International Mechanisms for Movement of Natural Persons: GATS, RTAs, or Both?

Yoshizumi Tojo
Rikkyo University
Cross-Border Movement of Natural Persons: Scope of the Issue

- GATS Mode 4 (definition):
  The supply of a service “by a service supplier of one Member, through commercial presence in the territory of any other Member”

- Mode 4 movement as a subset of temporary labor migration, which has been mainly regulated by national migration law of a Member
  (In Japan’s case: Immigration Control and Refugee Recognition Act)
Preliminary but Critical Understanding in Tackling the Issue

- Mode 4 Movement is necessarily accompanied by “entry, (temporary) stay, and return” processes which require the permission of migration authorities of a Member, including a visa and/or work permit.

- That understanding leads to two important consequences:
  (a) Mode 4 liberalization as a trade policy issue is intrinsically intertwined with the migration regulation mechanism
  (b) Mode 4 liberalization should draw lessons from experiences of the migration policy field
Lessons from Migration Policy Field

- International flow of movement of natural persons has become more diversified and complex.
- The distinction between “temporary” and “longer-term (or permanent settlement as a result of extension)” has become blurred, both factually and as a regulatory basis.
- Human resources are now seen as a critical engine for economic development for both receiving countries (“Host”) and countries of origin (“Home”).
Lessons from Migration Field (cont’d)

- What enters receiving countries is not “labor” as an abstract vehicle to deliver a service but “humans.”
  (a) Concern about the protection of domestic labor market: employment, wage rate, etc.
  (b) Need to secure labor rights for foreign workers, including wages, working conditions, and social security
  (c) Family reunion (in case of extension of stay)
  (d) Social and/or cultural integration (in case of settlement), re-integration (in case of return)
Lessons from Migration Field (cont’d)

- Irregular migration problem has become a top priority for receiving countries.
  (a) Security concern, especially after 9/11
  (b) Human rights of foreigners staying on an irregular basis
Implications for Mode 4 Movement

- Simple “liberalization” assertion as an analogy of international trade in goods could not be legitimized, at least for a certain category of Mode 4 movement.
- For that category, a “Managing the flow of Mode 4 movement” perspective is indispensable.
  (a) Unilateral (or national) regulation is no longer workable. → International Regulatory Scheme will be required for realizing the liberalization of cross-border movement of natural persons, including Mode 4 movement.
  (b) Then, GATS Mode 4 liberalization negotiation?
    → For some categories, yes. But for others, no. For the very reason mentioned above, GATS does not seem to be an appropriate international legal mechanism for all cross-border movement of natural persons which Mode 4 covers.
Implications for Mode 4 (cont’d)

As for RTAs…
(a) International cooperation is essential to manage the flow of cross-border movement of natural persons in areas such as information sharing, recruitment of qualified workers, prior training in home countries, post-admission protection of labor rights, imposition and enforcement of return requirement, and combat of irregular migration.
(b) RTAs are convenient “vessels” to realize a tailored regulatory mechanism among countries, from the free movement and rights of residence to Mode 4-type movement.
(c) Traditional bilateral-labor-agreement type of cooperation packages could be set in.
Legal Issues in Relation to the GATS

- The Annex on the Movement of Natural Persons
- MFN as a horizontal obligation (Art. 2 [1])
- Exception of Economic Integration (Art. 5)
- Specific Commitments (MA, NT)
The Annex on the Movement of Natural Persons

- The GATS does **NOT** cover:
  - Natural persons seeking access to the employment market
  - Measures regarding citizenship, residence, or employment **on a permanent basis**

- Government is free to regulate the entry of natural persons into, or their temporary stay in, its territory, provided that such measures do not nullify or impair the benefits of a specific commitment
Economic Integration (Art. 5[1])

- A Member is permitted to enter into an agreement liberalizing trade in services, provided that such an agreement it:
  (a) has substantial sectoral coverage, and
  (b) provides for the absence or elimination of substantially all discrimination between or among the parties in the mentioned sectors

*As of now, effectiveness of the discipline under this provision is questionable.

  → In the future, the MFN obligation could become a serious legal hurdle for both RTAs and GATS to play a complementary role in liberalizing and managing the flow of cross-border movement of natural persons.
Specific Commitments

- Most commitments on Mode 4 are “unbound except…”
- Achievement of the MA commitments is mostly for high-level persons such as managers, experts, and trainees, often as intra-corporate transferees.

* The majority of specific commitments do not override national migration legislation and the Members therefore retain broad discretion to grant, refuse, and administer stay permits and visas.

→ This result makes clear sense, considering the various policy concerns tied to this issue.
Thank You!

RIETI Policy Symposium, 6 August 2007