

**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

Government policies and practices regarding the temporary stay of natural persons, including application of visa and work permits, are not determined by Mode 4. But the Mode 4 commitments made on, and how they implement them in practice, are very much the domain of governmental migration managers.

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

The focus is on the temporary movement of people for work

Mode 4 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

Conference, managing labour migration reflects the interests of both countries of origin

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 migr

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

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

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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

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

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 ag

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?

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

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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

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

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 be

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

REFERENCES:

International Organization for Migration (IOM) & Korea Labour Institute
A Comparative Study on Labour Migration Management in Selected Countries,
(upcoming) a joint publication of the Korea Labour Institute and the International
Organization for Migration, Seoul, Republic of Korea, Geneva, Switzerland

International Organization for Migration, World Migration 2003: *Challenges and
Responses for People on the Move*

Bhagawati, J., Schatz, et al. (1984)
“The West German Gastarbeiter System of Immigration“, in *European Economic
Review*, 26: 277-294.

Doudeijns, Marco, Dumont, Jean-Christophe (2003)
“Immigration and Labour Shortages: Evaluation of Needs and Limits of Selection
Policies in the Recruitment of Foreign Labour”, presented at the *The Economic and
Social Aspects of Migration: Conference jointly organized by the European
Commission and the OECD*, Brussels, 21-22 January, 2003.

Ruhs, Martin (2002)

“Temporary Foreign Worker Programmes: Policies, Adverse Consequences, and the Need to Make them Work”, The Center for Comparative Immigration Studies, Working Paper No. 56, 2002.

IOM contribution to UNCTAD (2003)

“Mode 4 Expert Meeting: Complementary Approaches to Mode 4: Bilateral Agreements”, July 2003.

World Bank, *Global Economic Prospects 2005: Trade, Regionalism and Development* (forthcoming)(not to be cited or quoted)