

**IOM/World Bank/WTO
Trade and Migration Seminar
Geneva 4-5 October 2004**

BACKGROUND PAPER

An important step was taken toward better understanding the relationship between trade and migration during the OECD/IOM/World Bank Trade and Migration seminar of 12-14 November 2003. Mode 4 of the General Agreement on Trade in Services (GATS) involves the supply of a service by a service supplier of one country through the temporary presence of "natural persons" in the territory of another country. While the WTO Annex on Movement of Natural Persons specifically excludes coverage of access to labour market, citizenship and employment on a permanent basis,¹ of direct relevance to trade and migration policy makers and practitioners, Mode 4 temporary movement of persons takes place within the regulatory framework of governmental policies and practices on migration.² Mode 4 movement is a narrowly yet not fully clearly defined subset of temporary labour migration.³ Government policies and practices regarding the entry and temporary stay of natural persons, including application of visa and work permit requirements, are not determined by Mode 4. But the Mode 4 commitments governments take on, and how they implement them in practice, are very much the concern of governmental migration managers.

The purpose of this second seminar is to explore existing governmental mechanisms for managing temporary labour migration and what can be learned from these for Mode 4 of the GATS. Specifically, this seminar will look at the policy, administrative and implementation mechanisms employed by governments at the national, bilateral and regional level to manage temporary labour migration -- what are the policy objectives served, what are the mechanisms employed, and what have been the experiences to date -- with a view to lessons that can be drawn for Mode 4.

The rise of temporary movement of people for work⁴ has gained attention in recent years and is one of the statistically documented consequences of increasing globalization.⁵ As emphasized in the recently-concluded International Labour

¹"Mode 4 of the GATS – An Overview". Available at <http://www.mofa.go.jp/policy/economy/event/sympo0301-6.pdf>

² See Report on Trade and Migration Seminar organized by the OECD, the International Organization for Migration and the World Bank, held in Geneva on 12-14 November 2003. Rapporteurs: Massimo Geloso-Grosso, Daria Taglioni, OECD Trade Directorate. Available at http://www.iom.int//DOCUMENTS/OFFICIALTXT/EN/tms_final_report.pdf.

³ This seminar and background paper will not directly address questions regarding the precise scope of Mode 4 movement. For more information and analysis on this subject, see OECD Policy Brief, "Service Providers on the Move: Labour Mobility and the WTO General Agreement on Trade in Services". Available at <http://www.oecd.org/dataoecd/23/13/8890089.pdf>.

⁴ In this paper, terminology such as "movement for work" is used to distinguish this type of movement from movement for education, family reunion, tourism, refugee protection and other forms of movement. It is used generally to cover movement pursuant to an existing employment contract as well as movement in search of employment in another country and therefore is not intended to distinguish on Mode 4 grounds.

⁵For more information, see *Trends in International Migration: Annual Report*, OECD, 2002. Also, see "Towards a fair deal for migrant workers in the global economy", a report for the International Labour

Conference, managing labour migration reflects the interests of both countries of origin and countries of destination, with important ramifications for both, yet there is no comprehensive system at the international level governing labour migration.⁶ Rather, states have pursued primarily unilateral, and in more limited cases bilateral and regional, mechanisms to manage temporary labour movement to address their national priorities and circumstances, placing priority on flexibility to adapt to change. The ability to determine which non-nationals may enter its territory and under what conditions is considered one of the fundamental attributes of state sovereignty, and consequently many states have been reluctant to date to enter into binding multilateral commitments, such as pursuant to GATS Mode 4, that limit their flexibility to make and change such determinations over time.

This paper provides background information on temporary foreign worker schemes and cooperative mechanisms at the national, bilateral, regional, and multilateral levels. It discusses administrative arrangements implemented at all these levels. The main goal is therefore to set the scene for the seminar's exploration of what can be learned from existing mechanisms for managing temporary labour migration as a backdrop to the GATS Mode 4 debate. Particular emphasis will be placed in the seminar on instances where states have chosen to enter into cooperative mechanisms for managing temporary labour migration -- at the bilateral and regional level -- to help understand what interests are served by a cooperative rather than unilateral approach, what each brings to the table that is of interest to negotiating partners, how these arrangements are implemented at the national level, and what the actual experience has been.

GATS Mode 4 is not a migration agreement, and it was not created with direct regard to the policies, practices and administrative mechanisms utilized by states in managing temporary labour migration. Nonetheless, that is the context within which implementation of existing Mode 4 commitments, and consideration of potential new Mode 4 commitments, takes place. Consequently, creating a better understanding of these mechanisms and policies may facilitate more effective implementation of existing Mode 4 commitments, and may help clarify the way for further progress in the current or future negotiating rounds.

Temporary Foreign Worker Schemes

Current demographic trends with aging and declining populations of workers in much of the developed world, combined with structural deficits in specific sectors such as IT, health care, and domestic work, suggest a growing and continuing demand for foreign workers in the years to come, and indeed many states have recently changed or plan to change their legislation to facilitate entry, particularly of skilled foreign workers.⁷

Conference, 1-17 June 2004, Geneva. Available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/rep-vi.pdf>.

⁶ A recently adopted ILO Plan of Action for migrant workers includes the development over the course of the next year “of a non-binding multilateral framework for a rights-based approach to labour migration which takes account of labour market needs, proposing guidelines and principles for policies based on best practices and international standards.”

<http://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/pr-22.pdf>, p. 22.

