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PROVISION OF SERVICES AND INTERNATIONAL LABOUR MOBILITY

(Note by the Secretariat)

The attached report has been prepared by Jackson Young (Department of Foreign Affairs and International Trade, Government of Canada) and presented to the OECD. The views expressed are those of the author and do not commit either the Organisation or the national authorities concerned.

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SUMMARY

This report discusses the links between trade policy and domestic regulatory policy concerning temporary movements of service providers. Generally, the literature on trade policy focuses on labour mobility in terms of the temporary movement of service providers. It does not pay attention to the labour market impacts which could arise from this movement, arguing that service providers do not enter the local labour force because of their temporary nature. From a national perspective, entry limits are imposed on temporary workers because they are often not subject to the same degree of control as resident or citizen workers. Using as examples NAFTA and the GATS , the author argues that trade agreements pay no attention to the impact which temporary movements of service providers may have on local economies, while domestic regulatory policy is unsure how and by whom temporary labour should be dealt with. One way to begin to understand the problems arising from temporary movements as it is organised through trade agreements is to raise questions within this agreement concerning how the relevant provisions impact on the development of a skills market, the development of local labour markets, and the nature of employment contracts. In posing these questions, the author hopes to have an impact on the way trade negotiations operate to structure provisions for the temporary movement of labour.

PROVISION OF SERVICES AND INTERNATIONAL LABOUR MOBILITY¹

Introduction

1. Many trade agreements now include provisions for labour mobility, particularly where trade in services is concerned. This is the case, for example, with regard to the European Community Treaty (EC), the North American Free Trade Agreement (NAFTA), and the General Agreement on Trade in Services (GATS).

2. In the case of the EC, Article 48 dealing with the free movement of workers, Article 52 dealing with the freedom of establishment, and Article 59 dealing with the freedom to provide services provide not only for temporary access but also allow for permanent migration within the region regardless of skill level. Moreover, Article 6 of the EC Treaty prevents any discrimination on the grounds of nationality. This means that “nationals of each Member State must, within the material and personal scope of application defined by the Treaty, be assimilated to the nationals of any other Member State where they are present or are in permanent residence”.²

3. Over the fifty year period since the signing of the Treaty of Rome, complex problems have arisen over the implementation of these articles. These problems include issues concerning wage levels, conditions of work, social security, qualifications, licensing, standards, and so on. It is not the purpose of this paper to discuss these problems here since they have been well documented elsewhere.³ Instead, this paper will discuss how the provisions for labour mobility in the NAFTA and the GATS structure international migration in such a way that they raise similar problems for states and the state system as those encountered internally by the EC. This paper will use the international labour migration literature in conjunction with the trade literature to help understand how these problems arise in the context of the trade agreements in question.

1. International labour migration literature

4. The literature which seeks to explain international labour migration provides five general approaches from which to proceed:

1. The *neo-classical economic approach* which sees geographic differences in wages, productivity and, thus, supply of and demand for labour in origin and destination countries as the major driving forces behind individual migration decisions;
2. *Neo-classical micro-economic approach* which views migration as the result of a cost-benefit analysis of rational individuals. Here, wage differentials and employment rates are critical determinants;
3. *New economics of migration* which focuses on migration as a way for families to diversify sources of income, minimise risks, and obtain credit and capital. Migration is driven mainly by market failures (for example, in the insurance or capital markets);

4. *Dual labour market theories* where employers' demands for low wage migrants in developed countries are considered as the main force behind international migration. Recruitment policies in the countries of destination shape migration flows; and
5. *World system theories* in which the disruptive impact of capitalist economic structures on traditional, peripheral non-capitalistic societies is deemed to generate migration.⁴

5. Interestingly, these approaches to understanding migration begin from a state-centered standpoint. That is, movement occurs because of poor economic conditions in the sending state and better economic conditions in the receiving state. If poor economic conditions did not exist, migration would be unnecessary. Furthermore, these approaches point to ways in which those hiring migrant labour are attempting to avoid domestic regulatory standards in the receiving state. The underlying assumption is that the state can best ensure domestic regulatory standards when labour mobility does not occur. Hence the traditional emphasis by receiving states on providing mechanisms for permanent rather than temporary migration which, in turn, has led to an emphasis in the literature on permanent rather than temporary labour mobility and on state-centered policies dealing with that migration.

