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LABOUR MOBILITY IN REGIONAL TRADE AGREEMENTS

This paper forms part of a broader study on the relationship between Regional Trade Agreements and the Multilateral Trading System. Together with other chapters and an overall assessment, it will be incorporated into a consolidated document to be submitted to the Trade Committee on 28-30 October 2002.

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LABOUR MOBILITY IN REGIONAL TRADE AGREEMENTS

I. Key points emerging

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

2. The differing approaches in RTAs to labour mobility reflect a range of factors, including the degree of geographical proximity of the parties and the extent of similarities in their levels of development, as well as other cultural and historical ties. While generally, agreements among countries enjoying geographic proximity and similar levels of development have a more liberal approach to labour mobility (e.g. EU, EFTA, EEA, Trans-Tasman Travel Arrangement) as compared to agreements comprising geographically distant members of differing levels of development (e.g. APEC, US-Jordan), this is not always the case (e.g. MERCOSUR, SAARC).

3. It can be difficult to estimate whether the RTAs examined offer greater liberalisation than that offered by the countries concerned under WTO Agreements. Labour mobility provisions under the WTO are limited to those related to movement of service suppliers under the GATS, and access under the GATS is determined by Members' individual commitments, e.g. while the GATS includes service suppliers of all skill levels, Members' commitments are generally limited to the higher skilled. Indeed, an RTA which provides for general access for certain categories of personnel but which excludes certain sectors may offer additional liberalisation or may simply reflect a country's existing level of GATS commitments (in terms of actual commitments, RTAs amongst WTO Members would not normally offer less access than that accorded under GATS commitments, for obvious reasons). Assessment of whether the access offered by individual parties went beyond their GATS commitments would thus depend on case-by-case analysis.

4. Observations in this paper regarding whether particular RTAs contain additional provisions to the GATS are thus generally made on the basis of whether the agreements include elements which are not covered by the general GATS provisions, rather than the specific commitments of WTO Members. For example, additional elements can include: access to the labour market (EU, EFTA, EEA, Trans-Tasman Travel Arrangement); full national treatment and market access for service suppliers (ANZCERTA); commitments on visas (NAFTA), including for groups beyond service suppliers (US-Jordan); special market access or facilitated access for certain groups, including beyond service suppliers (CARICOM, NAFTA, Canada-Chile, Europe Agreements, APEC); separate chapters dealing with all temporary movement, including that related to investment (Japan-Singapore) or to trade in goods or investment (Group of Three); specific reference to key personnel in relation to investment (EU-Mexico, FTAA); extension of WTO treatment to non-WTO Members (AFTA); or non-discriminatory conditions for workers, including beyond service suppliers (Euro-Med).

5. Additionally, for the purposes of assessing the degree of liberalisation offered in an RTA and for comparison with the GATS, provisions related to labour mobility in RTAs should be read in conjunction with provisions in the same agreements related to supply of services. Facilitated movement of people does not always automatically entail the right to provide specific services; actual opportunities will also depend upon the degree of liberalisation in particular service sectors. This is true not simply of agreements where labour mobility is covered only by mode 4 in the services chapter (e.g. MERCOSUR, EU-Mexico, US-Jordan), it is also true of agreements which provide for broad freedom of movement (e.g. the EU) or where movement of natural persons related to services and investment is the subject of a separate chapter (Japan-Singapore). Additionally, a number of agreements exclude certain service sectors from coverage (e.g. ANZCERTA, EU-Mexico, Europe Agreements) or apply special rules to certain sectors (e.g. EU, EU-Mexico). Generally, right of labour mobility does not automatically entail the right to practice a certain profession; national regulations regarding licensing and recognition of qualifications are still applied and candidates must meet all criteria and conditions¹.

6. It should also be noted that assessment of the degree of liberalisation offered by different agreements is complicated by the very different approaches taken - it is easy to fall into the trap of comparing apples and oranges. Comparison of the types of exceptions in different agreements reveals little: certain types of restrictions are unnecessary when the agreement doesn't offer a certain kind of access. For example, the EU provides a general right to move and work anywhere in the Union, and thus it is necessary to specify that certain jobs in public services are reserved for nationals. Such provisions are not found in other agreements as they do not offer a level of general access to the labour market that would make such an exception necessary. Similarly, care is needed in comparing the liberalisation offered by agreements offering broad labour mobility, but excluding some sectors, and that offered by agreements including all sectors, but limiting mobility to certain defined groups.

7. Those agreements which do not provide for full labour or service supplier mobility (e.g. EU-Mexico, NAFTA, Canada-Chile, US-Jordan, MERCOSUR, Japan-Singapore, Group of Three) tend to use GATS-type carve outs, often using GATS language verbatim. That is, these agreements generally exclude permanent migration and access to the labour market (although NAFTA and Canada-Chile allow temporary entry to the labour market for some categories); and do not impinge on countries right to regulate entry and stay of individuals (subject to their not nullifying or impairing specific commitments undertaken). Some agreements (e.g. EU-Mexico and a proposal in the FTAA) seem to carve out a slightly broader regulatory prerogative for parties, including regulations relating also to work, labour conditions and establishment of natural persons in the general formulation of measures that a Member can apply provided that they do not nullify or impair specific commitments undertaken (per paragraph 4 of the GATS Annex on Movement of Natural Persons).