⁷ For more information on skilled labour, see McLaughan, G., Salt, J., “Migration Policies Towards Highly Skilled Foreign Workers”, Report to the Home Office, Migration Research Unit, University College London, March 2002. Available at http://www.geog.ucl.ac.uk/mru/docs/highly_skilled.pdf

Moreover, long-term economic development goals are being considered by most states in their approach to migration management as mobile human resources are now seen as critical resources for development -- whether as a factor of production in receiving countries, or in countries of origin as a source of skills acquisition, investment and foreign exchange earning through remittances. Demand for foreign workers, however, is more than matched by the demographic projections regarding the supply of potential workers in other parts of the world, and the desire of individuals to seek the higher wages, better working conditions and other benefits of employment opportunities abroad. Other factors including security and political considerations may mean that mechanisms for regulating the admission of foreign workers are unlikely to become significantly more lax in the near term.

Receiving countries' interest in Mode 4 movement is motivated by labour and skills shortages as well as by the need of multinational corporations to move staff around the world at short notice, including to form specialized project teams (intra corporate transferees) or the desire to promote business or investment in the economy more broadly (business visitors). In other cases, Mode 4 entry may be motivated by the desire to give domestic business access to world class services (e.g., via contractual service suppliers).

The interests of the countries of origin lie mainly in addressing labour market surpluses by ensuring access of their nationals to employment abroad through authorized channels, addressing skills and resource deficits in the local economy by promoting their acquisition through temporary employment of nationals abroad and the sending of remittances and newly-acquired skills and investment home, and protection of the rights and well-being of their nationals overseas. Countries of origin are increasingly investing in organizing their efforts to place their nationals overseas -- both at the governmental and private agency level -- to market their nationals in a competitive marketplace. For example, the Philippines Overseas Employment Administration (POEA) is a governmental administrative body working to improve the country's employment programs abroad by guaranteeing workers' rights and curbing illegal recruitment through repatriation and reintegration of workers, managing shared government information systems on migration, and disseminating labour market information.⁸

Employment-related migration policies in the receiving states are divided into permanent immigration programs with a long-term economic development goal and temporary migration policies aimed at responding mostly to short-term labour market needs. Some countries operate both schemes, while others primarily use temporary entry although such "temporary" entrants can stay for extended periods. Countries operating both schemes can allow temporary entrants to apply for permanent status. Therefore, the distinction between temporary and longer-term entrants has become blurred to some extent, including as countries use a mixture of these schemes. For example, traditional temporary labour migration countries such as South Korea and Singapore, now allow permanent settlement for highly-skilled migrants. In many OECD countries, temporary migration policy goals are based on the realities of labour market needs and aim to respond to labour market demands that cannot be met locally.⁹

⁸ More information on POEA is available at <http://www.poea.gov.ph/html/aboutus.html>.

⁹ Doudeijns, Dumont, 2003.

To protect domestic labour, receiving countries conduct labour market assessments/tests, establish yearly quotas or number of admissions of temporary foreign workers, issue a certain number of work permits/authorizations/visas/green cards, determine the length of stay and conditions of stay, including for family reunion and permit renewal, specify the terms of occupational mobility, and monitor migrant workers' obligations to their employers. In some cases, shortages exist in a specific sector of the economy, or specific occupations, while there may be overall unemployment in the economy as a whole. In some instances, labour may be available, but national workers may not wish to do certain work, or work at a certain (low) pay level. Information regarding labour shortages comes from employers as well as from comparisons of employment rates with structural rates of unemployment. Some countries operate both visa and work permit systems for foreign workers (the former permitting entry and the latter setting out the conditions under which economic activity is permitted). In others, the visa serves both functions. The agencies in charge of the issuance of these papers can be migration authorities or labour ministries, special bodies in cooperation with the ministries, or a Central Employment Board (for example in the Netherlands). In both cases, quotas on foreign workers can be set for a country as a whole, for the country's various regions or administrative districts, for certain sectors of the economy, for specified occupations, and/or for individual employers or enterprises.¹⁰ Many governments believe that a quota regime helps ensure a balance between the national and foreign populations, and makes it possible to improve the structure of the labour market and create favourable conditions for the integration of immigrants.¹¹ Quota regimes exist in Germany, Switzerland, South Africa, the UK, the US, and Italy, among others.

Some argue that governments do not react quickly enough to labour market changes and, therefore, employers should take the lead in determining the need for labour. In this view, governments should provide an enabling framework for recruitment, but not decide on precise numbers of foreign workers needed for different sectors. In demand-driven systems, it is the employers who request permission to hire foreign workers, while governments ask employers to demonstrate that the migrant workers will not take jobs away from national workers nor affect in a negative way wages and working conditions. In these systems, for example, shortage occupation lists may be used or a wage floor may be applied for jobs. These systems can also be used in combination in one country.

Procedures for selection and recruitment of temporary foreign workers vary with respect to restrictions on the skill and nationality of foreign workers, linguistic abilities, and the duties associated with sponsorship requirements (in most cases, the sponsor is the employer in the receiving country). As a general observation, the more detailed the selection criteria, the more costly the procedure in terms of financial resources and recruitment time and therefore there are cost-time/efficiency trade-offs.¹²

Since foreign labour migrants of concern here enter the receiving country on a temporary basis to provide their services, their visas and work permits are all time-limited. There is a variation across programs, however, in the number of years for which residence and employment are granted. In Australia, for example, the length of stay

¹⁰ Ibid.

¹¹ OECD, 1998.

¹² Doudeijns, Dumont, 2003.

allowed and the procedures for obtaining work permits vary depending on the category of skilled workers but usually they are granted for two years and may be renewed once, up to a maximum of four years. In France, provisional work permits are issued for a nine-month period, and may be renewed once for a further period of two years on an exceptional basis.¹³

Some governments impose a fee on employers for each foreign worker employed as a test of the real need to recruit a foreigner rather than a resident. This fee can be collected in addition to any fee covering administrative costs. Such fees can apply to the recruitment of all foreign workers, or to certain categories (unskilled workers, etc.).