6. As the international migration scholar John Salt noted in 1987, new issues confronting those interested in international migration include the association of international migration with formal political relationships between states, international migration as a component of the global economic order, and a focus on movement as opposed to migration - or temporary flows as opposed to permanent ones which can be in the direction of S-N flows as well as S-S, N-N, and N-S flows.⁵ There has not been a significant amount of migration research directed at these new issues, particularly where trade agreements operate to promote international labour migration. Some scholars have focused on the problem of "brain drain" resulting from trade agreements like the NAFTA⁶ but have not examined these agreements in detail to understand how and why formal political relationships between states have created the problem of brain drain. Other scholars have given attention to the temporary movement of intra-corporate transferees being shifted around as components of a globalized economic order⁷, but have not examined how or why this movement has been facilitated by the NAFTA and the GATS. Given that these two agreements speak to political relationships between states, attempt to facilitate labour migration as a component of the global world order, and focus on temporary movement, an examination of the relevant provisions concerning labour mobility within these agreements should shed new light on understanding why international labour migration occurs and what its implications for states and the state system are.

2. Trade literature

7. While the migration literature does not focus attention on relevant aspects of the trade literature dealing with labour mobility, the trade literature has not given attention to concerns raised by the international migration literature nor does it draw on this literature when trying to understand why temporary movement occurs and how it can be facilitated through trade agreements. Indeed, it is striking to find that there is little, if any, cross-fertilisation between these two bodies of literature, despite the fact that they appear to be interested in the same topic, namely movement of labour.

8. As I have mentioned, the migration literature has traditionally focused more on permanent flows than on temporary ones and is only beginning to look at movement involving the service sector.⁸ (footnote - also comment on EC). Where the trade literature, however, deals with movement of people, it is primarily concerned with the temporary movement of service providers and how this movement is formally organised through trade agreements.

9. When determining how and why to liberalise the movement of people within trade agreements, the trade policy literature has generally turned to two sources. The first is the business literature which has made some effort to explain why temporary movement is necessary to provide services.⁹ Generally, this literature identifies intra-corporate transferees as one vital component of deploying foreign direct investment (FDI) to provide services successfully. The second source is that developed by scholars from less developed countries (LDCs) as well as the United Nations Conference on Trade and Development (UNCTAD), to explain why temporary movement by service providers independent of FDI is legitimate, necessary, and feasible within agreements like the NAFTA and the GATS.¹⁰

10. As may already be noticeable, this literature does not operate from a state-centered perspective but from an international one which considers markets for services, including labour markets, to be global in nature. What are services and why are markets for them considered to be global in nature? Briefly, services are generally defined as intangible and produced and delivered simultaneously. They are considered to be the glue of any economy since they are embodied not only in the latest technological developments delivered by high-skilled professionals, but are also present in so-called basic social and economic activities like education, child-care, health-care, construction, and so on. It is widely known that, in OECD countries, the service sector accounts for over 60% of employment. This employment may range from occupations requiring low level skills to those requiring very high level skills.

11. From the perspective of those providing services, markets for services may now be considered global in nature because of significant advancements in technology, particularly where telecommunications and transportation are concerned. Moreover, the more proactive stance taken by states in the last decade towards FDI has enhanced opportunities to provide or trade services on a global basis. Not surprisingly, then, trade in services has experienced rapid growth in the past decade as statistics tracing the international balance of payments attests.¹¹

12. Services can generally be traded in four ways: cross-border (as in the transmission of a fax), via the movement of consumers of services (as in tourism), via FDI (as in the establishment of a commercial presence), and via the movement of a service provider (as in labour mobility). It is important from both a trade and migration perspective to keep in mind that the provision of a service via labour mobility can occur either in conjunction with FDI or independent of it. The former is usually undertaken by MNCs from economically advanced countries and involves the movement of the highly skilled such as intracorporate transferees. The latter is usually undertaken by LDCs and may involve both high and low-skilled labour as in the provision of information technology services or construction services. This is an important distinction to keep in mind not only because it reveals how services are traded, but also because it begins to reveal how trade agreements are structured to allow states to promote certain forms of labour mobility and not others.

3. Linking trade policy and domestic regulatory policy concerning temporary movement of service providers

13. Generally, then, the trade literature focuses on labour mobility in terms of the temporary movement of service providers. It does not give attention to the labour market impact that might arise from this movement except to say that service providers do not enter the local labour force because of their temporary nature. Here, a conceptual problem arises in terms of how to define temporary from the national perspective. From an international trade in services perspective, temporary movement involves any kind of movement that is not permanent. This may seem like an obvious statement except that temporary workers providing services often wish to remain in a host country for many years using the status of temporary. They remain temporary because they have not endeavoured to become a resident or citizen and because their employer may be located in the sending state.