8. While some agreements allow for general mobility of people and confer immigration rights (e.g. EU), the majority of agreements provide only special access or facilitation of existing access within existing immigration arrangements. In most agreements, labour mobility does not over-ride general migration legislation and parties retain broad discretion to grant, refuse and administer residence permits and visas. Additionally, some agreements (e.g. Euro-Med) specify that liberalising provisions of the agreement cannot be used to challenge immigration decisions refusing entry, or that dispute settlement under the agreement can only be invoked in cases where the matter involves a pattern of practice and local remedies have been exhausted (e.g. Canada-Chile, NAFTA).

¹ Provisions facilitating mutual recognition are included in some agreements (e.g. EFTA) and others have complementary arrangements (e.g. the ANZCERTA Services Protocol, the Trans Tasman Travel Arrangement and the Trans Tasman Mutual Recognition Arrangement together provide that persons registered to practice an occupation in one country can practice an equivalent profession in the other country).

9. Some agreements (e.g., the draft FTAA), while including mode 4 in the services chapter, also include provisions on the ability of companies to bring in key personnel in the investment chapter. Similarly, the ASEAN Investment Framework Agreement calls for the promotion of freer movement of skilled labour and professionals, the US-Jordan agreement includes visa commitments for investors and the EU-Mexico agreement section on financial services includes provisions on the nationality of key personnel. Although these provisions may be more concerned with mode 3 (establishment), they illustrate the linkages between modes 3 and 4. While such provisions arguably go beyond the GATS in specifying treatment of key personnel, they arguably also simply reflect the reality of WTO Members' GATS commitments, many of which provide better access for mode 4 movement linked to mode 3 (e.g. intra-corporate transferees). Other agreements devote a separate chapter to all types of temporary movement of business persons, covering business movement related to goods, services and investment (e.g., the Group of Three and a number of bilateral agreements in Latin America); or group intra-corporate transferees, service suppliers and investors in a separate chapter on movement of natural persons (e.g., Japan-Singapore).

10. Finally, the symbiotic relationship between the GATS and RTAs is also evident in the agreements chosen. NAFTA provided the model for language in the GATS on temporary entry (e.g. for the negative definition of "temporary") and, in turn, other RTAs use the GATS model (EU-Mexico, US-Jordan, MERCOSUR), sometimes simply by reference (US-Jordan). RTAs also feed off each other - Canada-Chile draws heavily on the NAFTA model, many of the agreements amongst Latin American countries closely mirror each other and the influence of both NAFTA and EU-Mexico can be seen in some proposals on the table in the FTAA. For labour mobility, RTAs basically take two general forms - free labour mobility (or close to it) or provision of certain forms of mobility for some categories of persons related to trade. Within each of these forms, the agreements generally contain basic types of similar provisions, with differences arguably reflecting the depth and extent of commitments rather than fundamentally different approaches.

II. Provisions in WTO Agreements

11. There are no provisions on labour mobility under the WTO Agreements. However, movement of natural persons as service suppliers is covered by mode 4 of the GATS which is defined as "the supply of a service... by a service supplier of one Member, through presence of natural persons of a Member in the territory of another Member". This includes independent service suppliers and the self-employed, as well as foreign employees of foreign companies established in the territory of a Member.² The GATS applies to nationals or to permanent residents where a Member does not have nationals or accords substantially the same treatment to permanent residents and nationals (however, in such cases, notification to the Council for Trade in Services is required).

12. The GATS Annex on Movement of Natural Persons Supplying Services under the Agreement contains two important limits on mode 4. Paragraph 1 of the Annex states that the GATS does not apply to "measures affecting natural persons seeking access to the employment markets of a Member, nor... to

² There is some debate within the WTO Secretariat about whether foreign employees of domestic firms are covered by mode 4. The WTO Secretariat Background Note on mode 4 (S/C/W/75, dated 8 December 1998) concludes that foreigners working for host country companies would fall under mode 4 if they worked on a contractual basis, but not if they were employees of those firms. However others have argued that, as many WTO Members' schedules refer to short-term employment, and schedules form part of the GATS, there is a degree of legal uncertainty on this point (see Karsenty, G. "Assessing trade in services by mode of supply" in Sauvé and Stern (eds) *GATS 2000: New Directions in Services Trade Liberalisation*, Brookings Institution, Washington DC 2000). Nonetheless, it should be noted that the WTO Secretariat is not the legal interpreter of the GATS.

measures regarding citizenship, residence or employment on a permanent basis". The GATS is thus limited to temporary movement, although "temporary" is not defined and Members have taken a range of approaches.

13. Paragraph 4 of the Annex notes that the GATS "shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure that orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment". Discriminatory visa requirements are not *per se* regarded as nullifying or impairing such benefits.

