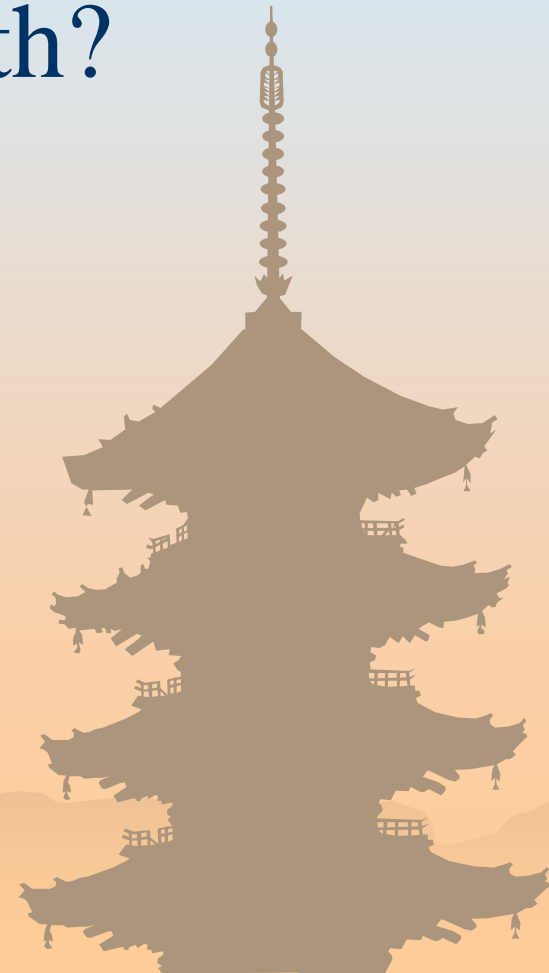


International Mechanisms for Movement of Natural Persons: GATS, RTAs, or Both?

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!

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