

The WTO/GATS Agreement on Movement of Natural Persons: Prospective for Indonesia*

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1. Background of the Negotiations

Unlike any other service sectors under the GATS, the initial proposal to include the movement of natural persons into the agenda of the Uruguay Round came chiefly from key developing countries.¹

The majority of these countries with abundant labour forces, but mostly low and medium-skilled workers expected that developed countries liberalised their market on the movement of natural persons from developing countries.² These countries were all aware that there were various forms of restrictions to the entry of foreign workers by developed countries. The restrictions, such as the licensing and qualifications requirements, are two examples that they have to encounter

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¹ Argentina, Colombia, Cuba, Egypt, India, Mexico, Pakistan and Peru proposed the Annex with a view to establishing the principles concerning the movement of personnel as a mode of delivery. (UNCTAD, *The Outcome of the Uruguay Round: An Initial Assessment*, (New York: United Nations, 1994), p. 173).

² See Bimal Ghosh, *Gains from Global Linkages: Trade in Services and Movement of Persons* (New York: St. Martin's Press, 1997), p. 57 (discussing the issue of comparative advantage of developing countries' low cost labour).

frequently. Against this background, the main objective of these countries to propose and discuss this field was to lower the entry barriers to foreign countries, and to push for entry commitments for less skilled employees, for example construction workers travelling abroad to work with a construction company.³

The background of the developing countries to raise and propose this issue in the services negotiations at the Uruguay Round was also well founded. Most services sectors tabled and discussed during the Uruguay Round were of the interests of the developed countries. Generally, these service sectors tended to concentrate on issues such as cross border supply and commercial presence, for example, the financial service sectors such as banking and insurance. Some key developing countries, such as India, Thailand, Egypt and Argentina, argued that their service providers did not have enough funds to set up companies, branches or subsidiaries abroad. Nevertheless, they argued that their labour (natural persons or individuals) could still supply services competitively in foreign countries without establishing commercial presence or companies in those countries.⁴

2. The Debate at the Uruguay Round

During the negotiations on this issue at the Uruguay Round, the conflict between developing and developed countries emerged. The root of this

conflict, as also found in almost all other areas of international trade in services, was the divergence of trade interest between these two blocs of countries. In this issue of cross border movement of natural persons, it had been clear to them that the issue was also important to their trade growth and workers. The developing countries were concerned with the movement of their low and middle skilled workers, for example tourism or construction workers. The developed countries on the other hand, had strong interests in the movement of their high skilled- workers, including the professionals, technical or managerial workers and artists.⁵

Initially, the developed countries took a defiant approach towards the proposal to discuss this issue. They feared that cross border movement of personnel would require major changes in their respective domestic immigration laws. These countries were worried that the negotiation and the conclusion of this issue might have legal implications to their immigration laws. In this respect, they would have to change their immigration laws in order to accommodate extensive labour movement in all service sectors.⁶

Conversely, the developing countries complained that the labour mobility position adopted by the developed countries discriminated against them. They contended that the developed countries sought only cross-border movement of white collar personnels, such as bankers, professionals, or technicians, and not those of blue collar

³ See: WTO, Press Brief: Movement of Natural Presence, at: <http://www.wto.org/englishH/thewto_e/minist_e/min96_e/natpers.htm> (hereinafter 'WTO Press Brief'). See also: Magda Shahin, *From Marrakesh to Singapore: The WTO and Developing Countries* (Penang: TWN, 1996), p. 13; D. Barth, 'Liberalising International Trade in Services: The European Perspective,' in: K.G. Deutsch and B. Speyer (eds.), *The World Trade Organization Millennium Round* (London, New York: Routledge, 2001), p. 92 (noting that 'developing countries have asked that restrictions on movements of natural persons be reduced to the strict minimum').

⁴ See: WTO Press Brief, *supra*, note 1353.

⁵ Terence P. Stewart (ed.), *The GATT: Uruguay Round: A Negotiating History (1986-1992)*, Vol. II: Commentary (Deventer, Boston: Kluwer, 1993), p. 2367.

