adopt a different approach to international labour mobility, it would be at risk of incurring punitive trade sanctions from other TPP countries. Democratically-enacted Canadian law is superseded by this agreement indefinitely.

Once U.S. lawmakers recognized that temporary entry provisions in FTAs needlessly limit government policy space, Congress prohibited U.S. negotiators from making any temporary entry commitments in the TPP. By contrast, the new Canadian government has yet to explain why future Canadian immigration policy ought to be permanently subjected to an international economic treaty negotiated by the previous government.

Appendix A1

Summary of Canada's Chapter 12 commitments

Category of Business Person	Sub-category of Business Person	Definition or other criteria	
A: Business Visitors	Business Visitors *(after-sales or after-lease service)*	Business persons for whom: (a) the primary source of remuneration for the proposed business activity is outside Canada; and (b) the principal place of business and the predominant place of accrual of profits remain outside Canada	
	Business Visitors *(all other)*		
B: Intra-Corporate Transferees (ICTs)	Specialist	Business persons employed by an enterprise in the territory of a Party who seek to render services to that enterprise's parent entity, subsidiary or affiliate [in Canada]. Canada may require the business person to have been employed continuously by the enterprise for one year within the three-year period immediately preceding the date of the application for admission.	An employee possessing specialized knowledge of the company's products or services and their application in international markets, or an advanced level of expertise or knowledge of the company's processes and procedures.
	Management Trainee on Professional Development		An employee with a post-secondary degree who is on a temporary work assignment intended to broaden that employee's knowledge of and experience in a company in preparation for a senior leadership position within the company.
	Executive		A business person within an organization who: (a) primarily directs the management of the organization or a major component or function of the organization; (b) establishes the goals and policies of the organization, or of a component or function of the organization; and (c) exercises wide latitude in decision-making and receives only general supervision or direction from higher-level executives, the board of directors or stockholders of the business organization.
	Manager		A business person within an organization who: (a) primarily directs the organization or a department or sub-division of the organization; (b) supervises and controls the work of other supervisory, professional or managerial employees; (c) has the authority to hire and fire or take other personnel actions (such as promotion or leave authorization); and (d) exercises discretionary authority over day-to-day operations.
	Spouses of ICTs	n/a	

C: Investors	Investors	Business persons seeking to establish, develop or administer an investment to which the business person or the business person's enterprise has committed, or is in the process of committing, a substantial amount of capital, in a capacity that is supervisory, executive or involves essential skills.	
	Spouses of Investors	n/a	
D: Professionals and Technicians	Professional	Specialty occupation means, for Canada, an occupation that falls within the National Occupation Classification levels O, A, and B.	Business persons engaged in a specialty occupation requiring: (a) theoretical and practical application of a body of specialized knowledge; and (b) a post-secondary degree of four or more years of study, unless otherwise provided in this schedule, and any additional requirement defined in the National Occupation Classification, and (c) two years of paid work experience in the sector of activity of the contract, and (d) remuneration at a level commensurate with other similarly-qualified professionals within the industry in the region where the work is performed. Such remuneration shall be deemed to not include non-monetary elements such as, inter alia, housing costs and travel expenses.
	Technician		A national engaged in a specialty occupation requiring: (a) theoretical and practical application of a body of specialized knowledge, and (b) a post-secondary or technical degree requiring two or more years of study as a minimum for entry into the occupation, unless otherwise provided in this Schedule, as well as any other minimum requirements for entry defined in the National Occupation Classification, and (c) four years of paid work experience in the sector of activity of the contract, and (d) remuneration at a level commensurate with other similarly-qualified technicians within the industry in the region where the work is performed. Such remuneration shall be deemed to not include non-monetary elements such as, inter alia, housing costs and travel expenses.
	Spouses of Professionals and Technicians	n/a	

Appendix A2

Summary of Canada's Chapter 12 commitments (cont'd)