14. The GATS provides no guaranteed access for mode 4 suppliers; access is determined by the nature of each Member's specific commitments. Generally, mode 4 commitments are quite restrictive, tend to mostly concern intra-corporate transferees and are often subject to economic needs tests. While mode 4 covers service suppliers at all skill levels, Members' commitments tend to be limited to higher skilled categories such as managers, specialists and professionals. Access under mode 4 can also be affected by MFN exemptions and licensing requirements, including recognition of qualifications, as well as restrictions under mode 3. There are no specific provisions in the GATS for facilitated entry, although individual countries' specific commitments may include measures to facilitate entry³.

III. Provisions in Regional Trade Agreements

15. The RTAs below have been divided into seven broad groups, according to the approach they take to labour mobility. Groupings are based on the provisions in their text, not on what has actually been implemented as this is beyond the scope of this study and would be difficult to assess accurately or objectively. Hence COMESA is included under the heading of "full labour mobility" as this is the agreed objective of the agreement, although progress towards that objective appears to have been limited to date. While a number of the agreements have built-in future work (e.g. the Euro-Med agreements commit to dialogue to explore ways to achieve progress on the movement of workers, the Group of Three and other Latin American agreements create Working Groups on temporary entry), a separate category ("works in progress") has been used for those agreements still under negotiation (e.g. FTAA, SADC). In the first case the parties have clearly agreed to something that they are yet to implement, or have agreed to a process; in the latter, it cannot be stated with any certainty what the parties will agree. Further, the groupings below are indicative only and some similarities exist between agreements in different groupings, e.g. NAFTA and US-Jordan both contain visa arrangements.

Agreements providing full mobility of labour

European Union

16. The EU provides for a broad right to labour mobility. As one of the four fundamental freedoms of the single market, Article 18 of the EC Treaty gives every EU citizen a fundamental, personal right to move and reside freely within the territory of the Member States (subject to some limitations and conditions). Additionally, Treaty provisions apply to movement of workers, the self-employed and to service suppliers (including those posted temporarily to another Member State):

³ It should also be noted that potential disciplines which may be developed under GATS Article VI:4 may also have implications for regulations affecting mode 4 movement.

- Freedom of movement of workers (Article 39) includes 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 regarding working conditions and employment-related benefits.
- Right of establishment (Article 43) includes the right to work as a self-employed person, either by establishing the main professional centre or a subsidiary, under the same conditions applying to nationals (subject to provisions relating to capital).
- Freedom to provide services (Article 49) covers commercial and industrial activities, craftsmen and the professions on a temporary⁴ basis, under the same conditions as for nationals (or, where a service has not been liberalised, restrictions must apply equally to nationals and other EU citizens).

17. No visas or work permits are required, although residence permits may be⁵. Even within the very liberal EU regime, there are exceptions on the grounds of public policy, public security or public health. However, any measures taken must be: justified by a real and sufficiently serious threat to a fundamental interest of society; in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and the proportionality principle; and not invoked to service economic ends. Limits on the freedom to provide services can also be determined by the degree of liberalisation in a given service sector. Special conditions also apply for transport, banking and insurance services. Additionally, some public service posts may be reserved for nationals.

18. The EU Treaty on free movement of persons is expanded, under the European Economic Area (EEA) agreement, to also include the EFTA-EEA states (see below).

Agreement on the European Economic Area (EEA)

19. The Agreement allows EEA nationals to enter any Member State of the EU as workers, self-employed, service providers or recipients⁶. 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. Discrimination based on nationality as regards employment, remuneration and other conditions of work and employment is forbidden. However, employment in the public service (i.e., the exercise of official governmental authority) is excluded. Rights of establishment are also guaranteed, including for self-employed persons. Exceptions relate to public policy, public security or public health and the exercise of official authority. 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.

⁴ Like the GATS, this refers to not seeking access to the labour market.

⁵ Residence permits must be granted for at least 5 years for workers; for temporary employment of less than one year a temporary residence permit can be issued for the expected duration of employment. Employees working for less than 3 months, cross-frontier workers and seasonal workers (on specified terms) do not require residence permits. The cost of residence permits cannot exceed that of identity cards for nationals.

⁶ EEA nationals should have sufficient funds to support themselves without recourse to public funds.

European Free Trade Association (EFTA)

20. Similar arrangements are provided under the Agreement Amending the Convention Establishing the EFTA (signed on 21 June 2001, and due to enter into force in parallel with the Swiss-EU bilateral agreements)⁷. These amendments largely extend to the entire EFTA area (i.e., also including Switzerland) the arrangements existing amongst the EFTA-EEA states (Iceland, Liechtenstein, Norway). The Agreement introduces free movement of persons for workers, the self-employed and persons with no gainful employment who otherwise have sufficient financial means (including under certain conditions, their family members). It 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. No visas are required. However, there are some limits and transition periods⁸ and special rules govern frontier workers; public service and public authority activities; and the acquisition of real estate in Switzerland.

