



FREE MOVEMENT OF NATURAL PERSONS: NORTH-SOUTH CONFLICTS OF ECONOMIC INTERESTS

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Abstract:

The establishment of the General Agreement on Trade in Service (GATS) is one of the major achievements of the Uruguay Round of trade negotiations. All the trades in services fall within the GATS through four modes of delivery under Article I:2 of GATS. Among the modes, the liberalization of mode 4: Movement of Natural Persons which relates the removal of restrictions on workers travelling abroad temporarily, upon which developing countries have comparative advantage, remains one of the least negotiated issues of the WTO, while the other 3 modes upon which the developed countries have dominance have been liberalized substantially. This study elucidates some logical arguments that mode 4 is the victim of the North-South conflict of economic interests. Besides, this study furnishes arguments how liberalization of mode 4 can be economically beneficial for both North and South. The structural weakness in Articles, Schedules and Annexes of GATS entailing mode 4 needs to be restructured so that developing countries are able to participate meaningfully in the world trade in services and see their economic interests are protected equitably with the developed countries so that the economic interests of both developed and developing countries in trade in services can become mutually supportive.

Keywords:

GATS, Natural Persons, North-South, Liberalization, Economic Interests.

1. Introduction

In recognition of the ever-increasing importance of trade in services for the growth and development of the world economy, the establishment of the General Agreement on Trade in Services (GATS) is one of the major achievements of the Uruguay Round of the trade negotiations. Since 1980, world trade in service has been growing faster and has recently become most dynamic segment of international trade (WTO, 2013). In 1999, the value of cross-border services amounted to US\$1350 billion (GATS, 2003). The export of commercial services has become highly significant for both developing and developed countries as it contributes 50% and 70% of their respective GDP (Mukherjee, 1999).

However, the industrialized countries now dominate most commercially tradable services, which accounts for around 70% of the total tradable services of the world (UNCTAD, 2002). Although trade in services plays significant role in global trade, it has until recently received only a little attention from the global trading community (Islam, 2004). Indeed, the continuous growth of trade in services demands for orderly governance through a mutually agreed legal framework (Islam, 2006). According to the Preamble of GATS, the global trading partners have mutually agreed upon to strive for achieving progressively higher levels of liberalization of trade in services, aimed at promoting the interests of all participants and facilitating the increasing participation of developing countries in trade in services through strengthening their domestic services capacity (GATS: Annex 1B). Besides, in the agreement particular importance was given on the serious difficulty of the least developed countries in terms of their special economic situation, trade and financial needs.

In principle, all service sectors and all measures affecting such trade falls within GATS by the following four modes of delivery under Article I.2: mode 1- cross-border supply of services, mode 2- consumption abroad, mode 3- commercial presence and mode 4- trade by means of temporary presence of natural persons (Mukherjee, 1999). Among them, the liberalization of Mode 4: Movement of Natural Persons which relates the removal of restrictions on workers travelling abroad temporarily on fixed term work contracts, upon which developing countries have comparative advantage remains one of the least negotiated issues in the discussions of WTO (Bhatagar, 2002).

However, the other 3 modes of services upon which developed countries have dominance have been substantially liberalized (Bhatagar, 2002).

In fact, Mode 4 is the victim of the North-South conflict of economic interests. This essay will try to demonstrate some logical arguments in support of why the Mode 4 is a victim of North-South conflict of economic interests. Then this will provide arguments how the liberalization of Mode 4 can be economically beneficial for both North and South. Finally, this essay will put forward some recommendations for the WTO to reform the GATS for the liberalization of Mode 4.

2. Methodology

This research will implement the analytical doctrinal methodological approach. The doctrinal approach examines primary legal documents in order to draw a logical conclusion regarding the state of the law (Hutchinson and Duncan, 2012). It involves the complex step of reading, analyzing and linking new information to the known body of law (Hutchinson and Duncan, 2012). This research will examine the present status and constraints of liberalization of mode 4: movement of natural persons to determine whether the interests of developing countries are protected equitably along with the developed countries in trade in services. To pursue the present status and constraints of the liberation of mode 4 this study will also conduct the review of the following documents:

2.1. Primary Documents

The key relevant GATS Article that this study will review are as follows: GATS Article IV which deals with the increasing participation of developing countries, Article VI which deals with domestic regulation, Article XIX which deals with the negotiations of specific commitments, Article XX, which deals with the schedules of specific commitments, Article XVI, which deals with market access, Article II which deals with the Most-favoured-Nation Treatment.