⁶ *Ibid*, p. 2373.

workers. They noted that the service industries of the developed countries were capital intensive and were handled by skilled or professional workers while the developing countries' service industries were generally more labour intensive. As a result, the developing countries believed that the developed nations sought to promote labour mobility only to the extent that their industries benefited and opposed the type of labour mobility beneficial to the developing countries.⁷

3. At the Conclusion of the Uruguay Round

At the closing stage of the Uruguay Round, the agenda on movement of natural persons was one of four services whose negotiations remained uncompleted. The other three were the negotiations in financial services, basic telecommunications and maritime transportation. Nevertheless, the Members acquiesced to adopt the legal instruments during the conclusion of the Uruguay Round, namely the *Annex on Movement of Natural Persons Supplying Services under the Agreement* (the 'Annex')⁸ and the *Decision on Negotiation on Movement of Natural Persons* (the 'Decision').⁹

The Annex contains only modest provisions. It has merely 4 paragraphs. Paragraph 1 on the scope of the Annex stipulates that the Annex 'applies to measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are

employed by a service supplier of a Member, in respect of the supply of a service.' The Annex is silent about the term 'measures'. The absence of this definition tends to suggest that it should be broadly defined. It may refer to any actions that may restrict the cross-border movement of natural persons.

Paragraph 2 of the Annex emphasises that GATS disciplines do not apply in respect of job seekers, or to any policies regarding citizenship, residence, or employment on a permanent basis.¹⁰

Paragraph 3 allows Members to negotiate specific commitments applying to the movement of 'all categories of natural persons supplying services under the Agreement.'¹¹ Natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment. This paragraph actually provides for the negotiation concerning all level of workers: low, medium or high skilled workers.

Paragraph 4 stipulates that Member shall not be prevented 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 the 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.' This paragraph reiterates the recognition of the GATS to

⁷ Ibid.

⁸ Annex on Movement of Natural Persons Supplying Services under the Agreement, in: WTO, Legal Texts: The Results of the Uruguay Round on Multilateral Trade Negotiations (WTO, 1995), p. 309.

⁹ Decision on Negotiation on Movement of Natural Persons, in: WTO, Legal Texts: The Results of the Uruguay Round on Multilateral Trade Negotiations (WTO, 1995), p. 402.

¹⁰ See also Patrick Low, 'Impact of the Uruguay Round on Asia: Trade in Services and Trade-Related Investment Measures,' in: A. Panagariya, M.G. Quibria and N. Rao, *The Global Trading System and Developing Asia* (Oxford, N.Y.: Asian Development Bank, 1997), pp. 503 and 512.

¹¹ Emphasis added.

the sovereignty of the Members to regulate the issue of the entry of foreign natural persons into its territory. These, among others, may take the form of regulating the immigration, health (quarantine), visa matters, etc. The inapplicability of the GATS Agreement on this issue is mainly because this issue is the 'sensitive policy'¹² of a Member (State) to regulate the natural persons within its territory.¹³

The *Decision on Negotiations on Movement of Natural Persons* embodies the intention of the Members to expand the negotiations. The Decision states that negotiations on further liberalisation of movement of natural persons for purposes of supplying services are to continue beyond the conclusion of the Uruguay Round.¹⁴ The objective is to achieve higher levels of commitments by participants under the GATS.¹⁵ The Decision also provides for the establishment of a negotiating group to carry out the negotiations and produce a final report no later than six months after the entry into force of the Agreement Establishing the WTO, namely 30 June 1995.¹⁶

Some members however made their commitments on the movement of natural persons at the end of the Uruguay Round.¹⁷ But only few Members made significant commitments in their national

schedules.¹⁸ The developed countries, for example, do not include the categories of interest to developing countries in their specific commitments. By far, these few liberalisation commitments are not to a large extent in favour of the developing countries. Essentially, it discourages developing countries' export opportunities in labour intensive industries.¹⁹ Most of the commitments of the developed countries on the movement of natural persons are meagre. Moreover, they are mostly limited to the so-called '*intra-corporate transferee*.' Canada and the USA also provide for limited commitments in respect of independent professional services suppliers.²⁰