Category of Business Person	Sub-category of Business Person	Work permit required	Maximum length of stay	Sector/activity restrictions
A: Business Visitors	Business Visitors *(after-sales or after-lease service)*	No	Six months	After-Sales or After-Lease Service
	Business Visitors *(all other)*			Meetings and Consultations, Research and Design, Manufacture and Production, Marketing, Sales, Distribution, General Service
B: Intra-Corporate Transferees (ICTs)	Specialist	Yes	Three years	None
	Management Trainee on Professional Development			
	Executive			
	Manager			
	Spouses of ICTs			
C: Investors	Investors	Yes	One year	None
	Spouses of Investors			
D: Professionals and Technicians	Professional	Yes	One year	Varies by country
	Technician			
	Spouses of Professionals and Technicians			None

Note In all cases, extensions to the maximum length of stay are possible at Canada's discretion.

Appendix B

Canada's Chapter 12 commitments to TPP parties

Category of Business Person	Sub-category of Business Person	Australia	Brunei	Chile	Japan	Malaysia	Mexico	New Zealand	Peru	Singapore	United States	Vietnam
A: Business Visitors	Business Visitors *(after-sales or after-lease service)*	●	●	●		●	●	●	●			●
	Business Visitors *(all other)*	●	●	●	●	●	●	●	●	●		●
B: Intra-Corporate Transferees (ICTs)	Specialist	●	●	●	●		●	●	●			
	Management Trainee on Professional Development			●								
	Executive	●	●	●	●	●	●	●	●			●
	Manager	●	●	●	●	●	●	●	●			●
	Spouses of ICTs	●	●	?	?	?	●		●			?
C: Investors	Investors	●	●	●	●	●	●	●	●	●		●
	Spouses of Investors	●		?	?		●		●			?
D: Professionals and Technicians	Professional	●	●	●	●	●	●		●			●
	Technician	●		●	●	●	●		●			●
	Spouses of Professionals and Technicians	●	●	?	?		●					?

Note "?" indicates uncertainty. It is unclear what Canada's threshold for reciprocity is for spouses. Some countries offer temporary entry but not a work permit to Canadian spouses, which may or may not be enough for Canada to offer full access to spouses from those countries.

Notes

1 In the context of NAFTA, for example, former U.S. Assistant Secretary of Labor Joaquin Otero has noted the "countless cases where abuses of non-immigrant visas resulted in massive layoffs of American workers." See: Joaquin F. Otero, "Comment" on George J. Borjas, "Economic Research and the Debate over Immigration Policy," in *Social Dimensions of U.S. Trade Policies*, Alan V. Deardorff and Robert M. Stern (eds.), Ann Arbor: The University of Michigan Press, 2000, p. 85.

2 Chris Kirkham, "'This isn't NAFTA,' U.S. trade representative says about Trans-Pacific Partnership," *Los Angeles Times*, December 10, 2015, http://www.latimes.com/business/la-fi-qa-tpp-20151210-story.html.

3 Canadian labour unions have come out strongly against the temporary entry provisions in the TPP for this and other reasons. See, for example, United Steelworkers, "Canadian and U.S. Governments Must Reject TPP: Steelworkers," December 11, 2015, http://www.usw.ca/news/media-centre/releases/2015/canadian-and-u-s-governments-must-reject-tpp-steelworkers.

4 Canada-European Union Comprehensive Economic and Trade Agreement (CETA), Article 10.2(1). Note that all references to CETA use the legally-scrubbed version of the text released in February 2016, not the preliminary text released in September 2014. The final version is accessible from the European Commission at http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf.

5 North American Free Trade Agreement (NAFTA), Article 1601.

6 CETA 10.2(5).

7 See Macdonald & MacEwen's forthcoming report on labour rights in the present CCPA series.

8 Trans-Pacific Partnership, Article 19.10(6)(n)(iii).

9 Immigration, Refugees and Citizenship Canada, "How to Hire a Temporary Foreign Worker (TFW): A Guidebook for Employers," last modified August 27, 2015, http://www.cic.gc.ca/english/resources/publications/tfw-guide.asp.