2.2. Secondary Materials

This study will review and evaluate different relevant secondary materials. Primacy will be accorded to materials published in peer reviewed journal articles. Besides, WTO And World Bank reports will be reviewed

3. Negligence of Mode 4 and the Priority of Economic Interests of Developed countries in GATS Negotiations

One important Annex for the developing countries among the eight integral Annexes appended to the GATS is the Annex on Movement of Natural Persons Supplying Services, which establishes that members may negotiate specific commitments applying to the temporary category of all natural persons (Mukherjee, 1999). However, the liberalization of the Movement of Natural Person under mode 4 of trade in service remains one of the least negotiated issues of trade policy among the 144 members of the World Trade Organization (WTO) (Bhatagar, 2002). The issue of liberalizing the movement of labour under mode 4 of delivery of services, upon which the developing countries have comparative advantage, remains mostly unresolved in the GATS negotiations. However, only commitments for the entry of mainly higher category of personnel have been undertaken, thus absolutely overlooking the natural advantage of developing countries in movement of low-skilled and un-skilled personnel (Mukherjee, 1999). The other 3 modes of services upon which the developed countries have absolute dominance, have been liberalized substantially. Multiple Annexes and subsequent ministerial decisions on commitments in the sectors of financial services (Article XI) and telecommunication (Article XVI), upon which developed countries have greater economic interests, depict a clear preference of the GATS negotiations for measures promoting the unrestricted movement of capital impacting their services and service suppliers with sheer negligence to the issue of movement of natural persons (Rafiq, 2004).

4. Partial liberalization of Movement of Personnel and the fate of developing countries

All services come under the purview of GATS except services supplied in the exercise of government authority, which are provided neither on a commercial basis nor in competition with other service providers (GATS, 1994).

This exception seems to be a great relaxation for the developing countries to serve essential public interests. However, in practice, during 1980s onwards World Bank compelled many developing countries to privatize and deregulate many of their enterprises and services of vital public sectors, such as: healthcare, road communication, telecommunication, ports, power plants and water plants as a conditionality of getting loans (Islam, 2004). This lending policy of World Bank, dominated by the US and other developed countries led to the opening of new opportunities for various professional service providers, such as: lawyers, accountants, financial advisers, doctors and engineers to offer their specialized services around the globe.

Developed countries are in a better position than the developing countries in terms of investible resources for human development and advanced technology to produce better professional service provider. In fact, developed countries with their resources, skilled workforce and latest technology can provide all services in every sector all over the world and thus, can easily encroach the capacity of developing countries and LDCs to deliver and regulate most their own services (Islam, 2004). On the contrary, most developing countries and LDCs have comparative advantage in exporting labor-intensive services of semi-skilled and un-skilled workers (Islam, 2004). Although GATS has recognized labour as a factor integral to trade in services in the Annex on Movement of Natural Persons, the mobility of labour under paragraph 2 of the Annex has been carefully kept beyond the purview of GATS (Islam, 2004).

The commitments in GATS mostly guarantee the entry of higher-level personnel in the professional, managerial, skilled and technical categories. The partial liberalizing approach in the provisions of GATS ultimately facilitates the developed countries and MNCs overwhelmingly in exploiting the most advantage of liberalizing the category of higher-ranking personnel. Thus, 'GATS commitments virtually sealed the fate of developing countries' comparative advantage in exporting labour in service.' (Islam, 2004).

5. Contradictions among different relevant provisions of GATS and the North-South Conflict

Not only para 2 but also para 4 of the Annex on Movement of Natural Persons, which denotes the discretionary power of the members in applying measures to regulate the entry of natural persons into their territory in the name of protecting integrity, visa procedures and discipline is the clear deviation from the commitments guaranteed to the developing countries and LDCs in the other provisions of GATS (GATS, Annex 1B). It militates against Preamble and the Article IV of GATS, which accentuate the commitments of providing necessary support to the developing countries and LDCs in strengthening their domestic service capacity, efficiency and competitiveness as well as liberalization of market access in favour of them to the sectors of their export interest (GATS, 1994).