Aside from the '*intra-corporate transferee*', there are two other categories of natural persons that are mentioned in the list of Schedules of developed and developing countries. They include:

- a. *Business visitors*. They are natural persons who are allowed to enter a country for a short time (usually 90 days) but without supplying services in return for payment within that country.²¹
- b. *Foreign qualified professional and practitioners*. They are natural persons who may enter and temporary stay to work in a country to perform

¹²Patrick Low, *supra*, note 1360, p. 513.

¹³Cf., UNCTAD, *supra*, note 1351, p. 173 (argued that this limitation to the entry of the movement of natural persons is not found in the movement of capital).

¹⁴Paragraph 1 of the Decision.

¹⁵Preamble and Paragraph 1 of the Decision.

¹⁶Paragraph 3 of the Decision.

¹⁷See: WTO Press Brief, *supra*, note 1353.

¹⁸Geza Feketekuty, 'Trade in Services - Bringing Services into the Multilateral Trading System,' in: Jagdish Bhagwati and Mathias Hirsch (eds.), *The Uruguay round and Beyond* (Berlin: Springer, 1998), p. 94.

¹⁹Pierre Sauvé, 'Developing Countries and the GATS 2000 Round,' 34 : 2 J.W.T. 88 (2000).

²⁰Patrick Low, *supra*, note 1360, p. 513. Cf., Bimal Ghosh however is of the view that there is a progress in terms of commitments made by the Members. He put forward a number of reasons: Firstly, 'the commitments can be withdrawn or modified in return for negotiated compensation and under certain conditions'. Secondly, 'the present schedules represent a first set of formal commitments providing a basis on which to build progressive liberalization through successive rounds of negotiations.' Thirdly, 'there is still a scope for intensifying bilateral or plurilateral negotiation on further liberalizing the regime for entry and temporary stay of foreign natural persons supplying services.' (Bimal Ghosh, *supra*, note 1352, pp. 113-114).

²¹See for example the commitment of India, below.

temporary assignments without being linked to the presence of a branch, office or subsidiary in that country.²²

In the next stage of negotiations, India representing the developing countries contended that the commitments made by the developed countries Members were far from satisfactory. India viewed that the developed countries' commitments were mainly for higher category of personnel. These neglected the natural advantage of developing countries in the movement of medium and low-skilled personnel.²³ Additionally since some countries still required the linkages of the entry of personnel with the commercial presence, India and others wanted this requirement be lessened. Other developing countries called for the relaxation of requirements for a certain category of personnel.²⁴

The developing countries also requested that the developed countries - in particular the Quad (US, EC, Japan and Canada) - expanded their offers in this area. The US and Canada responded positively to this request. The US said its existing policy of allowing temporary entry of up to 65,000 professionals each year would be 'bound' under the GATS (that is: committed as a minimum that would be difficult to change).²⁵ Canada assured that entry would be permitted for unlimited number of professionals, but it gave fewer categories of professionals than the United States.²⁶

During the extended period of April 1994-July 1995, the negotiating group held nine meetings. Negotiations on specific commitments, however, took place essentially in bilateral meetings. At its final meeting on 28 July 1995, the group concluded the negotiations without any significant progress. The group adopted revised schedule with improved commitments from only 5 countries: Australia, Canada, the EC (counting as one country), Norway and Switzerland,²⁷ and only one from developing country, namely India, that submitted its schedule of commitment in this area.

A very few improvement have been made, for example, by the EC. The EC has guaranteed opportunities for foreign professionals' assignments in several professional and business sector. Switzerland and Norway have made similar commitments. It is noteworthy however that the levels of commitments contained in the schedule of commitments of developed countries sometimes are more restrictive than their existing laws. The US' commitment for example provides 'limited terms' for admission of aliens in the H-1B visa category. H-1B category is the US commitment to allow 65,000 persons to enter into the US annually on a world-wide basis for a maximum of 3 years (under the condition that they have met all relevant requirements).²⁸

These commitments were annexed to the Third Protocol of the GATS.²⁹ The Protocol entered into force at the end of

²²See: WTO Press Brief, supra, note 1353.