14. From a national perspective, entry limits are imposed on temporary workers because they are often not subject to the same degree of control as resident or citizen workers. This problem arises because temporary workers may be employed in the sending country or host country on either a contract or permanent basis. Depending on the nature of the employment, they and their employers may not be subject to the same tax burden or the same labour standards as exists in the host country. It is therefore perceived by the state that their temporary status hinders the state's ability to develop and implement labour market development policies such as training initiatives, regional development, and so on. The response of the state to this situation is to make it difficult to enter on a temporary basis.

15. This response points to the reality that immigration and labour market development officials in both OECD countries and LDCs are not well organised to cope with this component of the global economic order, namely the temporary movement of service providers. The mission of most immigration authorities is to administer legislative acts which are largely defensive in orientation. It is not to reach out to the international business community to facilitate temporary entry of service providers. It is currently unclear in many countries who holds that responsibility at the national level. Meeting labour market development needs in terms of temporary labour is within the purview of labour market development officials, yet they do not control entry and have traditionally been concerned with employer-employee relationships at the national level rather than international service providers who claim not to be entering the local labour market. Clearly, there is both a conceptual and practical gap from the national policy side with regard to who is best positioned to respond to demands to accommodate service provision through the temporary movement of natural persons.

16. Summarising, we have a situation where trade agreements do not speak to the impact temporary movement of service providers may have on local economies while domestic regulatory policy is unsure how and by whom temporary labour should be dealt with. It is possible that the international labour migration literature provides some conceptual openings for bridging this gap. In particular, its connection of temporary movement to the development of a skills market, the impact on local labour market development, and the nature of the employment contract can be used to better understand the provisions for the temporary entry of service providers in the NAFTA and the GATS.

4. NAFTA

17. The provisions for labour mobility in the NAFTA are contained in Chapter 16 entitled "Temporary Entry for Business Persons". Allowing for the provision of services via labour mobility was initially included in the Free Trade Agreement between Canada and the United State in recognition that this form of movement was essential to service production and delivery. These provisions were carried over into the NAFTA (when Mexico joined the agreement) in almost exactly the same manner. Consequently, entry is allowed for those providing services (not for areas like agricultural work or staffing factories) on a temporary basis. The categories of services providers allowed to enter under the NAFTA include business visitors, traders and investors, intra-company transferees, and professionals. These categories provide for temporary movement in connection to FDI and independent of FDI. The latter two categories allow employment to be in either the sending or receiving state.

18. The NAFTA is structured to promote temporary movement of the highly skilled and hence the development of a skills market. This is particularly evident with regard to the provisions for intra-corporate transferees who must be rendering services in a capacity which is managerial, executive or involves specialised knowledge and with regard to professionals who, under the terms of Annex D of the Professional List, must generally possess a minimum baccalaureate degree for entry under this category. Furthermore, the NAFTA provides the United States with additional protection from Mexican service providers seeking to enter under the professional category by establishing an annual limit of 5500 entrants

for a period of ten years after date of entry into force of the NAFTA.¹² The fact that the NAFTA contains a “specialist” category for intracorporate transferees provides some room for the entry of service providers who do not possess a high level of education. However, because this category is administered in a discretionary manner, the likelihood that it would provide significant openings for lower skilled labour is not high.

19. Interestingly, although the provisions of this chapter stress that the movement is temporary and shall not be construed as a way to enter the permanent domestic labour force, it must interact with existing immigration and labour market development legislation which kicks in as soon as someone crosses the border no matter what their intent in the host market and no matter how their movement is positioned in the NAFTA. This means that, in the case of the United States, for example, those entering as professionals and to be employed by a local employer, may be immediately sponsored for residency. This represents a back door immigration process with a focus on highly skilled professionals.

20. The use of the professionals list in Annex D of the NAFTA to gain permanent entry into the US labour market has been increasingly used by Canadians who are attracted by the robust American labour market and the prospects of a lower tax burden. It is argued that this movement constitutes a brain drain from Canada to the United States and does not bode well for the development of Canada’s local labour market. The Canadian Government argues that Canadians are the least likely group of entrants into the American labour market to stay past a five year period and that therefore the experience they gain in this market will eventually benefit Canada’s labour market when they return.

21. The extent to which this movement lowers labour standards because of the nature of the employment contract is not well known. Some anecdotal evidence from the American Nursing Association, for example, indicates that Canadian nurses are willing to accept lower wages than American nurses thereby prompting this association to call for the removal of this profession from the Annex D professionals list. However, this claim is complicated by the different ways in which nurses are trained in Canada and the United States.