In case of cross border movement, the semi-skilled and unskilled labourers of South face restrictions from the North on the pretext of sovereignty and immigration law, while the workforce of the skilled and professional services enjoy the flexibility of entry requirements (Islam, 2004). The flexibility of entry for the skilled and professional services, implies that these categories are less threatening to the sovereignty issue of North, while imposing restrictions on the entry of unskilled labourforce of South in the name of sovereignty issue is a clear sign of double standard attitudes of the North. It is, indeed, perplexing how the North can draw a conclusion that some categories of services are more threatening than other categories only on the basis of their skills. In fact, under the disguised and vague entry requirements, the North is restricting the unskilled and semi-skilled labourforces from entering into their territories.

Moreover, as developing countries do not have sufficient skilled and professional workforce to export to the developed countries and on the contrary, they have to import skilled workforce from developed countries, mostly demanded by the widespread MNCs, positioned in the vital sectors of developing countries as a result indiscriminate privatization and deregulation of their service sectors prescribed by the World Bank and other international lending institutions dominated by developed countries. The skilled workforce of developed countries can also enjoy the liberalized Mode 3: Commercial Presence, in their entry into developing countries demanded by the MNCs and many international organizations. The process ultimately economically benefits the North and their skilled professionals at the expense of the ordinary workers of the South (Islam, 2004). This conflicting and irrational

treatment of the North with the unskilled labourforce of developing countries and LDCs undermines the rights of the South to non-discrimination in the global labour market.

6. How Liberalizing Mode 4 can be Mutually Supportive for North and South?

At present, Mode 4: Movement of Natural Persons only accounts for less than 2 percent of the total value of trade in services (World Bank, 2004). A recent study estimates that a mere 3 percent increase in developed countries' intake of temporary workers from developing countries could increase world income by over \$150 billion per annum and the gains from such liberalization would be shared by both developed and developing countries (Whalmsley and Winter, 2001). Moreover, Winters (2003a), in his study demonstrates that in 2001, developing countries earned \$70 billion dollar as foreign remittance, which is around 40% more than all development assistance and significantly more than net debt flows to developing countries. If mode 4 is liberalized it will also relieve them to a greater extent from being heavily dependent on World Bank and other international lending institution with stringent conditionalities and interests payment for financing their vital infrastructure development and mitigating balance of payment crisis.

'Developed countries face a declining ratio of workers to retirees and an increasing scarcity of lower-skilled labor.' (World Bank, 2004). Demographers have shown that many developing countries are facing acute shortage of workers due to the gradual increase of ageing population, for instance: a large number of people in Japan are greying so quickly that the country will need to import over 600000 workers annually until 2050 to keep its population stable (Bhatagar, 2002). In an inter-dependent globalized world on the basis of Ricardian principle of comparative economic advantage, the surplus workforce of developing countries tend to move to the developed countries to replenish the vacuum of labour shortage in different sectors of developed countries, not at the expense of wages and employment of the local workforce, but to move the wheels of the overall economies of the developed countries forward with the fulfillment of workforce in all sectors. If this movement of natural persons can be made unrestricted, it can ultimately boost the total prosperity of the world, benefitting both developed and developing countries. Surplus workers typically move from the areas of low productivity (developing countries) to areas of higher productivity (developed countries) leading to a rise in world output. The originating developing countries are also immensely benefited from the effects of temporary labour movements: firstly workers gain valuable experience and skill and secondly, inflow of huge remittance (Bhatagar, 2002).

7. Recommendation for the liberalization of Mode 4

The structural weakness in Articles, Schedules and Annexes of GATS should be reformulated to ensure proper functioning of multilateral trade liberalization in which developing countries and LDCs are able to participate meaningfully to see their interests are reflected equitably as promised in GATS. Some recommendations with a view to reformulating GATS and making it more functional, rational and binding are as follows:

The obligations set on the developed countries through GATS Article IV to undertake necessary measures for creating a level playing field for the developing countries and LDCs remain elusive (Mukherjee, 1999). In this Article, it is stated that the industrialized countries of WTO shall facilitate developing countries to strengthen their services capacity, efficiency and competitiveness (GATS, Annex 1B). The other provisions included in this article are the liberalization of market access in sectors and modes of supply of export interest to the developing countries.