Common Market for Eastern and Southern Africa (COMESA)

21. The COMESA Treaty envisions a community within which goods, services, capital and labour are free to move across national borders. The complete COMESA mandate is regarded as a long-term objective - establishment of a monetary union, free movement of *bona fide* persons, including right of establishment (economic community status) is planned for 2025. In the interim, COMESA is implementing a Protocol on the gradual relaxation and eventual elimination of visa requirements and a Protocol on the free movement of persons, labour, services and the right of establishment and residence.

Australia - New Zealand Closer Economic Relations (ANZCERTA)

22. The Services Protocol provides both full market access (Article 4) and full national treatment (Article 5) for all service suppliers.⁹ As all service suppliers are covered, the agreement does not feature detailed definitions of types of personnel, nor does it distinguish between different modes of delivering services. However, certain service sectors¹⁰ are excluded from coverage by the Parties and the agreement is also subject to the foreign investment policies of the Member States (Article 2). ANZCERTA does not cover general labour mobility but, arguably, does not need to as, under the "Trans-Tasman Travel Arrangement", 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 arrangement is not expressed in the form of any binding bilateral treaty, but rather is a series of immigration procedures

⁷ The original Stockholm Convention was signed in 1960.

⁸ Freedom of movement *into* Switzerland from the other EFTA states is subject to transition periods of up to 5 years. Switzerland reserves special quotas for EFTA citizens.

⁹ Different treatment is permitted provided that it is no greater than necessary for prudential, fiduciary, health and safety or consumer protection reasons and such different treatment is equivalent in effect to the treatment accorded by the Member State to its ordinary residents for such reasons (Article 5.2(a) and (b)). Both subsidies and government procurement are excluded from the scope of national treatment (Article 5.4).

¹⁰ These are: Australia: air services, coastal shipping, broadcasting and television; broadcasting and television (short-wave and satellite broadcasting); third party insurance; and postal services. New Zealand: aviation (airways services) and shipping (coastal shipping). For many of these services, only specific aspects or policies have been excluded.

applied by each country and underpinned by joint expressions of political support. This arrangement does not form part of ANZCERTA.

Agreements providing market access for certain groups, including beyond service suppliers and/or grouping all movement of natural persons/temporary business entry in a separate chapter

Caribbean Community (CARICOM)

23. Protocol II: Establishment, Services and Capital (1998) provides for free movement of university graduates, other professionals and skilled persons, and selected occupations¹¹; as well as freedom of travel and exercise of a profession (i.e., elimination of passport requirements, facilitation of entry at immigration points, elimination of work permit requirements for CARICOM nationals). National treatment is guaranteed (although specific reservations can be made), however, there is currently no MFN provision. Exceptions (per the GATS) cover activities involving the exercise of governmental authority and measures to protect public morals, human, animal or plant life or national security; maintain public order and safety; or secure compliance with the laws of a member state. Progress has been solid, but implementation is incomplete.

North American Free Trade Agreement (NAFTA) and the Canada-Chile Free Trade Agreement

24. NAFTA pre-dated and informed the development of the GATS. Chapter 16 of NAFTA facilitates movement of business persons and the corresponding part of the Canada-Chile Free Trade Agreement, Chapter K, is modeled on it. Both agreements are limited to temporary entry, defined negatively as being "without the intent to establish permanent residence" and apply only to citizens of Parties. Access is basically limited to four higher skills categories: traders and investors, intra-company transferees, business visitors and professionals (detailed definitions are provided). However, these groups are not limited to services and may include persons in activities related to agriculture or manufacturing. Labour certification or labour market assessment/tests are removed for all four groups¹² and work permits are required for traders and investors, intra-company transferees and professionals, but not business visitors (see footnote 11). While visas are still required, fees for processing applications are to be limited to the approximate cost of services rendered.

25. Under both agreements, existing general immigration requirements (e.g. related to public health or national security) still apply. Both agreements also refuse entry if it may adversely affect settlement of a labour dispute in progress at the intended place of employment, or the employment of any person who is involved in such a dispute. Equally, both specify that dispute settlement provisions cannot be invoked regarding a refusal to grant temporary entry, unless the matter involves a pattern of practice and the business person has exhausted the available administrative remedies.

¹¹ Graduates of universities (several regional universities are named but other are also included), media workers, sports persons, musicians and artists, and workers in the entertainment and tourism industries.

¹² Business visitors are exempt from labour market tests as they receive no remuneration in the country they are entering and are therefore not seen to be entering the labour market.

26. Under NAFTA, the US provides "Trade NAFTA (TN)" visas for professionals¹³ which last for one year and are renewable. Canadians can receive TN status at the port of entry on presentation of a letter from a US employer, but Mexicans must currently arrange for their employer to file a labour condition application (although this requirement will expire in January 2004), and then they must apply for a visa at the US Embassy in Mexico. There are no provisions for facilitated entry under the Canada-Chile agreement (although Chilean business persons can apply for an extension of the employment authorisation while in Canada).

27. Under NAFTA, the US applies a quota of 5 500 to Mexican professionals, due to expire on 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.

