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Annex - Temporary Movement of Service Personnel

The following communication is circulated at the request of the Delegation of the United States to the members of the Group of Negotiations on Services.

EXPLANATORY NOTE

The proposed Annex is intended to clarify the principles in Article 1(c) of the Framework (GNS/35) relative to cross-border movement of personnel as a mode of delivery. In the negotiation of specific access commitments pursuant to Part IV of the Agreement, parties to the Framework would apply this Annex to those sectors or sub-sectors for which they would grant market access under the Framework, as provided in the Schedules of Concessions.

Article 1

Purpose

1. The provisions of the Annex elaborate upon the Multilateral Framework on Trade in Services (hereinafter referred to as the "Framework"), as it applies to movement of personnel as a mode of delivery, to ensure that immigration regulations neither act as an unnecessary barrier to trade in services, nor nullify and impair benefits expected under the Framework.
2. The Parties recognize that progressive liberalization of trade in services may be hampered by barriers to movement of personnel essential for the delivery of services within the scope of the Framework. With a view to eliminating such barriers and to ensuring that immigration laws and regulations shall not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination among Parties or as disguised restriction on international trade, the Parties shall ensure that national laws and regulations governing entry of essential personnel which are barriers to trade will be progressively liberalized. Parties shall further ensure that criteria and procedures will be transparent, quick and simple to facilitate entry for temporary stay of these personnel.

3. The Parties agree that certain employees of firms which provide services in a service-importing country through a branch, subsidiary or affiliate established in that country are essential to the provision of such services. Employees considered essential for this purpose are those who have been in the prior employ of their firm outside the service importing country for a period of not less than one year and who are one of the following:

- (a) Managers - persons within an organization who primarily direct the organization, or a department or sub-division of the organization, supervise and control the work of other supervisory, professional or managerial employees, have the authority to hire and fire or recommend hiring, firing, or other personnel actions (such as promotion or leave authorization), and exercise discretionary authority over day-to-day operations. (This term does not include first-line supervisors, unless the employees supervised are professional, nor does it include employees who primarily perform tasks necessary for the production of the service.)
- (b) Executives - persons within an organization who primarily direct the management of the organization or a major component or function of the organization, exercise wide latitude in decision-making, and receive only general supervision or direction from higher-level executives, the board of directors, or stockholders of the business. (Executives would not directly perform tasks related to the actual provision of the service, or services of the organization.)
- (c) Specialists - persons within an organization who possess knowledge at an advanced level of expertise and who possess proprietary knowledge of the organization's service, research equipment, techniques, or management. (Specialists would include, but would not be limited to, members of accredited profession.)

4. The Parties also recognize that, in some cases, a party may determine that the entry into its territory of other types of labour then enumerated in paragraph 3, above, may be necessary to the provision of a particular service within its territory. Accordingly, they agree, that upon a party's making such a determination in an individual situation, that party will facilitate the entry into its territory of the personnel it determined to be necessary.

5. Nothing in the Annex is intended to affect:

- (a) immigration laws and regulations dealing with permanent residence, permanent employment or citizenship;
- (b) labour/management disputes.

Article 2

Scope and definition

1. This Annex applies to the temporary movement of service personnel essential to the effective delivery of a service. Such movement shall take place under conditions of specificity of purpose, and limited duration, not to exceed (three/five) years, so as to facilitate the provision of services.

2. Parties shall provide for the entry for temporary stay of essential personnel who are otherwise qualified for entry under applicable law relating to public health and safety and national security in accordance with the commitments contained in the Schedules of Concessions.

Article 3

Access to and movement of service personnel

1. Where parties permit entry of services personnel of firms providing services for which access has been granted under the Framework, such firms may recruit personnel from the source which is economically most advantageous among countries signatory to the Framework.

2. Parties shall not require labour certification tests or other procedures of similar effect as a condition for entry for temporary stay of those essential personnel described in Article 1.3.

3. The legal entity employing the service personnel shall co-operate, upon request, with the authorities of the importing country in a case of any breach of immigration laws and regulations by its personnel.

Article 4

Transparency

1. Each party shall make public its laws, regulations and procedures relating to the provisions of this Annex and provide to the other parties such explanatory materials as may be reasonably necessary to enable other parties and their service suppliers to become acquainted with them.

2. Data collected and maintained by a party with respect to the granting of temporary entry of personnel under this Annex shall be made available to other parties in conformity with applicable law.

3. Parties shall establish enquiry points, including in embassies and immigration offices abroad, to provide information on the procedure and regulations concerning the granting of entry for temporary stay under the provisions of this Annex.

Article 5

Expeditious procedures for entry for temporary stay

1. The procedures for temporary entry of, and work authorization for, stay of essential personnel shall be accomplished expeditiously so as to avoid unduly impairing or delaying the conduct of trade in services under the Framework.
2. Parties shall ensure that their embassies and immigration offices abroad, and immigration authorities at ports of entry are familiar with the visa issues pursuant to this Annex.

Article 6

Consultation

The Parties shall establish procedures which shall involve the participation of immigration officials with respect to the implementation of this Annex.

Article 7

Dispute settlement

1. Subject to paragraph 2, a party may invoke the provisions of Article XXIII of the Framework on dispute settlement with respect to any matter governed by this Chapter.
2. A party may not invoke the provisions of Article XXIII:2 and 3 with respect to the denial of a request for temporary entry of an essential services provider unless:
 - (a) the matter involves a pattern of practice; and
 - (b) available administrative remedies have been exhausted with respect to the particular matter involving the request for temporary entry, provided that such remedies shall be deemed to be exhausted if a final decision in the matter has not been issued within one year of the initiation of the administrative proceedings and the failure to issue a decision is not attributable to delay caused by the services provider.

Article 8

Relation of Annex to the Framework

1. In the negotiation of specific access commitments pursuant to Part IV of the Framework, parties would apply this Annex to those sectors or

sub-sectors for which they would grant market access under the Framework, as provided in their Schedules of Concessions.

2. No other provisions of the Framework shall be construed as imposing obligations upon any party regarding entry of foreign personnel.