As there is no implementation mechanism to enable the developing countries for better participation in trade in service, the aim of this Article has virtually been ignored in practice (Islam, 2006). There should be more binding provisions in this Article requiring developed countries of making specific commitments of providing adequate resources and technical supports in conformity with the provisions of Article IV of GATS to the developing countries to enhance the skills and efficiency of their human resources so that they can compete at global level. At the same time, there should be more specific and binding provisions in Article IV requiring developed countries to liberalize their market access to the supply of labour force from developing countries.

Article XIX of GATS requires members to enter into successive rounds of negotiation within stipulated time with a view to achieving a progressively higher level of liberalization and promoting the interests of all participants on a mutually advantageous basis and this Article also entails the commitments of providing flexibility for individual developing countries to liberalize their service sectors in line with their development situation (GATS, 1994). The Doha Ministerial Declaration requires members to submit initial request and offers for specific commitments within stipulated time frame (Islam, 2004). If developing countries and particularly LDCs are pressured without giving enough time and flexibility for higher level of liberalization, they may be forced to make unfavourable commitments without making appropriate cost-benefit analysis, detrimental to their national interests.

However, there should be obligatory provisions in Article XX of GATS: Schedules of Specific Commitments requiring the developed countries of making specific commitments for liberalizing their service sectors for mode 4: Movement of Natural Persons, especially for the movement of semi-skilled and un-skilled workforce from developing countries and LDCs. If no standards and specific provisions are available entailing accountability and precise obligations of the members, depending on their level of development and capacity in GATS, developed countries are not duty bound to give priority to LDCs' export of unskilled and semiskilled persons nor can LDCs claim market access of its services, including mode 4: Movement of Natural Persons to the developed countries as a matter of right (Islam, 2004).

Article VI of GATS deals with the domestic regulations of the members, which brings disciplines in the qualification and licensing requirements, procedures and technical standards with a view to ensuring that they do not constitute unnecessary barriers to trade in services (Islam, 2004). However, ultimately the level of protection depends on the desire of the members despite the prevalence of necessity test. This apparent inadequacy of domestic regulations of GATS, in turn, can legitimize external barriers to trade (Islam, 2004). The requirement of qualification and necessity tests should be universally harmonized under the supervision of International Labour Organization and should not be unnecessarily complicated to restrict the movement of laborforce of developing countries.

According to GATS Article XX, members are required to create specific obligations in those service sectors that are expressly specified in the commitment schedules of the members (GATS, 1994). The nature and extent of specific commitments depends absolutely on the choice of the members (Islam, 2004). There is flexibility for each member to determine the level of obligation of the GATS provisions on a sector-by-sector basis through negotiations. Even members can choose not to make any commitments in a particular sector and can structure their commitments in a manner enabling them to discriminate between foreign and domestic service providers and limit the degree of market access. The generalization and flexibility of obligation of implementing commitment schedules on a sector-by-sector basis further facilitate the developed countries to totally or mostly overlook the mode 4 of services and specially limit the natural movement of un-skilled workforce from developing countries and LDCs to the developed countries. In the provisions of XX of GATS, there should be more stringent and specific obligations on the developed countries requiring them to include specific commitments of liberalizing mode 4: Movement of Natural Persons in their schedules of the specific commitments.

Market Access (Article XVI) obliges a member to treat services and service suppliers of other members to stick to the terms and conditions agreed and specified in its schedules of commitments (Islam, 2006) 'Market access commitments do not affect the right to regulate services and do not oblige members to permit the entry of unlimited numbers' (Islam, 2006). The MNCs have the necessary means to enter foreign markets to take over key service industries by forcing developing countries to provide irreversible access to their market (Islam, 2006). There should be specific provision entailing some obligations on the developed countries to facilitate greater market access of the labourforce of the developing countries.