Europe Agreements¹⁴

28. There is no general freedom of movement for workers; however, Parties are to allow progressively the supply of services by nationals of, or companies established in, the Parties, taking into account the development of the services sectors. Temporary entry is provided for: natural persons providing a service; key personnel¹⁵; and representatives of an EU or CEEC company or national negotiating for the sale of services or entering into agreements to sell services (provided that they are not engaged in direct sales to the public or supplying services themselves). A horizontal transition period of ten years applies. General exceptions cover public policy, public security or public health, and activities connected to the exercise of official authority. Sectoral exclusions can also apply, varying between countries (e.g. transport for Poland). Rights of establishment (including on a self-employed basis) are also extended without discrimination and key personnel can be posted on a long-term basis, provided a real and continuous link with the home country is demonstrated. General exceptions (as above) and sectoral exclusions apply.

Japan - Singapore Free Trade Agreement

29. Chapter 9 (Movement of natural persons) applies to measures affecting the movement of natural persons of a Party (nationals of Japan and nationals and permanent residents of Singapore) who enter the territory of the other Party for business purposes (including as investors). Carve-outs are similar to the GATS Annex (i.e., regarding nationality, citizenship, residence or employment on a permanent basis). Conditions for entry and stay are governed by specific commitments covering short-term business visitors and intra-corporate transferees (Annex VI, Part A) and investors and independent service suppliers¹⁶

¹³ Criteria include that: the profession is on the NAFTA list; the candidate meets the specific criteria for that profession; the prospective position requires someone in that capacity; and the candidate is going to work for a United States employer.

¹⁴ The Europe Agreements reference and supersede previous bilateral labour agreements between some European Union Member States - in particular Germany - and some Central and East European Countries.

¹⁵ Key personnel are defined as senior employees of an organisation who primarily direct management of the organisation; and persons who possess high or uncommon qualifications referring to a type of work or trade requiring technical knowledge, knowledge essential to the organisation's service, research, equipment, techniques or management. They must have been employed by the organisation for at least one year prior and must be nationals of the country where they work.

¹⁶ The term independent service suppliers is not used; the actual terminology is: natural persons who engage in work on the basis of a personal contract with public or private organisations. Specific commitments for

(Annex VI, Part B). Specific commitments apply only to those sectors where commitments have been made under Chapter 7 (Services) and where no specific restrictions have been made under Chapter 8 (Investment)¹⁷. The agreement includes the general exceptions of GATS Article XIV (with the exception of XIV(d) and (e) relating to taxation) and includes the language from the GATS Annex (paragraph 4) regarding measures to regulate the entry and stay.

*Group of Three*¹⁸.

30. Temporary Entry for Business Persons is the subject of a separate chapter (Chapter XIII) which refers to the preferential trading relationship between the Parties, the desirability of facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and procedures for temporary entry, and the need to ensure border security and to protect the domestic labour force and permanent employment in their respective territories. (GATS carve-outs related to access to employment markets or permanent employment are found in Chapter X on services). The agreement requires each Party to apply expeditiously measures relating to such entry so as to avoid unduly impairing or delaying trade in goods or services or conduct of investment activities. The Parties also endeavour to develop and adopt common criteria, definitions and interpretations for the implementation of the Chapter. The agreement creates a Temporary Entry Working Group, including immigration officials, which must meet at least once a year.

31. Similar provisions are found in the Mexico-Nicaragua Agreement, the Agreement between Central America and the Dominican Republic, the Chile- Mexico Agreement, the Mexico-Bolivia Agreement and the Mexico-Costa Rica Agreement.

investors and independent service suppliers are to be implemented in accordance with each Party's laws and regulations.

¹⁷ Singapore's specific commitments provide for entry for the following categories (all defined): business visitors - 1 month upon arrival, extendable up to 3 months on application; intra-corporate transferees who are managers, executives or specialists linked to mode 3 presence (12 month immediate pre-employment requirement applies) - 2 year period extendable for periods of up to 3 additional years each time for a total term not exceeding 8 years (further extensions may be possible); investors - limited to a 2 year period extendable for periods of up to 3 additional years each time for a total not exceeding 8 years (further extensions may be possible); independent service suppliers (see footnote 16) limited to engineers recognised under the domestic laws and regulations of Singapore - 2 year period extendable for periods of up to 3 years each time for a total of not more than 8 years (further extensions may be possible). Japan's specific commitments provide entry for: short term-business visitors (defined) - a period not exceeding 90 days; intra-corporate transferees (subject to an pre-employment requirement of not less than 1 year) - no time limits specified, but the person must be engaged in certain types of activities (basically senior management or involving certain types of specialised skills); investors - for as long as the person continues to meet the criteria and conditions stipulated at the time of entry; independent service suppliers (see footnote 16) limited to those engaged in work which requires technology or knowledge pertinent to engineering - for as long as the person continues to meet the criteria and conditions stipulated at the time of entry.

¹⁸ Material on this, and the other agreements mentioned under this heading, is sourced from the web-site of the Organization of American States - www.oas.org.