²³Neela Mukherjee, 'GATS and the Millennium Round of Multilateral Negotiations: Selected Issues from the Perspective of the Developing Countries,' 33 : 4 J.W.T. 91 (1999).

²⁴Patrick Low, supra, note 1360, p. 513.

²⁵See: WTO Press Brief, supra, note 1353.

²⁶See: WTO Press Brief, supra, note 1353.

²⁷WTO, GATT Activities 1994-1995 (Geneva: WTO, 1996), p. 30.

²⁸See: US Department of State, World Trade Organization and the Movement of Persons,' at <<http://www.state.gov/issues/economic/2world.html>>.

²⁹The national commitments are published in: WTO, Third Protocol to the General Agreement on Trade in Services (Geneva: WTO, October 1995).

January 1996 for those members who accepted it by the date. The protocol was also open for acceptance by other members until the end of June 1996. The extension of the negotiations until the end of July did not attract other developing countries (or developed countries) to submit their commitments. Therefore the extension did not bring any major changes to the status of the Members' commitment on the movement of natural persons which was previously concluded on 28 July 1995.

4. Developing Countries' Commitment

India is one of the prominent developing countries that took the initiative to raise the issue of the movement of natural persons (called formerly labour mobility) on the agenda of the Uruguay Round. During the negotiations on this issue, India has also taken an active role in the form of, for example, submitting a proposal on the Annex on this area.³⁰

Other key developing countries, notably *Malaysia* and *Indonesia*, played a rather *least* role in the negotiation on this issue. Malaysia and Indonesia did not join or submit their commitments to the Annex on the Movement of Natural Persons. These countries position regarding the entry of the movement of natural persons may then be seen from these countries' commitment on the presence of the natural persons under their national schedules. This fourth mode of supply known in the GATS is actually the same as those contained in the Annex. The Annex is proposed intentionally as a response to

the low commitment that other Members offer. Therefore, the Indonesian or Malaysian legal status concerning the movement of natural person may be found in the fourth mode of supply under other GATS' Annexes. The commitments that have been concluded so far are the commitments in Basic Telecommunications Agreement³¹ and the Financial Services Agreement.³²

Under the Indonesian commitment, only natural persons at the level of management and technical experts are allowed to enter Indonesia. On the basis of a joint venture company framework, no limitation concerning the number of natural persons be admitted (at the management level), but for technical expert, there should be no more than 20 persons.

With regard to Malaysia's commitment, the limitations to the entry of foreign natural persons are rather restricted. In financial sectors, for example, Malaysia allows only 2 (two) senior managers (for each foreign institution). Nevertheless, no requirement or qualification concerning a senior manager is given. In addition, Malaysia allows five specialists or experts for each institution for areas relating to trade financing, corporate finance, and information technology. All entry is limited to a maximum period of 5 years.³³

The position of India towards this agenda was that cross-border movement of labour in labour intensive service industries should be encouraged. This position was supported by the fact that the fields such as construction sector,

³⁰Terence P. Stewart (ed.), *supra*, note 1355, p. 2374.

³¹Fourth Protocol to the GATS (April 1997).

³²Fifth Protocol to the GATS (February 1998).