Most Favoured Nation (MFN) is a principle of non-discrimination, which requires each member to accord immediately and unconditionally to services and service suppliers of any other member no less favourable than it accords to like services and service suppliers of any other country (GATS, Article II). However, the unconditional nature of MFN obligation is tempered by number of exceptions (GATS Article II), which permit differential and

discriminatory treatments listed in the Annex of Article II of GATS and the exception cannot last longer than 10 years in principle (Islam, 2006). The scope and duration of MFN exemptions should be clearly articulated so that the specific and genuine requirements of the developing countries and LDCs can be addressed. The 10 years of exemptions especially in terms of natural movement of persons should be based on the genuine economic needs and the level of development of the members and should not be indiscriminately offered to the developed and advanced developing countries at the same level as offered to the lower developing countries and LDCs.

The time limit of MFN exemptions warrants further extension, considering the genuine economic and trading plight of the lower developing and LDCs keeping in conformity with the Preamble and Article IV of GATS with a view to providing special and differential treatment to them. The provisions of the flat use of the notion of 'developing countries', which include countries of diverse economies from oil producing Saudi Arabia, newly industrialized China to the poorest ones, such as: Kiribati and Bangladesh is not really a useful category of granting exemptions/concessions (Islam, 2005). Government of immigration receiving countries may have political and economic motivations to avoid making a migration-MFN commitment, as many of them have done in trade in goods (Broude, 2010).

Most importantly the spirit of the Annex on Movement of Natural Persons Supplying Services Under the Agreement is lacking force and commitment (GATS, Annex 1B). The Paragraph 4 which stipulates, 'the agreement shall not prevent a Member from applying measures to regulate the entry of natural persons, into, or their temporary stay in its territory...' weakens the spirit of mode 4: Movement of Natural persons and is lacking enforceability. Thus, it seems it is formulated to give supports to the protectionist countries against the mode 4. What circumstances will constitute the logic of applying measures to regulate the entry of natural persons should be clearly explained. In fact, any measure that unnecessarily and intentionally restricts the free movement of natural persons from developing to developed countries will ultimately hamper the expansion of the total volume of trade in service and the ultimate victims of which will be the poor people of lower developing and LDCs. So, there should be obligatory provisions to truly liberalize the movement of natural persons.

8. Conclusion

The structural weakness in Articles, Schedules and Annexes of GATS entailing Mode 4: Movement of Natural Persons needs to be restructured so that the developing countries and LDCs are able to participate meaningfully to see their interests are reflected equitably. Most commitments to improve their capacity and address the development needs, specially the liberalization of mode 4: Movement of Natural Persons remain unfulfilled due to its resorting to the 'best endeavor approach as opposed to mandatory approach in the relevant provisions which warrant to be further restructured. In fact, WTO will have to translate its soft and glossy rhetoric into hard rules of international trade (Islam, 2006)

If mode 4: 'Movement of Natural Persons' is not liberalized, the un-skilled and semi-skilled workforce of developing countries on which they have comparative advantage will be deprived of realizing benefits from trade in services. The service sectors of developing countries will be over-saturated with the supply of many additional workforces. The wages will decline and workers and the countries will be burdened with many disguise and unemployed youths and their productivity will be wasted. Thus, the total prosperity of the world will decline. Then the question of equity and human rights arise with the liberalization of mode 4. In fact, any restriction to the liberalization of labour will make international human rights and multilateral trade regime mutually conflicting (Bravo, 2009).

In an inter-dependent globalized world, the mindset of the members of WTO should change from competition to cooperation and from unilateralism to pragmatic multilateralism with a view to promoting the economic growth of all trading partners with special focus on the development of developing and the least developed countries as a matter of equity. Both developed and developing countries can mutually be benefitted to a great extent through liberalizing mode 4: Movement of Natural Persons, especially, paving the way for easy and unrestricted access of the semi-skilled and un-skilled workers of developing countries to the relevant service sectors of developed countries.

GATS will have to go a long way to make the economic interests of both developed and developing countries in trade in services mutually beneficial and supportive through restructuring its provisions towards more functional and rational with emphasis on equity as well as binding on member States.

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