Agreements using the GATS model with some additional elements

US-Jordan Free Trade Agreement

32. Labour mobility under the US-Jordan agreement is covered under the section on trade in services (Article 3), which uses the GATS as a frame of reference (unless otherwise stated, all terms in Article 3 and the accompanying schedules have their GATS meanings *mutatis mutandis* (Article 3.4(a)). Treatment of mode 4 is also modelled on the GATS - the GATS Annex on Movement of Natural Persons gives rise to rights and obligations under the US-Jordan agreement (Article 3.2(c)(ii)) and specific commitments appear in Schedules annexed to the agreement.¹⁹ However, the agreement goes further than the GATS in specifying visa commitments (Article 8) for both independent traders (Article 8.1) and persons linked to investment²⁰ (Article 8.2), beyond service suppliers. Nationals of Jordan are eligible for US treaty-trader (E-1) and treaty-investor (E-2) visas and similar treatment is guaranteed for US nationals seeking entry to Jordan. However, these provisions are subject to the laws relating to entry, sojourn and employment of aliens of the Parties.

EU-Mexico Free Trade Agreement

33. The EU-Mexico Agreement addresses labour mobility through trade in services. The agreement provides for the creation of a GATS Article V agreement, based on principles of market access, most favoured nation and national treatment. Negotiations on modalities are to take place within three years of the date of entry into force of the Agreement. The negotiated commitments are to be implemented over a transition period of a maximum of 10 years from that date. The Agreement is not intended to cover movement beyond service suppliers under the GATS. Like the GATS, mode 4 access will not include access to the labour market (Article 3(c)(i)) and Parties maintain their right to regulate the entry and stay of individuals - although, unlike the GATS, EU-Mexico also specifies regulations with regard to "work, labour conditions and establishment of natural persons" (Article 27 (Exceptions)). Access is limited to nationals of the Parties (Article 3(f)). Some services sectors are specifically excluded from the scope of the negotiations - audio-visual, those air transport services not currently covered under GATS and maritime cabotage.

34. Specific mention is made of "Key personnel" under the separate section on financial services (Chapter III). This states that Parties may not require that managerial or key personnel be of a particular nationality, nor that more than simple majorities of boards of directors of financial service suppliers of other Party be nationals and/or residents of a Party (Article 16). However, Parties may maintain measures inconsistent with this provided they are scheduled and subject to review with a view to their modification, suspension or elimination (Article 17). While these are technically requirements related to mode 3

¹⁹ Mode 4 commitments are primarily horizontal, with sectoral commitments "Unbound, except as provided for the horizontal section" but sometimes with additional requirements. Commitments cover: US - services salespersons, intra-corporate transferees (being managers, executives and specialists), personnel engaged in establishment, fashion models and speciality occupations; and Jordan - business visitors, intra-corporate transferees, executives, managers, specialists and professionals.

²⁰ Independent traders must be engaged in substantial trade, including trade in services or trade in technology, principally between the Parties. Persons linked to investment must be establishing, developing, administering or advising on the operation of an investment to which they, or a company of the other Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.

(establishment) rather than mode 4, they illustrate the linkages between these two modes, in particular the impact of mode 3 restrictions on mode 4 (see also FTAA below).

ASEAN Free Trade Area (AFTA)

35. AFTA contains no specific provisions on labour mobility, although mode 4 is included under the general coverage of trade in services. The 1995 ASEAN Framework Agreement on Services committed Members to negotiations aimed at achieving commitments beyond those in their existing GATS schedules. Packages of offers were finalized in 1997 and 1998 respectively, covering all modes of supply and including service sectors not previously included in GATS commitments. The 1998 package also provided for Member States who were WTO Members to extend their GATS specific commitments to ASEAN Member States who were not WTO Members. Indonesia and Laos are yet to ratify this agreement. The Framework Agreement on the ASEAN Investment Area (1998) commits Members to promoting the freer flow of capital, skilled labour and professionals and technology among ASEAN Member States.

Euro-Med Association Agreements (Morocco and Tunisia)

36. The Euro-Med Association Agreements with Morocco and Tunisia²¹ (Title III, Right of Establishment and Services) simply reaffirm each Party's obligations under the GATS. However, they provide for future widening to cover rights of establishment and supply of services through the establishment of an "economic integration" type of agreement, with progress to be reviewed no later than 5 years after the entry into force of the agreement. Additionally, under Title VI "Co-operation in Social and Cultural Matters, Chapter II (Dialogue on Social Matters), Parties agree to conduct regular dialogue to find ways to achieve progress in the field of movement of workers (Article 69.2) (note that this is all workers, and not limited to service suppliers). The same Title (Chapter I Workers) also includes stipulations for non-discriminatory treatment with regard to working conditions, remuneration, dismissal (including for temporary workers) (Article 64)²² and social security (Article 65). However, non-discrimination obligations with regard to redundancy cannot be invoked to obtain renewal of a residence permit. Granting, renewal and refusal of residence permits remains governed by the legislation of each Party, or any bilateral agreements. Nationals residing or working illegally in another party are excluded (Article 66), and bilateral agreements between individual Member States and Morocco/Tunisia may provide more favourable treatment (Article 68)²³.

