

## **ISSUES PAPER – DAY 1**

This paper aims to provide some brief context for session II and to pose some questions which participants may want to address in their interventions and presentations. It is by no means comprehensive, but simply a tool to aid discussion.

The background for session I is found in a separate background document: “A Quick Guide to the GATS and Mode 4”.

Participants may also wish to consult a further background document “So how big is it? Extracting Mode 4 from broader groups of temporary workers”

## SESSION I: TRADE AND MIGRATION CONTEXTS

1. The background for session I is found in a separate background document: “A Quick Guide to the GATS and Mode 4”. Participants may also wish to consult a further background document “So how big is it? Extracting Mode 4 from broader groups of temporary work”.

## SESSION II: THE REALITY OF TEMPORARY LABOUR AND MODE 4 MOVEMENT

2. This session covers a variety of schemes to facilitate the temporary movement of labour at the national, bilateral and regional levels. It should be noted that a number of these schemes cover workers beyond the scope of mode 4 – for example, by including those in sectors beyond services. However, experience with these schemes, their strengths and weaknesses, may provide some valuable lessons for any initiatives related to mode 4 movement. Equally, exploration of these schemes may also shed light on the question of how any schemes more focused on mode 4 workers would mesh with existing regimes (see Issues paper for Day 3).

### A. National schemes

3. Globally, temporary migration is on the increase. In many countries, the emphasis is on facilitating movement by the highly skilled, with governments devising new temporary migration schemes to respond to a range of factors, including skills shortages in the domestic labour market, or the demands of large global companies looking both to recruit globally, and to assemble global teams for specific projects at short notice. Some governments also see the ability to access the highly skilled on a global basis as a contribution to the international competitiveness of the economy as a whole.

4. In the late 1990s/2000, most OECD countries introduced special measures to facilitate the recruitment of highly qualified foreign workers, leading in many cases to increases in entrants (see Box).

#### Recent increases in temporary foreign workers in OECD countries<sup>1</sup>

In the United Kingdom, the number of approved work permit applications increased from 85 600 in 2000 to 115 700 in 2001 (versus 58 200 in 1999). Increases were particularly high in key sectors such as education (100%), health care (nearly 42%) and computer technology (roughly 25%).

In Ireland, the number of work permits granted doubled between 2000 and 2001 to 36 400. This increase was concentrated in service sectors (e.g., in the health care sector permits increased up to 65%), but was not limited solely to sectors employing skilled workers (e.g., significant increases were also seen in the hotel industry).

<sup>1</sup> While these are temporary entry schemes, in some cases, visa- or permit-holders may be entitled to apply for permanent residence after a certain period. Applicants may be required to leave the country before applying however.

In Switzerland, the quota for skilled workers, which had been unchanged for over ten years, was raised temporarily in May 2001 by nearly 30% to meet labour market requirements.

In Korea, the number of documented skilled foreign workers rose from 17 700 in 2000 to nearly 28 200 in 2001, an increase of nearly 60%.

In Germany, the employment of foreigners tripled in the health care sector, and more than 13 000 foreign computer engineers obtained "green cards" under the programme instituted in August 2000, which foresees the issuance of "green cards" in accordance with the length of an employment contract, for a time period that may not exceed five years.

In the United States, the quota of highly qualified temporary visas (H1B), which had been raised to 195 000, was not used up entirely in 2001, although more than 163 000 permits were distributed, representing an increase of more than 40% from the previous year. However, the quota is predicted to revert to the legislatively mandated level of 65 000 for 2004.

Source: OECD

5. While these schemes remain in place, it is unclear whether the same increases will be experienced in the coming years. Some of the labour shortages in OECD countries are expected to increase in the coming years, including as a result of ageing populations (e.g., the demand for health and care workers, in which there is no substitute for human labour, is expected to continue to rise). However, in other areas, shortages have tended to fluctuate, particularly in the information and communication technology (ICT) sector where large shortages foreshadowed around 2000/01 are being revisited in light of the bursting of the dotcom bubble.<sup>2</sup>

6. These fluctuations are one of the reasons why the detail and openness of national systems is not always reflected in GATS commitments. Indeed, while GATS commitments on mode 4 are limited (see "A Quick Guide to the GATS and Mode 4"), they do not necessarily represent the existing level of openness. This is a reflection of the fact that while GATS commitments are binding, the needs of local labour markets can fluctuate significantly and governments often choose to maintain flexibility by committing to less than their current levels of access and by implementing some measures via national, bilateral and regional arrangements. Actual trade is thus much greater than GATS commitments would suggest.