³³See also: Rosi Dahlan, 'Movement of Personnel - Malaysia,' in: Attorney General's Department and Law Council of Australia, Twenty-First International Trade Law Conference, Sydney, 17-18 October 1994, (1994), pp. 177-185 (discussing the regulations regarding foreign workers in Malaysia).

required cross-border movement of personnel to act as suppliers, support personnel and as the actual service providers.³⁴

Additionally India also took the view that the immigration laws in the Member countries should not become an unnecessary barrier to trade in services nor nullified benefit under the framework. This position was reflected in the proposed annex regarding the 'Movement of Persons as a Mode of Delivery.'³⁵

In its schedule of commitments regarding the movement of natural persons, India provides for 3 categories of high-skill natural persons. They include:

- a. *Business visitors* are given for business negotiations or for preparatory work for establishing a commercial presence in India. Entry for persons in this category shall be for a period not more than 90 days.
- b. *Intra-corporate transferees* are those who are at the level of managers, executive and specialists. They must have been in the employment of a company (of another Member) for a period not less than one year prior to the date of application for entry into India and are being transferred to a branch or a representative office or a company.
- c. *Professionals* are natural persons who are engaged by a juridical person in India as part of a service contract for rendering professional services for which he/she possesses the necessary academic credentials and professional qualifications with three years experience in the field of physical sciences, engineering or other natural

sciences. Under this category, entry and stay is for a maximum of one year. It may be extended for a maximum three months.³⁶

5. Significance of the Annex

Initially the purpose of the negotiations on the Annex on the Movement of Natural Persons is aimed at lowering the entry barriers or limitations to the natural persons in supplying services in other Members' market. This idea came from the developing countries that have comparative advantage in low or medium skilled workers.

There are at least, two measurements that may be used to determine whether a certain international treaty, in this regard the Annex, has its significance. Firstly, the number of participants (Members) to the Annex; and secondly, whether the substance of the content of the Annex benefits its Members (in general).

Seen from the number of participants, which are only 5 (five) developed countries (including EC counted as one country), and only 1 (one) developing country (India), it demonstrates that the Annex has not been attractive to the majority of the WTO members. The fact that only 1 developing country, that is India, joins the Annex also indicates that it is astonishingly not a popular Annex to the developing countries. Nonetheless, the fact that India is the only developing country that joins the Annex may be easily understood. By far, India has comparative advantage not

³⁴Terence P. Stewart, (ed.), supra, note 1355, p. 2373.

³⁵Terence P. Stewart, (ed.), supra, note 1355, p. 2374.

³⁶'India-Schedule of Specific Commitments, Supplement 2,' in: WTO, Third Protocol to the General Agreement on Trade in Services (Geneva: WTO, October 1995), pp. 35-49.

only in low or medium-skilled labour, but also in high-skilled professionals. With more than one billion populations, India 'has a large pool of well qualified professionals capable of providing services abroad.'³⁷ It is also a matter of common knowledge that many Indian information technology professionals are now working in the United States' Silicon Valley in California, Singapore, and a number of western European countries. Therefore, offering or giving commitments in low or medium skilled workers or even high-skilled professionals do not pose a serious threat or problem to the Indian economy or workforce.

With regard to its substance, the fact that it does not fulfil the objective of the Annex (as inscribed in the preamble of the Annex, that is lowering the entry barriers), suggests that probably the Annex has lost its significance. As shown above, the US' commitment, for instance, is even lower than its existing national laws. Most Members are only committed to high skilled or expert workers, including

managers, professionals or advisers. Pierre Sauvé suggested that the developing countries should link the issue of the movement of natural persons with the future negotiations on the investment at the WTO.³⁸ He also suggested that, should the negotiation on investment takes place in the future, developing countries 'should press for labour mobility issues to be treated in an equivalent manner to the movement of capital under WTO law.'³⁹ This proposal should be welcome and supported. Nevertheless the effectiveness of this suggestion remains to be seen. But, one may easily see that the nature of the negotiations on the movement of natural persons, just like other negotiations regarding national commitments under the GATS, is generally conducted on a bilateral level. With the lack of bargaining power on the part of the developing countries, it seems that it is still very much difficult for developing countries to find any benefit from the Annex on Movement of Natural Persons.

³⁷ 'Report of the Government of India,' in: WTO, Trade Policy Review India 1998 (Geneva: WTO, October 1995), p. 237.

³⁸ Pierre Sauvé, supra, note 1369, p. 88.

³⁹ Pierre Sauvé, supra, note 1369, p. 88.