Examples of selection and recruitment policies

In terms of using skill level as a worker's eligibility criteria, countries like Singapore explicitly limit admission under its *Employment Pass R* program to semi-skilled workers (R1 Pass) and unskilled workers (R2 Pass).

In Switzerland, the *Auslaenderausweis B* program primarily targets highly skilled workers but not exclusively so; an *Auslaenderausweis B* may be granted to a semi-skilled foreign worker if no Swiss or EU worker can be found to fill the vacancy.

The US H1-B program is one of the programs that explicitly restricts admission to highly skilled workers for "specialty occupations", requiring "theoretical and practical application of a body of specialized knowledge along with at least a bachelor degree or its equivalent."¹⁴

Kuwait's selection policy under its *Kafala-Visa 18* program does not explicitly tie eligibility for admission to any particular skill level.

Source: Ruhs, 2002

Example of economically-oriented work permit fees: Singapore

The government of Singapore influences the annual number of admissions for its *Employment Pass R* Program through a combination of fees and ratios. The so-called "foreign worker levies" are flexible and specific to the sector and skill level of the foreign worker. Singapore has used the combination of economically oriented foreign-worker levies and "dependency ceilings" to manage the inflow and employment of unskilled foreign workers. Dependency ceilings specify the maximum share of foreign workers who may hold an Employment Pass R, mostly in the total company workforce (except for domestic services where dependency ceilings are not imposed); in addition, an industry ceiling is imposed in some cases. For example, the dependency ceiling in construction was 20% in 2003.

Source: Ruhs, 2002; Ministry of Manpower, Singapore¹⁵

¹³ OECD, 2003.

¹⁴ Ruhs, 2002, p.12.

¹⁵ Ministry of Manpower of Singapore. Available at Available at [http://www.employmenttown.gov.sg/MOM/WPD/Procedures/2325_WP_General_Guide\(27Jun03\).pdf](http://www.employmenttown.gov.sg/MOM/WPD/Procedures/2325_WP_General_Guide(27Jun03).pdf).

Labour market assessment or testing -- often referred to as an "economic needs test" or "ENT" -- is designed to restrict entrants of foreign workers to circumstances where there is felt to be an identified need or gap that cannot be filled from the domestic market (it is also argued to protect the domestic labour force from outside competition). Employers in countries conducting these tests (Australia, Canada, Kuwait, the UK, and the US, among others) are obliged to demonstrate that they have tried to recruit a domestic worker on the labour market. In Australia, the tests are conducted by advertising the position in question in newspapers and employment agencies. Employers must provide information on who responded to the advertisement and why the applicants were not hired. Similarly, in the UK, employers must demonstrate that the post cannot be filled by a UK or EEA¹⁶ national by proving that the post has been advertised widely enough within the previous six months and that no satisfactory response has been received. If the result of labour market testing establishes a certain quantifiable need for additional outside workers, employers are authorized to submit a request to the appropriate ministry to issue work permits to the given number of foreign workers.

Since in many developed countries shortages are forecast to occur in certain highly skilled occupations (e.g., IT sector in France, Germany, Netherlands, Canada, and USA; health sector in Norway, Denmark, Ireland, and Netherlands), these sectors may not be subject to labour market tests and highly skilled foreign professionals can be exempt from work permit requirements.¹⁷ Other categories of persons for whom no labour market test is required frequently include, for example, business people and sole representatives of firms (UK and France), for executive managers (Switzerland); and certain categories of persons entering for business purposes, provided they do not remain for longer than 9 months (Canada).

Bilateral Labour Agreements

Most temporary labour migration today takes place outside of state-to-state agreements. Nonetheless, a forthcoming OECD study found a proliferation of bilateral labour migration agreements in the past decade, and a resurgence of interest in cooperative and broadened approaches to managing labour migration.¹⁸ This reflects an overall trend toward more planned and managed migration, and to greater inter-state cooperation in this effort. As has been noted repeatedly by IOM's member states in the IOM Council's International Dialogue on Migration,¹⁹ cooperatively managed migration has the greatest chance of reaping benefits for countries of origin, countries of destination, individual migrants and the communities with which they are affiliated.

¹⁶ The European Economic Area. The EEA was maintained because of the wish of Norway, Iceland and Liechtenstein to participate in the Single Market, while not assuming the full responsibilities of membership of the EU. More information on the EEA is available at http://europa.eu.int/comm/external_relations/eea/.

¹⁷ For information on labour shortages in specific countries, refer to McLaughan and Salt, "Migration Policies towards Highly-Skilled," University College London, 2002. Available at <http://www.homeoffice.gov.uk/rds/pdfs2/migrationpolicies.pdf>

¹⁸ See "Bilateral Labour Agreements: Evaluation and Prospects", Seminar on Bilateral Labour Agreements and Other forms of Recruitment of Foreign Workers, organized jointly by the OECD and the Swiss Federal Office of Immigration, Integration and Emigration (IMES), Montreux, Switzerland, 19-20 June 2003. Forthcoming publication (not to be cited or quoted). Hereinafter "Montreux".

¹⁹ See IOM Council, International Dialogue on Migration (<http://www.iom.int/en/know/idm/index.shtml>) and the Swiss Government's Berne Initiative (<http://www.iom.int/documents/officialtxt/en/resource%20doc%5Feng.pdf>).