22. Interestingly, gaining access to a trade member’s labour market using the Professionals List is not guaranteed without some mechanism which recognises qualifications and licensing requirements in the profession concerned. Chapter 12 of the NAFTA on Cross-Border Trade in Services provides a way to develop such mechanisms by encouraging NAFTA members to develop mutually acceptable professional standards and to provide recommendations on mutual recognition agreements (MRAs) with regard to education, examinations, experience, conduct and ethics, professional development and re-certification, scope of practice, local knowledge, and consumer protection. To date, such agreements have been developed only bilaterally between the United States and Canada in the areas of architecture and accountancy. Recent efforts to develop an MRA trilaterally for the engineering profession failed; Canada and Mexico were ready to sign the agreement but only one jurisdiction in the United States, namely Texas, was interested in joining.

23. Although MRAs privilege the highly skilled, they also provide the opportunity for professionals in LDCs to compare their standards to more economically advanced economies. In the case of engineering, Mexican standards were found to be high which lent confidence to Mexican engineers interested in trading their services abroad and which raised their profile in the eyes of two other advanced economy jurisdictions. The fact that MRAs (pioneered in the EC context) do not harmonise standards but provide a mechanism for mutually recognising standards in other jurisdictions, is positive for local development since both diversity and quality can be maintained simultaneously.

5. GATS

24. The provisions for labour mobility in the GATS are contained in the so-called fourth mode of supply, namely, the movement of natural persons to provide a service. Commitments to liberalise mode 4 or allow entry to provide services via labour mobility are listed in countries' schedules of commitments. These schedules also contain the restrictions countries may wish to retain on allowing temporary entry. These restrictions may be quantitative, as in the number of foreign persons that may enter in a particular sector, or these restrictions may include requirements for an "economic needs test" which commonly refers to a labour market development test such as testing for non-availability of local labour before foreign entry can be granted. These restrictions exist despite the fact that entrants under mode 4 are assumed not to be entering the host labour market.

25. Interestingly, the inclusion of labour mobility in the GATS was pushed for by both MNCs and LDCs during the Uruguay Round of multilateral trade negotiations (1987-94) when the GATS was negotiated. MNCs argued labour mobility was necessary for fielding FDI and LDCs argued it was necessary as a trade-off for loosening restrictions on FDI. The way labour mobility is positioned within the GATS allows it to be scheduled as something dependent on mode 3 or commercial establishment and hence mainly of interest to MNCs from OECD countries capable of fielding FDI and intra-corporate transferees *and* as movement independent of any other mode. This independence is championed by LDCs who do not generally have home-grown MNCs capable of undertaking FDI but would like to export services via labour mobility on a temporary basis primarily in the areas of health services, computer and information technology services, marine services, and construction services. Therefore, the GATS contains provisions for labour mobility both to benefit MNCs and as a political compromise to draw LDCs more deeply into the trading regime.

26. In terms of the development of a skills market, GATS commitments privilege the highly skilled and those who provide services in conjunction with FDI such as managers, executives, specialists, and intra-corporate transferees. Some commitments also provide for the movement of professionals but are often explicitly limited by numerical restrictions, economic needs tests, and being allowed only in connection to FDI. As in the case of NAFTA, some openings for lower skilled labour are provided for in the "specialist" category. In the case of the United States, whose schedule explicitly states that a specialist does not necessarily have to have a minimum education level, this category is used by the so-called lower skilled to gain entry to the American market.

27. In the next round of services negotiations to begin in 2000, LDCs have indicated that they will push for the reduction of numerical restrictions and economic needs tests within schedules of commitments as well as attempt to broaden the service sectors where movement of service providers independent of FDI can be used. Although this will be difficult to achieve because of political sensitivities surrounding temporary entry to OECD markets, LDCs will make the argument that greater access to their markets via FDI should be conditioned on greater access to OECD markets with regard to the temporary entry of service providers. The current commitments, they argue, are unbalanced because they privilege movement of capital over movement of people and therefore undercut LDC's comparative advantage in human resources in certain sectors of export interest to them. Here, LDCs would like to see a wider skills market being developed through the GATS which allows them more opportunities for effective economic participation.

28. One significant barrier to creating such a wider skills market through the GATS is the fact that temporary entry independent of commercial establishment is not well regulated in terms of the nature of the employment contract. That is, the employer in the sending country or in the receiving country? Is the employment based on a contractor-contractee relationship or on an employer-employee relationship? The schedules of commitments vary in the extent to which they accommodate these possibilities.

29. These questions are important at the domestic or local labour market development level because, depending on who the employer is, different regulatory issues will arise concerning taxation, wages, labour market regulation and development, collective bargaining agreements, the collection of statistics, and so on. They are also politically important since the argument that the use of mode 4 does not displace local labour rests on the notion that a service supplied by a foreign provider does not displace local workers because they do not enter the labour market. Where foreign service suppliers are hired by a host country employer, they are usually supposed to be filling local labour market gaps. From a trade perspective, these issues are important since they influence the ability of service providers and service consumers/employers to be competitive. From a labour migration perspective, these issues raise local labour market development issues which are not well addressed through the schedules of commitments. It is unclear where they would be addressed since the GATS does not mandate negotiations over labour standards issues.

30. Developing local labour market policies are also affected in the GATS by the binding nature of the commitments. That is, member states can never reverse their commitments to allow temporary entry of service providers once these commitments have been made. This positions local labour market policies developed by the state as static and operates to prevent the state from implementing new policies when the need arises.

31. Interestingly, the GATS includes an article concerning domestic regulation whereby disciplines are to be developed which ensure that domestic regulatory measures relating to qualification requirements and procedures, technical standards, and licensing requirements do not constitute unnecessary barriers to trade in services. This article authorises the Council for Trade in Services to develop such disciplines: based on objective and transparent criteria, such as competence and the ability to supply the service; by ensuring that such requirements are not more burdensome than necessary to ensure the quality of the service, and; in the case of licensing procedures, ensure that these requirements are not in themselves a restriction on the supply of a service.

32. In 1995, the Working Party on Professional Services (WPPS), a sub-committee of the GATS Council, was mandated to focus on developing such disciplines for accountancy. After three years of intensive negotiation with domestic regulatory bodies, professional associations, and MNCs, the WPPS produced "Disciplines on Domestic Regulation in the Accountancy Sector". Although criticised for its weakness, this is an interesting document in terms of its implications for local labour market development in the context of how accountancy services are exported by MNCs.

33. Briefly, the exporting of accountancy services (undertaken mainly by five large MNCs based in OECD countries) takes place through contract networks rather than through parent-subsidiary relationships. This means that ownership is located in the local environment with the contract being used to assure quality control and consistency of service often delivered with the help of intra-corporate transferees. However, the contract (and the way intra-corporate transferees may act in the market) must compete for quality control with the domestic regulatory environment. Where the Asian financial crisis, for example, pointed to problems with accountancy standards, MNCs were "bound" to act within that regulatory environment. However, this financial crisis has galvanised accountancy professionals worldwide to push for minimum standards and qualifications. The disciplines on accountancy developed by the WPPS work toward this goal but also contain weaknesses with regard, for example, to efforts to open up domestic regulatory reform to foreign input. Here, local jurisdictions "shall endeavour to provide opportunity for comment, and give consideration to such comments, before adoption".¹³

34. In terms of local labour market development, the WPPS disciplines for accountancy (which may continue to be strengthened during the next round of services negotiations in 2000) lend accountants in local labour markets legitimacy with regard to meeting international standards. The extent to which these

standards can accommodate local diversity while also meeting international requirements is still a subject of negotiation.

35. Interestingly, the WPPS was recently reincarnated as the Working Party on Domestic Regulation and is now mandated to develop disciplines for domestic regulation in all service sectors. Presumably, this means that such disciplines would be applied both to the rules by which the service is performed (which accounts for high-skilled professional services) and the technical characteristics of the service itself (which accounts for lower-skilled occupations such as constructions). This means that disciplines will eventually be developed for all skill levels in all sectors thereby providing more of an opening for labour mobility among the less skilled.

Conclusion

36. Clearly, political relationships between states in the form of trade agreements act to structure temporary labour migration in the services sector. While trade policy concerns itself with facilitating service production and delivery through temporary movement, it does not give significant attention to how this movement is perceived or received at the domestic or local level. At the same time, the domestic policy arena is muted by its inability to adequately deal with temporary labour flows given the way labour market and immigration policies are configured. This disjuncture between the national and international level is not easily solved given the absence of broader and explicit integrative goals in the trade agreements in question. As has been demonstrated, one way to begin to understand the problems arising from temporary movement as it is organised through trade agreements is to raise questions within these agreements concerning how the relevant provisions impact on the development of a skills market, the development of local labour markets, and the nature of employment contracts. It is hoped that raising these questions can begin to have an impact on the way trade negotiations work to structure provisions for the temporary movement of labour.

NOTES

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1. The views expressed in this paper are solely those of the author (Allison Young, Department of Foreign Affairs and International Trade, Government of Canada) and in no way represent the views of the Department of Foreign Affairs and International Trade, Government of Canada.
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