#### Questions

- What are the types of categories of workers covered by national schemes to facilitate movement? To what extent do they go beyond the coverage of mode 4 (i.e., beyond service suppliers)?
- What lessons can we learn from national systems to facilitate movement? What have been the challenges for such systems?
- Who are the main stakeholders and what kinds of political management are involved in setting up such systems?

#### Bilateral labour agreements

7. Bilateral labour agreements serve a range of purposes. For the *destination country*, the primary aim is to address skill gaps in the local labour market, be they for seasonal workers or low-skilled labour or

<sup>2</sup> Measurement of labour shortages remains a challenge. Measurement methods differ greatly amongst countries and the reliability of many estimates is highly contested. The OECD *Employment Outlook* (2003) notes that when the broader concept of "non-employment" – encompassing both unemployment and inactivity – is taken into account, OECD countries appear rich in unused labour reserves.

for higher skilled workers in sectors such as health or ICT. Agreements can also be used to foster broader economic objectives; within Europe, bilateral labour agreements have been developed in harmony with the ongoing process of deep regional economic and monetary integration and to assist at first the development and, more recently, the enlargement of the European Union to the new acceding countries from Central and Eastern Europe. Bilateral labour agreements can also play a role in combating irregular migration; providing a legal channel for temporary entry can both reduce the incentives for illegal migration and contribute to securing country of origin willingness to cooperate in managing irregular migration, including with regard to readmission of nationals (e.g., Italy signed both a labour and a readmission agreement with Albania in 1997). Cultural and historical ties may also play a role, such as in the “Working Holiday Maker” programs operating amongst the UK and some Commonwealth countries.

8. For *countries of origin*, bilateral labour agreements can be a means to increase the access of their workers to international labour markets and to promote the enhancement of occupational skills, technology transfer and the development of their human capital. Agreements can also ensure that workers who have acquired these new skills actually return to their country of origin, avoiding “brain drain”. For example, a proposed scheme between the Dutch and Polish Ministers of Health aims to prepare Polish nurses to be employed within the Dutch healthcare system for a maximum period of two years and to facilitate their return and reintegration into the Polish healthcare system after their return<sup>3</sup>. Finally, sending countries can use bilateral labour agreements to secure the rights and welfare of their workers abroad (the Philippines has signed a number of such agreements).

9. Bilateral labour agreements provide a high degree of flexibility for countries to target specific groups, adapt to fluctuating labour market conditions and share responsibility for monitoring and managing migration between sending and receiving countries. They can also contain provisions to minimise the potential impact of foreign workers on nationals - e.g., by requiring wage and social insurance parity.

**Examples of bilateral labour agreements**

***Canada and the Caribbean and Mexican Seasonal Agricultural Worker Programme***

The programme involves Canada and Jamaica, Mexico, Trinidad & Tobago, Barbados, Antigua & Barbuda, Dominica, Grenada, Montserrat, St Kitts & Nevis, St Lucia, St Vincent & the Grenadines. It operates in Alberta, Manitoba, Ontario, Québec and Nova Scotia where it was introduced in response to shortages of available Canadian agricultural workers.

Before applying for migrant agricultural workers, employers are required to consider the availability of Canadians for employment. Where these are unavailable, employers submit an application specifying the number of workers required; the length and location of the work; and the working and living conditions. The employer can specify individual workers by name, otherwise participating governments recruit and select the workers in the countries of origin, with work permit applications processed by the local Canadian embassy or consulate.