The OECD study found more than 176 bilateral agreements including mobility provisions (note that this figure includes bilateral investment treaties as well) in force today in OECD countries, covering a range of skill levels, occupations, and purposes. Why do some states choose to enter into bilateral labour migration agreements? What do the parties bring to the table that is of interest to their negotiating partners? What do these bilateral agreements cover? How do they work in practice? And what is the assessment of their success in achieving their objectives? While the OECD study notes that there has been little empirical or analytical work on bilateral labour agreements, and even less on assessing their effectiveness, some preliminary conclusions can be drawn.²⁰

For receiving states, the reasons for entering into bilateral labour agreements are generally one or a combination of the following: to respond to labour market needs of a temporary or permanent nature, to promote economic links with other countries, to combat irregular migration as well as to preserve or to strengthen ties between countries sharing historical and cultural links. Bilateral labour agreements offer predictability for receiving states in meeting labour market shortages, and quality control through, for example, engagement of the sending country in pre-selection recruitment and screening and product "branding", e.g. the hard-working and honest reputation of Filipino workers. The new generation of labour migration agreements today increasingly have multiple purposes, and are often aimed at combating irregular migration in addition to meeting labour market shortages. Many contain provisions requiring the country of origin to readmit its irregular migrants, as is the case for example in agreements by Spain with Ecuador and Morocco, and Italy with Romania. Many agreements today are aimed at fostering economic and cultural cooperation that might lead in the future towards further regional integration, as is the case with bilateral agreements between Germany and Central and Eastern European countries.²¹

For sending states, the objectives for entering into bilateral agreements are generally one or a combination of the following: to relieve labour surplus by increasing access to the international labour market for their workers, to ensure better living conditions and earning capacity for their workers, and to promote the acquisition or enhancement of vocational skills and qualifications.²² Sending countries can facilitate the protection of the rights of their nationals abroad through including specific provisions on social security and social protection in bilateral agreements. They can also limit the effects of brain drain by including measures to ensure the return of their nationals at the end of a temporary stay. Setting the level of a quota of foreign worker admissions based on cooperative agreement between the sending and receiving countries can be a useful tool for sending countries in regard to their human resource development planning strategy.

²⁰ The preliminary chart on bilateral labour agreements prepared by the secretariat for this seminar is designed to create an even more comprehensive picture of bilateral mechanisms for managing temporary labour migration today. Its completion over the course of the coming months based on verification by participants together with replies to the questionnaire accompanying the invitation to the seminar will provide a rich source of data for further quantitative and qualitative analysis.

²¹ IOM presentation at the UNCTAD Mode 4 Expert Meeting: *Complementary Approaches to Mode 4*, 2003. Hereinafter "IOM Mode 4".

²² Ibid.

Bilateral agreements allow for sharing of the burden between countries of origin and destination, for example with respect to pre- and post-migration processes, living and working conditions, and monitoring and enforcement.²³

In terms of the content, bilateral agreements normally specify the purpose of the agreement, the definition and scope of the labour concerned, admission criteria, the terms of migration, the legal status of the migrants, fair and equitable treatment as compared to national workers, and annual quotas, where applicable.²⁴ Existing bilateral agreements cover from low skilled to high skilled migrants (yet generally do not cover the highly-skilled) as well as migration for varying time periods.²⁵

The bilateral agreement between Spain and Ecuador is illustrative of the new generation of bilateral labour agreements with explicit multiple purposes, including a focus on reducing irregular migration through a specific provision regarding return of labour migrants. Before being recruited, temporary workers sign a promise that they will return to Ecuador at the expiration of their permit; if they do so, it will be easier for them to be recruited again, as Spanish authorities take return into consideration when issuing work permits.²⁶ Of all bilateral labour agreements, two cases are often cited as best practices in terms of framework efficiency - the program developed in Canada in seasonal agriculture and the contract worker scheme in Germany.

²³ Id.

²⁴ See Montreux.

²⁵ Id.

²⁶ Ibid.

Canada and the Caribbean and Mexican Seasonal Agricultural Worker Program

The Commonwealth Caribbean and Mexican Seasonal Agricultural Worker Program (CCMSAWP) covers temporary, sector-specific movement. The Program's objective is to "provide a supplementary source of reliable and qualified seasonal labour in order to improve Canada's prosperity by ensuring that crops are planted and harvested in a timely fashion". Human Resources Canada Centre (HRDC) operates the program through local centres in the provinces of Alberta, Nova Scotia, Québec, and Ontario where the program was initially introduced. The purpose of the program was to respond to shortages of available Canadian or permanent resident agricultural workers. During the process, employers play a predominant role. They are authorized to apply for migrant agricultural workers only after they consider the availability for employment of Canadian and permanent residents. In the event there are none available, employers submit an application to the local HRDC centre, specifying the number of workers needed, the length and location of the work and the working and living conditions. Governments of sending countries recruit and select the workers. Subsequently, Canadian immigration officers at the embassy or consulate in the country concerned process work permit applications. The length of employment for migrant agricultural workers under this agreement is a maximum of eight months. The Canadian employer and the migrant worker sign a standard agreement, which specifies the employer's responsibility to cover the worker's return travel costs, to provide accommodation at no extra charge, and to pay workers the highest applicable minimum wage. The agreement also specifies sanctions for an employer who knowingly breaches the terms of the agreement. Migrant workers are limited in their occupational mobility to one employer unless they receive an approval of the relevant provincial representative. Lastly, the program provides incentives for migrant workers to comply with its requirements to enter the program again – if the worker is called by name by an employer s/he can benefit from higher wages.

Source: IOM, 2003²⁷

²⁷ IOM Mode 4.

German Contract Worker Scheme

German bilateral agreements with central and eastern European countries (CEECs) cover the greatest number of workers and therefore provide the most statistically significant examples of bilateral labour agreements. They seek not only to satisfy German labour market needs but also to strengthen relations between Germany and CEECs and provide mutual benefits to German companies (by establishing contacts and potentially better market access to the Eastern European markets) and CEE workers (by gaining knowledge of the German market and German techniques). Under the German contract worker scheme, several forms of temporary migration for work purpose are established.