10 Citizenship and Immigration Canada, *FW 1: Foreign Worker Manual*, January 29, 2013, http://publications.gc.ca/collections/collection_2013/cic/Ci63-27-2013-eng.pdf.

11 Immigration, Refugees and Citizenship Canada, *ENF 4: Port of entry examinations*, February 10, 2016, http://www.cic.gc.ca/english/resources/manuals/enf/enf04-eng.pdf.

12 Workers covered by an FTA fall under exemption R204(a) in the *Immigration and Refugee Protection Regulations (SOR/2002-227)*, accessible at: http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-227/section-204.html.

13 CBSA officers receive 50 hours of online instruction, 18 weeks of classroom instruction, and 12 to 18 months of on-the-job training before they can make immigration decisions. Canada Border Services Agency, "From Recruit to Officer Trainee – Training and Development Programs," last modified July 9, 2014, http://www.cbsa-asfc.gc.ca/job-emploi/bso-asf/training-formation-eng.html.

14 NAFTA 1603.4.

15 The trade in services chapter covers measures affecting "the presence in the Party's territory of a service supplier of another Party" (TPP 10.2(1)(d)), which would include any foreign worker granted temporary entry under Chapter 12. At the same time, Article 12.9 makes it clear that Chapter 10 does not "impose any obligation on a Party regarding its immigration measures." Moreover, Article 10.2(4) reiterates that Chapter 10 does not impose "any obligation on a Party with respect to a national of another Party who seeks access to its employment market or who is employed on a permanent basis in its territory, and does not confer any right on that national with respect to that access or employment."

16 CETA 10.6(2)(b) and CETA 10.6(3).

17 TPP 12-A(Canada)(B)(4).

18 "What is a Labour Market Impact Assessment?" Citizenship and Immigration Canada, last modified February 2, 2016, http://www.cic.gc.ca/english/helpcentre/answer.asp?q=163&t=17.

19 For a deeper discussion of the LMIA process and its relationship to Canada's FTAs, see Hadrian Mertins-Kirkwood, *Labour Mobility in Canada: Issues and Policy Recommendations*, Canadian Labour Congress, December 8, 2014, http://canadianlabour.ca/issues-research/labour-mobility-canada-issues-and-policy-recommendations.

20 See, for example, CETA 10.8(3).

21 Canada's Annex 12-A does not explicitly prohibit Canada from imposing "economic needs tests" for some categories of workers, but the prohibition on labour certification tests and numerical limits ultimately serves the same purpose. The World Trade Organization has previously concluded that economic needs tests should be interpreted broadly to include all forms of quantitative restrictions or any tests that "condition market access." See paragraph 24 in Council for Trade in Services, "Economic Needs Tests: Note by the Secretariat," *World Trade Organization S/CSS/W/118*, November 30, 2001.

22 See, for example, this letter dated April 22, 2015 from U.S. Trade Representative Michael Froman to Republican Congressman Chuck Grassley: http://www.grassley.senate.gov/sites/default/files/judiciary/upload/Immigration%2C%2004-22-15%2C%20letter%20from%20USTR%2C%20immigration%20in%20trade%20agreements.pdf.

23 Sec. 914(a), *H.R.644 - Trade Facilitation and Trade Enforcement Act of 2015*, 114th Congress (2015-2016), introduced on February 2, 2015, became public law on February 24, 2016, https://www.congress.gov/bill/114th-congress/house-bill/644.

24 TPP 12-A(Canada)(B)(5).

25 TPP 12-A(Canada)(A)(3).

26 CETA 10.1.

27 Citizenship and Immigration Canada, *FW 1: Foreign Worker Manual*, p. 173.

28 For the full list, see "National Occupational Classification Matrix 2011," Employment and Social Development Canada, last modified March 2, 2015, http://www5.hrsdc.gc.ca/NOC/English/NOC/2011/html/Matrix.html.

29 For Japan, "Researchers, except for those working in an academic entity" are also excluded.

30 Whereas the other countries receive access for "contractors and supervisors" in a number of different fields, Japan only receives access for supervisors in those same fields. Japan also does not receive access for electricians or plumbers.