The programme is strictly seasonal and workers can only stay in Canada for a maximum of 8 months. The minimum term of employment must not be less than 240 hours in a 6 week or less term. Employers are responsible for workers' return travel costs and for providing their accommodation at no extra charge and must pay them the highest applicable minimum wage. Workers cannot seek alternative or additional employment or transfer to another farm without government approval. Employers face sanctions (penalty up to \$50000 and/or 2 years' imprisonment) where workers enter the local labour market. The programme does not open any right of access to more permanent status.

Experience with the programme has been generally considered to be positive. The possibility of re-circulation, and the fact that workers coming for a second time or named by an employer benefit from higher wages and lower fee to pay, has led to a lower number of overstayers than in other similar programmes.

<sup>3</sup> A letter of intent for this scheme “Polish nurses in the Netherlands: development of competencies” was signed between the Dutch and Polish Ministers for Health in July 2002.

**German Contract Worker Scheme**

This scheme operates between Germany and a number of countries of Central and Eastern Europe. It allows employees of foreign companies to work in Germany as contract workers providing services to German companies. The foreign company acts as a sub-contractor to a German firm, with the workers remaining under contract with their foreign employer. Duration is limited to 2-3 years. The foreign firm must ensure the exit of the workers but some enforcement responsibility is also placed on the local German company. Part of the contract payment is withheld until the workers return home. Bilateral contract worker agreements include country-specific quotas that can be adapted to the labour market situation in Germany.

Source: IOM, OECD

10. Bilateral labour agreements tend not to be included in GATS commitments, for two reasons. First, they would not comply with the requirement in the GATS that access offered to one WTO Member be offered to all other WTO Members (the Most Favoured Nation, or non-discrimination, requirement). Indeed, a number of agreements are the subject of MFN exemptions under the GATS (see “A Quick Guide to the GATS and Mode 4”). GATS commitments are also guaranteed minimum treatment, so committing to such schemes under the GATS may deprive the host countries of the flexibility with which the schemes are currently implemented. [Winters et al, 2001].

11. Not all countries have entered into bilateral labour agreements. The vast majority of United States’ admission programmes are open to citizens of all countries<sup>4</sup>. The range of temporary visa programmes includes both skilled professionals (e.g., H-1B visas) and other kinds of temporary labour (e.g., H-2A temporary agricultural workers). Likewise, aside from a long-standing arrangement with the United Kingdom and its participation in the European Economic Area<sup>5</sup>, Ireland does not have any substantive bilateral agreements with other countries. Working visas cover specified skilled occupations in designated categories; work permits largely (around 75%) cover semi-skilled or unskilled workers, mostly in services [Sexton, 2003]. The UK has also not concluded any major bilateral labour agreements in the last 40 years<sup>6</sup>, with most schemes open to global recruitment. The work permits scheme is geared towards the higher-skilled (university degree or equivalent professional experience); other schemes exist for lower-skilled and seasonal agricultural workers.

**Questions**

- o What kinds of workers tend to be covered by bilateral labour agreements? Do countries prefer to take a bilateral approach to lower skilled labour?
- o What has been the experience with bilateral agreements? What implementation challenges have been encountered?
- o What are the strengths and weakness of such agreements? Are they likely to increase in the future?
- o What lessons can we learn from these agreements in terms of the negotiations on GATS mode 4?

<sup>4</sup> The exception is programs for Canadian and Mexican nationals under the North American Free Trade Agreement (NAFTA), outlined in the following section.

<sup>5</sup> EEA includes the EU countries plus Iceland, Norway and Liechtenstein.

<sup>6</sup> Two new treaties have been signed on illegal migration with Bulgaria and Romania respectively.

### C. Regional schemes

12. Regional trade agreements (RTAs) approach labour mobility in a wide variety of ways. Some agreements cover the mobility of people in general, including permanent migration and non-workers; others offer free movement of labour, including entry to the local labour market; some are limited to facilitated movement for certain kinds of trade- or investment-related activities; and still others are, like the GATS, confined to temporary movement and only for service suppliers (and explicitly exclude entry to the labour market or permanent migration). While some agreements cover workers at all skill levels, most are limited to higher skilled workers.

13. These different approaches reflect a range of factors, including the geographic proximity of the parties, their similarities in levels of development, and cultural and historical ties. Generally, agreements among countries enjoying geographic proximity and similar levels of development have a more liberal approach to labour mobility as compared with agreements between geographically distant members of differing levels of development, but this is not always the case.