Contract workers schemes in Germany allow employees from foreign companies to work in Germany as contract workers. These schemes are established on a bilateral basis between the governments of Germany and Poland, Bulgaria, Hungary, as well as other central and eastern European countries²⁸ and include country-specific quotas, which are adjusted to the labour market situation in Germany. Migrant workers enter the country on an employment contract with the foreign company although they provide services to a German company in Germany. The length of employment for the migrant worker is 2 or 3 years. The advantage of this system of employment of foreign workers is that it enables the temporary and flexible recruitment of foreign labour, with quotas being adapted to changing labour market conditions. This system also makes recruitment the responsibility of the country of origin, avoiding burdensome labour market testing in Germany. The German contract workers scheme delegates responsibility for enforcing the return of workers to their countries of origin at the end of the contract period to the local companies and specifies that part of the payment will be withheld until the workers return home.

Source: IOM, 2003²⁹

Relationship to and Implications of Bilateral Labour Agreements for Mode 4

Bilateral labour agreements make no specific reference to Mode 4 of the GATS, nor are their criteria and coverage specifically related to GATS Mode criteria. Moreover, by their very terms, bilateral labour agreements may run counter to GATS most-favoured-nation principles of equal treatment for trading partners by creating preferential treatment for the nationals of contract states, provided they cover Mode 4 trade. Bilateral agreements covering Mode 4 movement can nevertheless be consistent with the GATS provided they are covered by a specific MFN exemption. Just as GATS Mode 4 is not a migration agreement, bilateral labour agreements are not trade agreements but rather migration agreements. Nonetheless, there may be some lessons that can be drawn from bilateral labour agreements for Mode 4, particularly at the administrative level.

²⁸ Ibid. While the German contract worker programme may be declining in relevance as a result of EU enlargement, it is nonetheless the most extensive and statistically-significant example of bilateral worker programmes and therefore bears mention here. Germany, for example, has agreements for recruitment of construction workers from Estonia and nurses from Croatia and Slovenia. For more information, see Montreux.

²⁹ IOM Mode 4.

Can clear and transparent specification of the substantive and procedural requirements for eligibility, as in the Canadian seasonal agricultural worker programme, enhance prospects of success? Can success ratios be enhanced by active participation and cooperation of sending and receiving country officials and/or employers in screening and preparing potential foreign workers? Are temporary workers more likely to match the identified need, perform according to programme criteria, and comply with applicable requirements, including return at the end of the temporary stay, under bilateral agreements? Can assistance by international organizations, such as IOM, facilitate this process?

Can clearly allocating and enforcing responsibility for ensuring that temporary stay remains temporary -- whether to the employer, the temporary worker, or the country of origin -- help ensure programme integrity and the maintenance of public support for the programme?

Can bilateral labour agreements offer an alternative or complement to Mode 4 in the near term (provided they are consistent with WTO Members' GATS MFN obligations), particularly with respect to lower-skilled labour movement, as bilateral agreements allow flexibility to adjust to changing circumstances both in terms of duration and coverage? Can monitoring of implementation, and procedural and other adjustments as necessary, facilitate this?

There has also been a proliferation in the past 10 years of efforts to manage regular and irregular migration at the regional level through the development of so-called regional consultative processes on migration. These include, for example, the Regional Conference on Migration (Puebla Process, 1996) for north and central America, the South American Forum (Lima Process, 1999), the Migration Dialogue for Southern Africa (MIDSA, 2000), the Bali process, and many others. Two newer dialogues -- the Conference on Western Mediterranean Cooperation (5 plus 5) of the 5 states on the northern shore and 5 states on the southern shore of the Western Mediterranean, and the Asian Labour Ministerial Consultations -- have an explicit focus on labour migration. These fora are informal in nature, focus largely on information sharing and open avenues for operational cooperation in more limited cases. Of the many existing processes, apart from the 5 plus 5 and the Asian Labour Ministerials, none is exclusively or even primarily focused on labour migration. None has resulted in concrete agreements regarding the temporary movement of persons for work. As mentioned previously, inter-state cooperation in managing migration, including temporary labour migration, is still nascent, and can best be characterized as at a confidence-building stage.³⁰

Free Trade Agreements

While the focus of bilateral labour agreements is primarily labour mobility, trade agreements are mainly concerned with decreasing barriers to trade between the parties. They address labour mobility between member states as a means of achieving trade liberalization and/or economic integration, rather than as a means primarily to manage migration.

³⁰ See, IOM, World Migration 2003: *Managing Migration: Challenges and Responses for People on the Move*.

Regional agreements on labour mobility range from covering 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; others are, like the GATS Mode 4, confined to temporary movement and only for service suppliers, and still others contain no provision for market access beyond facilitating entry visas or have plans that will only be realized in the future. Regional agreements cover workers at all skill levels yet most are limited to higher skilled workers.³¹

Importantly, the majority of these agreements do not override migration legislation and the parties therefore retain broad discretion to grant, refuse and administer residence permits and visas. Moreover, professional qualifications requirements, such as licensing and recognition of qualifications, are still applied.