31 Unlike Australia, Japan, and Peru, Chile's list does not include architectural technologists and technicians; industrial designers; drafting technologists and technicians; land survey technologists and technicians; and technical occupations in geomatics and meteorology.

32 The new coverage is for architectural technologists and technicians; industrial designers; drafting technologists and technicians; land survey technologists and technicians; and technical occupations in geomatics and meteorology. Curiously, the Canada-Peru FTA includes chefs and underground production and development miners, which the TPP does not.

33 Neither the Canada-Chile FTA or NAFTA distinguish between professionals and technicians, so a direct comparison of occupational coverage is difficult. New coverage in the TPP appears to be mainly in the construction and engineering sectors (e.g. construction inspectors, carpentry contractors, electricians).

34 We use a "spot check" measure of valid work permits, rather than a count of total entries in any given year, because migrant workers may enter Canada multiple times in one year or stay in Canada for longer than one year at a time. Nevertheless, the spot check approach likely underestimates the total number of migrant workers because it assumes workers leave the country when their permits expire, which is not always the case.

Unless otherwise noted, figures provided in this section are based on data produced for the Canadian Centre for Policy Alternatives by Citizenship and Immigration Canada (dated May 2015).

35 FTA workers in Canada on December 31st, 2014 as a share of total employed persons in Canada in 2014 (approximately 17.8 million). Statistics Canada, "Table 282-0012: Labour force survey estimates (LFS), employment by class of worker, North American Industry Classification System (NAICS) and sex," CANSIM, last modified January 8, 2016, http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=2820012.

36 On December 31, 2013, Australia was the fifth-biggest source of work permit holders under the International Mobility Programs (after the United States, France, India, and the United Kingdom). Japan was seventh overall, behind Ireland. See "3.4. International Mobility Program work permit holders by top 50 countries of citizenship and sign year, 2004 to 2013," Citizenship and Immigration Canada, last modified December 31, 2014, http://www.cic.gc.ca/english/resources/statistics/facts2013/temporary/3-4.asp.

37 Author's estimate. NAFTA accounted for 97% of all FTA work permits on December 31st, 2014 and the ratio of American to Mexican entries under all branches of the International Mobility Programs is approximately 14:1 (see CIC, "3.4" above), so the U.S. share of total entries is roughly 90%.

38 Hadrian Mertins-Kirkwood, "The hidden growth of Canada's migrant workforce," *The Harper Record 2008-2015*, Teresa Healy & Stuart Trew (eds.), Ottawa: Canadian Centre for Policy Alternatives, 2015.

39 Temporary business persons accounted for 0.07% of the labour market in Canada in 2004 (same methodology as above). Even without the TPP, this figure will likely continue to rise as the Canadian economy continues to integrate with Canada's existing FTA partners.

40 Mertins-Kirkwood, *Labour Mobility in Canada*.

41 Canadian Press, "Foreign worker permits for Conifex Power plant raise questions in B.C.," *CBC News*, June 23, 2014, http://www.cbc.ca/news/canada/british-columbia/foreign-worker-permits-for-conifex-power-plant-raise-questions-in-b-c-1.2685242.

42 Kathy Tomlinson, "RBC replaces Canadian staff with foreign workers," *CBC News*, April 6, 2013, http://www.cbc.ca/news/canada/british-columbia/rbc-replaces-canadian-staff-with-foreign-workers-1.1315008.

43 Armine Yalnizyan, "Immigration policy should foster new Canadians, not temporary workers," *The Globe and Mail*, July 6, 2015, http://www.theglobeandmail.com/report-on-business/rob-commentary/immigration-policy-should-foster-new-canadians-not-temporary-workers/article25328607.

44 For a deeper discussion of Canadian corporate concentration in the era of trade and investment liberalization, see Jordan Brennan, *Ascent of Giants: NAFTA, Corporate Power and the Growing Income Gap*, Ottawa: Canadian Centre for Policy Alternatives, 2015.

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