14. An important factor in labour mobility is the extent to which countries are aiming at deep integration agreements, or at agreements more focused on opening or facilitating trade. The former tend to result in agreements with free labour mobility (or close to it), while the latter focus on provision of certain forms of mobility for some categories of persons related to trade. Within each of these forms, the agreements generally contain basic types of similar provisions, with differences reflecting the depth and extent of access granted, rather than fundamentally different approaches. Agreements often use each other, and the GATS, as a model for key provisions (e.g., related to exceptions).

15. A few other general observations can be made about labour mobility in RTAs:

- Although some (e.g., the EU and, for the highly skilled, CARICOM) allow the general mobility of people and/or confer immigration rights, the majority of agreements provide only special access or facilitation of existing access within existing immigration arrangements<sup>7</sup>. In most agreements, labour mobility does not override general migration legislation, and parties retain broad discretion to grant, refuse, and administer residence permits and visas.
- Right of labour mobility also does not automatically entail the right to practice a certain profession; national regulations for licensing and recognition of qualifications are still applied and candidates must meet all criteria and conditions. Additionally, specific professions or service sectors must be open to foreign suppliers. Many agreements exclude certain service sectors from coverage or apply special rules to certain sectors.
- Some agreements no longer deal with mobility under the trade in services section, but group intra-corporate transferees, service suppliers, and investors together in a separate chapter on movement of natural persons more generally. While still focused on trade-related movement, they are no longer limited simply to trade in services, but can include investors and businesspeople from other sectors (e.g., manufacturing).

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<sup>7</sup> Of course, the EU is not at all a representative agreement. While normally included in all OECD work on RTAs, the EU is actually a deep integration agreement, an economic and monetary union where the free circulation of people across member states' borders is one of founding principles and one of the 4 fundamental freedoms upon which the union is based. In this case, therefore, the member states' migration legislation is required to assist the overriding economic objective of eliminating all barriers to the EU-wide movement of people, capital, services and goods.

16. The three schemes to be presented in this session represent different approaches to regional labour mobility. While comparison between agreements is difficult, broadly speaking, they can be said to range from reasonably ambitious schemes covering general freedom of movement for the highly skilled (CARICOM), to agreements which provide for access for certain groups (NAFTA), through to a system which does not provide access per se, but facilitates the movement of certain groups by minimising the migration procedures attached to their movement (APEC).

The type of mobility envisaged under the **Caribbean Community (CARICOM<sup>8</sup>)** is towards the far-reaching end of the continuum. CARICOM provides for the free movement of university graduates, other professionals and skilled persons, and selected occupations<sup>9</sup>, as well as freedom of travel and exercise of a profession. It eliminates passport requirements, facilitates entry at immigration points, and eliminates work permit requirements for CARICOM nationals. Foreigners generally receive equivalent treatment to nationals (subject to certain reservations made by each country). Exceptions cover activities involving the exercise of governmental authority and measures to protect public morals, human, animal, and plant life, and national security; maintain public order and safety; and secure compliance with the laws of a member state (these basically reflect the exceptions found in the GATS).

The **North American Free Trade Agreement (NAFTA<sup>10</sup>)** is more limited, focused on facilitating the movement of businesspeople. The agreement is limited to temporary entry, defined negatively as being "without the intent to establish permanent residence," and applies only to citizens of parties. Access is basically limited to four higher-skill categories: traders and investors, intra-company transferees, business visitors, and professionals (detailed definitions are provided). However, these groups are not limited to services and may include persons in activities related to agriculture or manufacturing. Labour certification or labour market assessment/tests are removed for all four groups and work permits are required for traders and investors, intra-company transferees, and professionals, but not business visitors (per previous footnote). Although visas are still required, fees for processing applications are limited to the approximate cost of services rendered.

Existing general immigration requirements (e.g., related to public health or national security) still apply. Entry can also be refused if it may adversely affect settlement of a labour dispute in progress at the intended place of employment, or the employment of any person who is involved in such a dispute. Dispute settlement provisions cannot be invoked for a refusal to grant temporary entry, unless the matter involves a pattern of practice and the business person has exhausted the available administrative remedies.

The United States provides "**Trade NAFTA**" (**TN visas**) for professionals, which are valid for one year and are renewable<sup>11</sup>. Canadians can receive TN status at the port of entry on presentation of a letter from a U.S. employer, but until 1 January, 2004, Mexicans must arrange for their employer to file a labour condition application, and then must apply for a visa at the U.S. embassy in Mexico. Similarly, until 1 January, 2004, the United States applies an annual quota of 5,500 to Mexican professionals.

The **Asia Pacific Economic Cooperation (APEC<sup>12</sup>) Forum** does not contain any specific market access arrangements related to labour mobility and periods of, and conditions for, temporary entry are left to vary among economies. APEC arrangements exclude the self-employed and unskilled or semiskilled labour and are focused on business mobility. APEC arrangements are focused on information exchange; dialogue with business; development and implementation of immigration standards; and capacity building to help streamline temporary entry, stay, and

<sup>8</sup> CARICOM: Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago. The Bahamas does not participate in the common market and Haiti is not yet a full member.

<sup>9</sup> Graduates of universities (several regional universities are named but others also are included), media workers, sports persons, musicians and artists, and workers in the entertainment and tourism industries.

<sup>10</sup> NAFTA: Canada, Mexico, the United States.

<sup>11</sup> Criteria include: the profession is on the NAFTA list; the candidate meets the specific criteria for that profession; the candidate is licensed in the state of destination to practice their profession; the prospective position requires someone in that capacity; and the candidate is going to work for a U.S. employer.

<sup>12</sup> APEC: Australia; Brunei Darussalam; Canada; Chile; China; Hong Kong, China; Indonesia; Japan; Republic of Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; Philippines; Russia; Singapore; Chinese Taipei; Thailand; United States; Vietnam.

departure processing for businesspeople. In-principle agreements have been reached to improve application processing times for temporary entry permits for executives and senior managers on intra-corporate transfers and for specialists.

Although APEC does not grant any right of entry, it has established a scheme to facilitate the entry of business visitors under the **APEC Business Travel Card Scheme**. The APEC Business Travel Card is valid for three years and provides multiple short-term business entries, with stays of two or three months on each arrival. Cardholders are required to present their passports, but receive expedited airport processing and are not required to submit separate applications for business visitor visas<sup>13</sup>. Participating economies commit to implement the scheme on a best endeavours basis and are free to maintain existing visa requirements for business visitors<sup>14</sup>. All economies retain the right to refuse an individual without providing reasons or to refuse entry to APEC Business Travel Card holders at the border.

#### Questions

- What are the different levels of ambition in regional initiatives to promote labour mobility? What are the factors influencing the perception of what is feasible within a given regional arrangement?
- What categories of persons are covered by these schemes – e.g., businesspersons? Professionals? A wider range of temporary workers, including beyond service suppliers? Are these schemes broader than service suppliers (i.e., broader than GATS mode 4)?
- What has been the experience with regional schemes to promote labour mobility?
- What have been their strengths and weaknesses?
- What sorts of implementation challenges have been encountered?
- To what extent have the schemes actually been used and promoted increased mobility?
- What impact has regional labour mobility had on local labour markets? Is there a gender bias in provisions, or in their application? A skill level bias?

<sup>13</sup> There is no limit on the number of cards, and almost 4,000 have been issued to date. Fees vary among the participating economies. The scheme is open to citizens of participating APEC economies who are bona fide businesspeople. It does not include spouses and children; persons who wish to engage in paid employment or working holidays; and professional athletes, news correspondents, entertainers, musicians, artists, and persons engaged in similar occupations.

<sup>14</sup> There are currently 14 APEC countries participating in the ABTC Scheme are: Australia, Brunei Darussalam, Chile, China, Chinese Taipei, Hong Kong, China, Indonesia, Japan, Republic of Korea, Malaysia, New Zealand, Peru, the Philippines, and Thailand. While more countries are expected to join in the next future, neither the United States nor Canada are planning to participate in the business travel scheme.



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