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 types, the agreements generally contain basic types of similar provisions, with differences reflecting the depth and extent of access granted, rather than fundamentally different approaches. Interestingly, many regional agreements and the GATS Mode 4 mimic each other, and there is at times a close correlation between the two.³²

Relationship to and Implications of Free Trade Agreements for Mode 4

Regional trade agreements -- and bilateral trade agreements specifically addressing labour mobility -- both in their terms and in their implementation mechanisms likely have the most direct relevance to GATS Mode 4. What lessons can we draw from these? Are the incentives to enter into these cooperative arrangements -- as opposed to pursuing a unilateral approach -- the same or similar to those with respect to Mode 4? Do the parties bring the same things to the table, or do regional dynamics differ sufficiently -- i.e., focus on regional economic integration -- that they are not instructive? Are efficiency, transparency and predictability provided by these approaches, as is projected under Mode 4? As the legislative and administrative mechanisms for implementing bilateral and regional trade commitments with respect to movement and temporary stay find their place within the same national regulatory framework as Mode 4-related movement, what lessons can we draw?

³¹ Much of the material for this section is drawn from Nielson, 2002.

³² Nielson, 2002.

Examples of Free Trade and Regional Integration Agreements

In the **European Union**, there are no visas or work permits required for citizens of member states although residence permits may be needed in some countries or cases. The rights and benefits of the migrant workers include access to employment in other Member States; residence rights (with family) in other Member States (for those seeking employment, a six month time limit normally applies); and equality of treatment with nationals regarding working conditions and employment-related benefits. In close connection with this agreement are the **European Economic Area (EEA)** agreement and **European Free Trade Association (EFTA)** agreement. In the EEA agreement, there are no restrictions on the freedom to provide services and temporary service providers receive national treatment. Exceptions apply for the exercise of official authority and special conditions apply to transport, financial, audio-visual and telecommunications services. In general, workers can stay or move freely within EU and EFTA states for the purpose of employment and remain in the territory of EU and EFTA states after having been employed. The EFTA agreement specifically confers the right of access to work, entry/exit and establishment (residence), the right to provide services for a period of up to 90 days per year and the right of equal treatment. These rights cover all persons, irrespective of nationality, who are integrated into one of the EFTA state's regular labour market.

Under the **Australia-New Zealand Closer Economic Relations (ANZCERTA)** program, Australians and New Zealanders are free to live and work in each other's countries for an indefinite period (limited exceptions apply, e.g. people with criminal records). This agreement is complementary to the Trans-Tasman Travel Arrangement that stipulates that the citizens of Australia and New Zealand are exempt from the visa or work permit requirement to undertake employment in each respective country of destination³³. On social security, the agreement provides for equal treatment of nationals, maintenance of acquired rights, and export of benefits.

In the **Caribbean Community (CARICOM)** agreement, work permits are eliminated for all CARICOM nationals (Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago). The free movement clause extends to university graduates, other professionals, skilled workers, workers in entertainment and tourism industries, and others. Nationals of member countries are free to travel and exercise a profession on the territory of CARICOM states, which implies elimination of passport requirements, facilitation of entry at immigration points, and elimination of work permit requirements for CARICOM nationals. National treatment is guaranteed.

The North American Free Trade Agreement (NAFTA) and the **Canada-Chile Free Trade Agreement** cover traders and investors, intra-company transferees, business visitors and professionals. However, these groups are not limited to services and may include persons in activities related to agriculture or manufacturing. Visas are still required but fees for processing applications are limited to the approximate cost of services rendered. Under NAFTA, the US provides "Trade NAFTA (TN)" visas for professionals that last for one year and are renewable. Canadians can receive TN status

³³ ILO, 2003.

at the port of entry on presentation of a letter from a US employer, but Mexicans, have to arrange for their employer to file a labour condition application, and then apply for a visa at the US Embassy in Mexico. There are no provisions for facilitated entry under the Canada-Chile agreement (although Chilean businesspersons can apply for an extension of the employment authorization). Labour market tests are removed for all four groups. In terms of quotas, under NAFTA, the US applied a quota of 5,500 to Mexican professionals, until 1 January 2004. The Canada-Chile agreement does not permit either Party to impose or maintain any numerical restriction relating to temporary entry of any category. Work permits are required for traders and investors, intra-company transferees and professionals, but not business visitors. The length of stay is limited to temporary entry.

There are also a number of free trade agreements (e.g., between **Japan and Singapore**, and **US and Jordan**) that provide for the free movement of persons whose occupations are directly linked to trade – short-term business visitors, intra-corporate transferees and investors and independent service suppliers in the Japan-Singapore trade agreement; independent traders and persons linked to investment, and service suppliers in the US-Jordan trade agreement.

Source: Nielson, 2002³⁴

Multilateral agreements (GATS Mode 4)

GATS Mode 4 applies to the movement of natural persons in connection with the supply of a service. Natural persons falling within the scope of Mode 4 include independent contractual service suppliers as well as natural persons employed by service suppliers. Although the GATS does not specify the duration of temporary stay, Mode 4 applies to the temporary movement of natural persons, with the exclusion of permanent migration. Clearly in many cases the concepts and categories of natural persons employed by GATS Mode 4 do not coincide with the categories of migrants covered by a Member's visa and work permit systems. A better understanding of national systems should help to understand and clarify the scope of existing Mode 4 commitments as well as contribute towards advancing progress in the current GATS negotiations.

This seminar will explore what lessons can be drawn from each of these unilateral migration regimes, bilateral labor agreements and free trade agreements for more effective implementation of existing GATS Mode 4 commitments, as well as what the prospects are for further Mode 4 commitments in the current or future negotiating rounds. Are bilateral and regional schemes a help or hindrance to Mode 4? Should they replace or complement one another? Where do the greatest benefits lie? And what realistically can be achieved?

³⁴ Available at <http://www.oecd.org/trade>.

Post-admission policy

There are a series of post-admission policy considerations affecting foreign workers. This section will call attention to some of the most significant policy issues, and provide examples of some of the most frequent policies adopted.