²¹ Provisions on labour in the various types of Euro-Med agreements vary. There are no specific provisions on Services in the Euro-Med Association Agreement with the Palestinian Authority. The Co-operation Agreement with Algeria does not contain general provisions on services, but does include provisions similar to Articles 64 and 65 on non-discrimination re labour (Articles 38-41 in the Agreement). Co-operation agreements with Egypt, Jordan, Lebanon and Syria contain no provisions on either services or labour/workers. The First Generation Association Agreement with Cyprus similarly contains no provisions on either services or labour/workers.

²² The Joint Declaration relating to Article 64 states that without prejudice to conditions and procedures in each Member State, parties will examine access to a Member State's labour market of spouse and children legally resident under family reunification arrangements for the duration of the worker's authorised stay. This specifically excludes seasonal workers, those on secondment or on placement.

²³ Migration issues more generally are raised in Article 69.3 (dialogue on migration issues) and Chapter III "Co-operation in the Social Field" Article 71 (projects aimed at reducing migratory pressure).

New Zealand - Singapore Closer Economic Partnership

37. Labour mobility is included in Part 11: General Provisions by Article 72 (Movement of Natural Persons) which mirrors almost exactly the language of the GATS Annex. Movement of service suppliers is covered by the Part 5 (Services) which adopts the GATS framework. Parties undertake to review their schedules of commitments at least every two years (earlier if so agreed) and progressively to expand these initial commitments as well as expand market access and/or national treatment between them on accordance with the APEC objective of free and open trade in services by 2010 (Article 20:4). In specific commitments, both Singapore and New Zealand have scheduled horizontal commitments²⁴ for mode 4 limited to certain categories.²⁵

Agreements which use the GATS model*Southern Common Market Agreement (MERCOSUR)*

38. MERCOSUR also directly replicates the GATS model. GATS carve-outs relating to access to the labour market and permanent migration and Members' right to regulate the entry and stay of foreigners in their territory are included verbatim. Market access is based solely on specific commitments, covering the movement of all categories of natural person who provide services within the framework of the protocol. Movement of natural persons is not specified under the Bolivia-MERCOSUR Agreement, or the Chile-MERCOSUR Agreement (see www.oas.org).

Agreements providing no market access but facilitated entry*Asia Pacific Economic Co-operation Forum (APEC)*

39. APEC does not contain any specific market access arrangements on labour mobility, with periods of, and conditions for, temporary entry varying between economies. However, APEC does include arrangements aimed at facilitating labour mobility by: information exchange; dialogue with business; development and implementation of immigration standards; and capacity building to assist streamlining temporary entry, stay and departure processing for business people. In-principle agreements have been

²⁴ New Zealand also makes reference to presence of natural persons under "Dental services". National treatment on mode 4 "Dental services" is limited to registered dentists who must satisfy the relevant registration board that they intend to reside and practise in New Zealand.

²⁵ New Zealand has made no commitments other than on certain categories of intra-corporate transferees (defined as natural persons employed by a service supplier of the other Party supplying services through a commercial presence) and business visitors. Intra-corporate transferees are executives and senior managers and specialist and/or senior personnel (all defined and subject to 12 months pre-employment) and receive an initial period of stay of up to 3 years. Installers and servicers (where such installation or servicing is a condition of the purchase of the machinery or equipment) receive periods of stay not exceeding 3 months in any 12 month period. Business visitors receive a period or periods not exceeding 3 months in any calendar year. Singapore has also left presence of natural persons unbound, except for intra-corporate transferees and business visitors. Intra-corporate transferees are limited to managers, executives and specialists (all defined and subject to 1 year minimum pre-employment) and entry is limited to a three year period that may be extended for a further 2 years, but with the total period not exceeding 5 years. Business visitors are granted an initial stay of up to 1 month on arrival, extendable to a maximum of 3 months on request.

reached to improve application processing times for temporary entry permits for executives and senior managers on intra-corporate transfers and for specialists²⁶. APEC arrangements exclude the self-employed and un- or semi-skilled labour.

40. While APEC does not grant any right of entry, it has established a scheme to facilitate the entry of business visitors under the APEC Business Travel Card Scheme. The APEC Business Travel Card is valid for three years and provides multiple short-term business entries, with stays of two or three months on each arrival. Cardholders are required to present their passports, but receive expedited airport processing and are not required to submit separate applications for business visitor visas²⁷. Participating economies²⁸ commit to implement the scheme on a best endeavours basis and are free to maintain existing visa requirements for business visitors. All economies retain the right to refuse an individual without providing reasons or to refuse entry to APEC Business Travel Card-holders at the border.

South Asian Association for Regional Co-operation (SAARC)

41. The South Asian Preferential Trading Arrangement does not cover trade in services, although a South Asian Free Trade Area was due to be developed by 2001. However, under a Visa Exemption Scheme (1992) visa requirements are waived for 21 categories of persons. Simplification of visa procedures and requirements is also underway to assist business people to accelerate promotion of trade and tourism within the region.