Restrictions on employment including occupational mobility and wage

It is a common practice in the receiving countries that temporary foreign workers are obliged to stay with the same employer and thus within the same job market sector as well as the same occupation for the entire length of employment. This is the case for most categories of foreign workers in Kuwait, Singapore, Switzerland, and the US. In these countries, programs restrict employment of an admitted foreign worker to a specific employer. In some cases, a transfer to a new employer is possible after some time but needs to be applied for (as in Kuwait). According to national labour migration legislation in Australia, a migrant worker can change employers after two years of employment.³⁵

Family Reunion

The permission for a migrant to bring along family members to accompany him/her in the receiving country depends ultimately on the duration of the proposed stay and on his/her skill level. At the most general level, short-term labour migrants are rarely authorized to have family members accompany them, but at the higher the skills level, greater possibilities exist for family members to accompany. In Asia, for example, family reunification for unskilled workers has not been a major issue because unskilled workers usually cannot afford to maintain their families in the country of employment. By contrast, skilled foreign workers with an employment visa are allowed to bring their families.³⁶ In Singapore in particular, the Employment Pass P program allows a change in status and family reunion.³⁷ In France, only high-level staff are entitled to be accompanied by family members. In Germany and Switzerland, family reunion is not possible for foreigners holding short-term residence permits; in the Netherlands and the UK, family reunion is permitted if the conditions regarding sources of income and accommodations are met; and in Australia, Canada, and the US, certain defined family members may be authorized to accompany the visa holder.

Wages and Working Conditions

The rights and benefits that foreign workers are entitled to in the countries of destination vary from full national treatment to much lower levels of protection, both in legislation and in practice. Major concerns relate to discriminatory treatment with respect to wages and working conditions.

³⁵ ILO, 2003

³⁶ IOM, 2003

³⁷ Ruhs, 2002.

For example, in Asian countries of destination,³⁸ the principle of non-discriminatory treatment is recognized in national labour legislation, providing for equal treatment and non-discrimination especially in the matter of remuneration. The Labour Standards Law in Japan stipulates that an employer shall not engage in discriminatory treatment with respect to wages, working hours, or other working conditions by reason of nationality, creed or social status of any worker.³⁹ In Taiwan Province of China and in South Korea, legally admitted foreign workers are also guaranteed the same rights as national workers. Migrants' rights and benefits vary from country to country and are not always guaranteed.⁴⁰

However, it should be noted that some countries regard wage differentials as constituting part of their comparative advantage.

Social Security

Eligibility and responsibility to pay into the social security scheme of the home and host country, and to receive -- and transfer -- benefits from one or both are significant issues facing migrant workers. In some countries, foreign workers have to contribute to social security and pay taxes in both the country of origin and destination, which leads to double taxation for which they gain no benefits in return. In most of Asia, unskilled foreign workers are excluded from social security systems. Singapore has discontinued the scheme for unskilled foreign workers under the provident fund on the ground that their stay is temporary. In Japan, the law provides for the required insurance benefits when a worker suffers injury, disease, physical disability, or death resulting from employment regardless of the worker's nationality and regardless of whether the worker's stay or work is legal or illegal.

In the US and Switzerland, highly skilled *H-1B* and *Auslaenderausweis B* permit holders are granted the explicit right to equal treatment with regard to social security.⁴¹ In Australia, migrant workers can accumulate rights only under the terms of international social security agreements that Australia has signed with other countries. If a person resides in a country that has an agreement covering this matter, s/he can generally claim the specified payment and accumulate residence periods. In Germany, migrant worker status has nothing to do with admittance to social security systems in Germany. Foreigners are entitled to family allowance only if they hold a residence permit. Furthermore, in principle the family allowance is not for children who are resident outside the EU or EEA.

South Africa has a social protection system comprised of social insurance, provident funds, social assistance, and universal benefits. Migrant workers are also able to maintain their acquired rights with respect to benefits regardless of whether they stay in the country or not. They are not able to accumulate rights in situations where work is carried out in different countries.⁴²

³⁸ Bangladesh, India, Nepal, Pakistan, Sri Lanka, Indonesia, Philippines, Thailand, Viet Nam, China, Japan; Republic of Korea has started granting the equal treatment with the Act on Foreign Workers' Employment, effective August 17, 2004.

³⁹ IOM, 2003

⁴⁰ See, generally, ILO 2003 and various ILO reports and working papers on this subject.

⁴¹ Ruhs, 2002

⁴² ILO, 2003

Rights & Benefits: The Case of Germany

In Germany, §§ 4 and 5 of the Social Code Book IV (SGB IV) contain regulations on the compulsory insurance assessment of German workers working abroad and foreign workers working in Germany. An employer must offer migrant workers a wage no less than that offered to nationals before they are allowed to hire a migrant worker. In addition, they must be in a selected or priority branch of activity or geographic area. Legal assessment of abusive recruitment practices is carried out according to general criminal law (e.g., §263 of the Penal Code (StGB) concerning deception). Employment of a worker for an unreasonably low pay may be prosecuted (§291 para. 1 no. 3 StGB). All workers are protected against forced labour by the Constitution. In accordance with article 12(2) of the Basic Law (GG), no one can be forced to perform any specific job, except in the framework of a traditional, general public service obligation, where everyone is treated in the same manner. It is a fundamental right, to which everyone is entitled. The GG explicitly prohibits discrimination on the basis of sex, descent, race, language, native country, origin, belief or religious or political views. To take action against discrimination in employment and occupation, directives 2000/43/EC, 2000/78/EC and 2002/73/EC on the implementation of equal treatment will be incorporated into national legislation. There are no special rules concerning equal treatment with national workers in respect to wages; however, general labour legislation applies. With respect to minimum wages, the legislation makes no distinction between these three groups of workers.

Return requirement and enforcement

With the rise globally of irregular migration, security concerns, and criminal trafficking and smuggling organizations in circumventing entry controls and in abuse of migrants, most particularly those in an irregular situation, questions regarding how to ensure enforcement of conditions for migrant workers, as well as to ensure return at the end of a temporary stay, have proven particularly important and difficult. While certainty is not possible, estimates suggest that one-third to one-half of new entrants to developed countries does so in an irregular manner, representing an increase of 20 percent over the past ten years.⁴³ According to high-end estimates, the U.S. may now host as many as 12 million irregular migrants, the number of migrants processed at Ellis Island in the first 60 years of its operations. Irregular migration into the EU was estimated to be approximately 500,000 persons per year in 1999. Moreover, authorized temporary entry does not necessarily mean temporary migration, as the incidence of persons overstaying authorized entry is substantial and is of the greatest concern to the Mode 4 debate -- how to keep temporary migration temporary.

The vast majority of undocumented migrants are unskilled, for a variety of reasons: most receiving countries offer greater opportunities for skilled workers to migrate legally than for unskilled; many skilled workers are less willing to experience the uncertainty and take the risks of irregular movement; and employers are more likely to offer unskilled jobs to undocumented workers whose tenure is less certain and therefore requires less investment in technical expertise. While attention and concern are often

⁴³ IOM, World Migration 2003: *Challenges and Responses for People on the Move*, for this and the other statistics in this section.

focused on the risk that lower-skilled migrants would overstay a temporary authorization, interestingly, the practice of some developed countries of not enforcing return of highly-skilled at the end of a temporary stay -- and indeed in some cases specifically considering successful temporary workers for possible future settlement -- makes it easier for high-skilled temporary workers to gain a more permanent status.

Monitoring mechanisms in receiving countries can help ensure that the rights of migrant workers are respected by the employer and that working conditions are appropriate. In addition, monitoring can help ensure that the migrant workers are not overstaying their visas, are employed legally, and are not in violation of the receiving country's employment laws. But the responsibilities for these enforcement mechanisms need not rest exclusively with employers in the destination country. Employers in the country of origin have an important role to play as well, and can be allocated some of the burden of ensuring compliance, through risk and burden allocation mechanisms. Similarly, officials in countries of origin as well as countries of destination have roles to play. Some of the most effective examples, as noted above, are those where the country of origin is invested in ensuring the return of the temporary worker at the end of the temporary stay. Moreover, for return to be sustainable, successful reintegration is key. It does not necessarily happen automatically but requires thoughtful consideration and effort.⁴⁴ There is much room for creativity and innovation in this entire domain.

Monitoring Mechanisms: Country Examples

In Australia, the Department of Employment and Work Relations (DEWR) monitors the employment of all workers and does not distinguish between migrant and national workers. For temporary residents, all sponsors are monitored via a questionnaire within 6 to 12 months of the arrival of workers and asked to provide evidence of salary payments made and of compliance with their sponsor's undertakings. Where it appears industrial relations, taxation laws, or other laws may be breached, the employer is referred to the relevant authorities for their investigation and action. Discrimination matters are referred to the Human Rights and Equal Opportunity Commission. Issues regarding Occupational Health and Safety are referred to relevant state authorities. The DIMIA checks migrant workers' authorization to work when they conduct visits. The Business Center Monitoring Unit conducts inspections of business premises where complaints are received from visa holders. Primary considerations in these inspections are working conditions and pay rates (67). DIMIA routinely undertakes targeted monitoring of employers, including site visits, to ensure that employers honor their sponsorship obligations. It visits 25% of employers who sponsor temporary workers. Sanctions are being introduced for employers who breach the law.

In Thailand, the Government monitors the conditions of migrant workers through general labour inspections as well as reports from the competent authority and reports from employers' and workers' organizations, local administrative bodies and NGOs. Special inspections are undertaken when complaint are received from migrant workers.

In South Africa, the conditions of migrant workers are monitored through regular labour

⁴⁴ "Successful reintegration spells the difference between migration that benefits the development of migrants and their home countries, and migration that becomes a revolving door of labor exportation." Graziano Battistella, *Return Migration in the Philippines: Issues and Policies*, in *International Migration: Prospects and Policies in a Global Market*, Douglas S. Massey, J. Edward Taylor, eds., Oxford University Press, 2004.

inspections in order to determine their working conditions and ensure that they are not subject to forced labour. Special inspections are also undertaken if a complaint is received from a migrant worker.

For Germany, there is no special supervisory procedure focusing solely on the inspection of the situation of migrant workers. Only foreigners obliged to have work permits are subject to a special state supervisory system. Furthermore, foreign workers are subject to general labour inspections.

In the Philippines, the working conditions of migrant workers are monitored through regular labour inspections. All workers, both nationals and foreigners, in an establishment subjected to inspection, are included in the inspection. Special inspections are undertaken in cases where a complaint is received from a migrant worker.

Conclusion

While GATS Mode 4 movement is not synonymous with temporary labour migration, exploration of existing mechanisms for managing temporary labour migration -- at the national, bilateral and regional level -- can help shed light on how existing Mode 4 commitments can be made more effective, and what prospects there might be for further reductions in barriers to Mode 4 liberalization. In addition, examination of these mechanisms can also serve to highlight areas in which parallel or complementary progress might be achieved, such as with the possibility of further elaboration of bilateral and regional labour migration agreements in non-service and/or lower-skilled sectors. Moreover, bringing trade, labour and migration practitioners and policy-makers together to deepen dialogue, understanding and confidence-building serves, in its own right, the interests of greater global prosperity and development, fairness, safety and security. For this reason alone, sustaining and strengthening an informal exchange on the pressing global issue of the relationship between trade and migration to promote more orderly and productive movement of people warrants our concerted efforts.

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