Agreements without provisions on labour mobility or services

Central European Free Trade Agreement (CEFTA)

42. There are no provisions on labour mobility nor trade in services (and thus mode 4) in CEFTA. There are no plans at this stage to expand the scope of the agreement.

Agreements which are works in progress

Free Trade Area of the Americas (FTAA)

43. The FTAA is very much a negotiation in progress, but proposals on the table seem to reflect provisions in agreements to which putative FTAA members are already party.

²⁶ Guideline definitions have been developed for executives and senior managers. Specialists are defined by each economy and are included in economies' APEC Travel Handbook entry.

²⁷ There is no limit on the number of cards and almost 4000 have been issued to date. Fees vary between participating economies. The scheme is open to citizens of participating APEC economies (or permanent residents of Chinese Taipei and Hong Kong, China), who hold a valid passport (or equivalent), have never been convicted of a criminal offence and are bona fide business persons. The scheme does not include: spouses and children; persons who wish to engage in paid employment or working holidays; or professional athletes, news correspondents, entertainers, musicians, artists or persons engaged in similar occupations.

²⁸ Australia; Brunei Darussalam; Chile; Chinese Taipei; Hong Kong, China; Korea; Malaysia; New Zealand; Peru; the Philippines and Thailand. Neither the US nor Canada are planning to join.

44. At this stage in the FTAA, mode 4 is included in the draft Services Chapter in terms similar to the GATS. Proposed coverage is for citizens/nationals and possibly permanent residents. Proposals for exceptions are also similar to the GATS - e.g. relating to permanent migration or access to the labour market or requiring that the agreement be subject to Members' laws and regulations, including in relation to labour and the entry and stay of foreigners. One proposal also includes the additional elements from the EU-Mexico agreement relating to requirements with respect to "work, labour conditions and establishment of natural persons". A further proposal would also exclude government procurement in services and certain public services from the agreement.

45. Provisions on "Key Personnel" are also found in the draft Chapter on Investment, covering nationality requirements for senior management and boards of directors, and the ability of companies to bring in key personnel (including management and persons with specialised knowledge or skills or considered indispensable to the proper control of an investment). It is also proposed that key personnel be exempted from labour certification tests or numerical restrictions.

Southern African Development Community (SADC)

46. The ultimate aim of SADC is to promote the free movement of goods and services within the region; however, there are currently no provisions for free movement of labour or service suppliers. Work is underway on a study of labour market issues, including migrant labour and mobility of high-level personnel. The study will explore the development of sub-regional classification of occupations to facilitate mobility of labour. Recommendations from a tripartite seminar on labour migration held in Zambia in March 2000 are under consideration.

GLOSSARY

AFTA (ASEAN Free Trade Area): Brunei Darussalam, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

ANZCERTA (Australia-New Zealand Closer Economic Relations Trade Agreement): Australia and New Zealand

APEC (Asia Pacific Economic Co-operation Forum): Australia; Brunei Darussalam; Canada; Chile; China; Hong Kong, China; Indonesia; Japan; Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; the Philippines; Russia; Singapore; Chinese Taipei; Thailand; United States; Vietnam.

CARICOM (Caribbean Community): Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Republic of Suriname and Trinidad and Tobago. The Bahamas does not participate in the common market and Haiti is not yet a full member.

CEFTA (Central European Free Trade Agreement): Bulgaria, Czech Republic, Hungary, Poland, Romania, Slovakia, Slovenia.

COMESA (Common Market for Eastern and Southern Africa): Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Zambia, Zimbabwe.

EEA (Agreement on the European Economic Area): Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Portugal, United Kingdom, Spain, Sweden.

EFTA (European Free Trade Association): Iceland, Liechtenstein, Norway and Switzerland.

EU (European Union) : Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, United Kingdom, Spain, Sweden.

Europe Agreements: The EU has concluded these with Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovak Republic, Slovenia.

Euro-Med (Euro-Mediterranean Association Agreements) (First-generation): The EU has concluded these with Cyprus, Malta, Turkey.

Euro-Med (Euro-Mediterranean Association Agreements): The EU has concluded these with Tunisia, Israel, Morocco and the Palestinian Authority.

Euro-Med (Euro-Mediterranean Co-operation Agreements): The EU has concluded these with Algeria, Egypt, Jordan, Lebanon and Syria.

FTAA (Free Trade Area of the Americas): Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St Lucia, St Kitts and Nevis, St Vincent and Grenadines, Suriname, Trinidad and Tobago, Uruguay, United States, Venezuela.

Group of Three: Colombia, Mexico and Venezuela.

MERCOSUR (Mercado Común del Sur/Southern Common Market Agreement): Argentina, Brazil, Paraguay and Uruguay.

NAFTA (North American Free Trade Agreement): Canada, Mexico, United States.

SAARC (South Asian Association for Regional Co-operation): Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, Sri Lanka.

SADC (Southern African Development Community): Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe.