

Migration under World Trade Organization

Is this a Correct Insertion?

Srutee Badu

O.P. Jindal Global University
Sonapat, Haryana, India

ABSTRACT: Migration is taken up as an international agenda and given recognition under article 1 of GATS 1995. The history of human existence was based on this particular idea and there was a time because of industrialization, there were measures taken to increase migration. However, the preceding phase saw regulations and restrictions being imposed as this created a burden on the economy of the countries. The General Agreement of Trade and Tariff was set up by WTO for the smooth functioning of trade. However, this paper argues that the issue of migration is not limited to the economic opportunities, rather it can be based on a number of events like natural calamities, war, better quality of life, higher income. Therefore, the question comes down to whether WTO is the right organization who can regulate laws relating to international migration?

The Mode 4 application is based on the same principle of MFN and each country has to commit their service sector through schedule of commitments. So, in reality the countries do not open certain service sector and use methods like VISA rejection without any valid reasons. Also Mode 4 is tilt towards high-skilled educationalist and not the labour force. The purpose of this paper is to show that WTO has expanded and exceeded its power regarding this particular issue. The reasons behind this is the hoax idea of development and the power play that is still persistent in the world through international organizations. The scope for negotiations and creating a different platform of migration would definitely help.

I. INTRODUCTION

The topic of international migration has been a topic of discussion but also this is an area where the international negotiations have always failed. ‘However, worldwide migrants have still continued to grow reaching 258 million in 2017, up from 248 million in 2015, 220 million in 2010, 191 million in 2005 and 173 million in 2000.’¹ This clearly indicates the importance of further study in this topic. The International Conference on Emigration and Immigration, held in Rome in 1924² defined an “emigrant” as a person who leaves his country in search of employment, or to accompany or join with his consort, who have already emigrated for the same purpose, or one who returns in the same conditions to the country which he has already entered as an immigrant on previous occasion. Then the International Conference of Migration Statisticians held in Geneva in 1932³ expressed the idea as when the removal is for one year or more the migration should be regarded as permanent and when the removal is less than a year the migration should be regarded as temporary. ‘The definition of migrants is basically the category of persons moving across international boundaries or, in

¹ International Migration Report 2017, Department of Economic and Social Affairs, Trends in International Migration Stock: The 2017 Revision, United Nations, New York 2017

² International Labour Office, Statistics of Migration: Definitions, Methods, Classifications, Studies and Reports, Series N (Statistics), no.18, Geneva, 1932,p. 22

³ “Early Warning of Disastrous Population Movement”, International Migration Review, 20(2), 1986

other words, of international travelers.’⁴ All of the above description gives an overview of immigration as something related to the economics of trade. However, this paper argues that the issue of immigration is not limited to the economic conditions of humans but can also be affected by other factors.

Here, WTO (World Trade Organization) has included the movement of persons under the article 1 of GATS (General Agreement on Trade in Services) 1995 but neutralizing the issue towards economic factors is very problematic. The question then comes to ‘whether including human migration under WTO, whose motive is to promote trade and commerce, is the correct form of analysis or not.’

II. HISTORY:

The international migration dates back to as long as the formation of human race, where the nomads used to migrate in search of food and environment. There was a time when there was a need for workers because of which measures were taken to increase migrations. ‘However, the opposite trend can be seen today with the immigration control being the rule rather than the exception.’⁵ The Uruguay Round happened from 1986 to 1994 which gave rise to WTO and the commitments scheduled under Mode 4 were divided into two categories. This includes intra company transfers as ‘essential personnel’ and the business visitors who are general short term in their visits and not employed in the host country. Then there was a negotiating group on Movement of Natural Persons which was concluded in the year 28 July, 1995 which supervised bilateral negotiations on Mode 4. ‘The outcome from this negotiating group was the six member (Australia, Canada, European Community and its members, India, Norway, Switzerland) who improved their commitments on the movement of natural person. The results of this negotiation were adding of additional categories of service suppliers and independent foreign personals in business sectors, extension of their permitted duration of the stay.’⁶ After an unsatisfactory quality of Mode 4 improvements, a fresh input was given by Hong Kong Ministerial Conference of December 2005. The new and improved commitments focused on better commitments on persons linked with commercial presence, reduction/elimination of the economic needs test, extended permitted duration of stay.⁷ On March 2006, a plurilateral Mode 4 process was launched which focused on better commitments for categories of persons whose movements are not linked to commercial establishment abroad. But presently this format is exhausted. The history shows a failure of the quality of negotiations that has happened internationally and also the unlimited power that is given to the WTO in its functioning.

⁴ Problems of Migration Statistics, Population Studies, no. 5, United Nations Department of Social Affairs, Lake Success, New York, November 1949

⁵ Immigration History and the Future of International migration, Goran Rystad, The International Migration Review, Vol. 26, no.4 (Winter, 1992), pp.1168-1199, Sage Publications, Inc. on behalf of the Center of Migration Studies of New York, Inc.

⁶ OECD (2002), “Service Providers on the Move: the Economic Impact of Mode 4”, Working Party of the Trade Committee, TD/TC/WP(2002)12/FINAL, Paris, 19 March, 2003

⁷ Movement of natural persons, Symposium on Mode 4 of the GATS – Taking Stock and Moving Forward, 22-23 September 2008

III. MIGRATION ISSUE:

There is no doubt that the barriers under the rule of migrations are much higher than the rules of trading. “Since the 1960s the worldwide ratio of immigrants to population has increased only modestly while the ratio of imports to GDP has doubled.”⁸ There are many reasons behind this particular difference. Immigrants are seen as a global threat in the world because they are a potential burden in the welfare functioning of the government. Along with this because of the globalization in the recent years, there are more number of unskilled migrants, which is already creating a migration pressure on the countries⁹. The reasons of migration also vary as it is not limited to the economic causes but also includes political migration (war or public prosecution), social migration (better quality of life), environmental causes (natural disaster) etc. “According to Charles Tilly, there are three factors for which the issue of migration exist, (i) the changing geographic distribution of employment opportunities, (ii). Demographic imbalances, alterations of regional differentials in natural increase, (iii). The actions and policies of nation state i.e. making war expelling or relocating specific ethnic groups, controlling migration.”¹⁰ This clearly shows that restricting the immigration issue only to the economic value is not the correct analogy.

The question then comes to whether WTO is the right organization who can regulate the laws relating to international migration?

IV. WORKING OF MODE 4:

Under Article 1 of the GATS, for the purposes of this Agreement, trade in services is defined as the supply of a service:

- (a) from the territory of one Member into the territory of any other Member;
- (b) in the territory of one Member to the service consumer of any other Member;
- (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
- (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

The mode 4 is defined as the movement of natural person from a territory to that of another member. Under the GATS and the annex on Temporary Movement of Natural Persons (MONP), only the temporary movement is

⁸ According to the UN's figures, the share of the world's population that is foreign-born increased from 2.2% in 1965 to 2.8% in 2000. However, much of this increase is accounted for by the re-drawing of national boundaries as a result of the breakup of the Soviet Union (Hatton and Williamson, 2000).

⁹ Timothy J. Hatton, Should we have a WTO for international migration?, *Economic Policy*, Vol.22, No.50 (April, 2007), Center for Economic Policy Research

¹⁰ *International Migration and the Western World: Past, Present and Future*, “International Migration, Vol. 16, Bohning, W.R., 1978

liberalized without even defining the duration of the stay. The working of this particular clause starts with each member of WTO entering into each of the four different modes of service supply defined in article I of GATS. Its called “schedule of commitments”. It requires that the commitments can be made for individual service sectors, which are specific commitments or across the board for all sectors, which are horizontal commitments. If a member decides to modify this, it must compensate on a MFN basis. Under article XVI of GATS, market access by a member shall be given treatment which is no less favorable than that provided under the schedule. However, the market access commitment can be conditioned on authorization requirements. ‘WTO members under article XIX and XX of GATS are required to liberalize access to their services market but in reality they do not open certain service sectors or limit the same.’¹¹ Also the labour receiving countries use this to protect their domestic workforce. ‘The existing Mode 4 commitments are tilted towards the high-skilled persons.’¹² The significance of Mode 4 commitments are diminished due to the unfair practices, where there are almost no commitments for the low-skilled personnel.

V. ARGUMENTS ADVANCED:

- **“Migration is driven by absolute advantage rather than comparative advantage”:**

The concept of absolute advantage was developed by Adam Smith where one country would have an absolute advantage over the other if it can produce more amount of goods than other countries using same amount of resources. The concept of comparative advantage articulated by David Ricardo in Principles of Political Economy and Taxation (1817), is the ability of a party to produce a particular good or service at a lower marginal and opportunity cost over another. Therefore, migration is more one way than trade as under trading system both the parties get benefited. Also, here is a huge economic gap between the countries in the world and because of which this difference of migration from trade will exist. ‘Therefore the agreement based on reciprocity will be very hard to reach.’¹³ There are many proposed theories through which reciprocity can be achieved under Migration policies. The first being developing regional agreements that involve cooperation between the countries. The historical evidence of such agreements however were not successful enough for implementation. Though in some cases where the development gaps between the countries are small, there has been some progress like The Economic Community of West African States (ECOWAS) and The Common Market for Eastern and Southern Africa (COMESA) have agreed on free movement.¹⁴ But the question again revolves around why will a developed country make an agreement with a developing or a poor country for the

¹¹ Allison M.Young, “Where Next for Labor Mobility under GATS?.,in GATS 2000, NEW DIRECTION IN SERVICE TRADE LIBERALIZATION

¹² WTO Council for Trade in Services, Presence of Natural Persons (Mode 4), S/C/W/75 (8 Dec.1998), Table 9

¹³ Timothy J.Hatton, Trade Policy and Migration Policy: Why the Difference?, University of Essex and Australian National University, March 2006

¹⁴ UN,2004,p.194

ease of migration. ‘A good illustration is of Mexico and United States where the North American Free Trade Agreement(NAFTA) was formed but could not embrace the free migration because Mexico is poorer than United States’¹⁵. The second proposal is about bargaining through the linkage of migration issue with that of some other issue like Trade. The idea is already present through the working of Mode 4 but the problem with mode 4 working is that it is not based on reciprocity. For example there is this proposal about ‘exchanging more open immigration policies in developed countries through environmental controls in developing countries.’¹⁶ But this was also a failure as the burden of more environmental regulations are always imposed on developing countries which is seen as a barrier to their development.

- **Migration is Caused Due to Development:**

One of the most important critique that is given relates to the hoax about development. “Development is actually an international project which is secured by a promise that one day everyone will join the status of elite.”¹⁷ According to Sundhya Pahuja the idea of state is actually a projection of statehood and the hierarchy in the world is maintained through the process of development. In today’s world the technical means of actualizing state is done through enforcement of a border, requiring VISA, issuing passport etc. The economic gap between the countries in the world will always remain and “if the poorest countries’ economies become larger and more complex, the rates of immigration tend to rise and not fall”.¹⁸ The main idea behind this argument is that every country’s aim is to achieve the maximum level of development but the gap in the economies will always prevail. For example, ‘the investment in education of the youth comes with the requirement of the return, where they enter into the labour force with higher economic aspirations (U.S student VISA requires the applicants to go through a higher school education and also qualification in terms of exams like GMAT).’¹⁹ These increases the standard of competition and the urge to have better education, ultimately leading to a reason for migration.

An illustration of a Malian man’s decision on whether to invest in migration or not- ‘If he stays at home and work, then he can earn US\$1000, and if he spends US\$700 to migrate to Europe, then he can earn up to US\$1500, with a clear profit of US\$1400. So even if the development index of Mali does extreme well still it would never reach nearer to what he can earn in Europe.’²⁰ This example gives a clear idea about the idea

¹⁵ NAFTA was formed to reduce the pressure of illegal migration from Mexico to United States on the criteria that there is more possibility of trade between the countries and trade can substitute the migration.

¹⁶ Lodefalk and Whalley (2002), Survey of proposals for a World Environment Organization

¹⁷ Sundhya Pahuja, *Laws of Encounter: A Jurisdictional Account of International Law*, University of Melbourne, sept 2013

¹⁸ Hein de Haas(2007), “Turning the Tide? Why Development will not stop Migration”, *Development and change*,38(5)

¹⁹ Thu Hien Dao, Frederic Docquier, Christopher Parsons and Giovanni Peri(2016), *Migration and Development : Dissecting the Anatomy of the Mobility Transition*, IZA Institute of Labor Economics.

²⁰ Michael A.Clemens, *Migration is a Form of Development: The need for Innovation to Regulate Migration for Mutual Benefit*, Technical Paper no.2017/8 Population Division, United Nations, Department of Economic and Social Affairs

behind this argument. Therefore, it is evident from the above that ‘*development causes migration*’²¹. So, migration will happen and increase with the increase in the demand for development in the world.

- **Application of WTO is limited:**

The Preamble of the WTO agreement essentially talks about the objectives of the agreement which was mostly taken from GATT. “ It describes the relation in the field of trade and economics which should be conducted with a view to raise standard of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of resources of world and expanding the production and exchange of goods.”²² This clearly shows the intention behind the agreement which is the enhancing and smooth flow of trading facilities in the world. Therefore, Mode 4 of the GATS agreement is not an agreement of migration per se and the application is also very limited. The working of the mode 4 is limited only to the temporary movement of migrants and not to the permanent residents. “Also, neither the text nor the Annex on Temporary movement of Natural persons(MONP) defines the duration of stay”²³. Adding to this the liberalization achieved through WTO is also very low and the exact mode 4 flows at a very less percent of 5% in the world²⁴

Another very important topic of discussion is about the restricted policies and economic needs of the countries which they implement under mode 4. One that is heavily criticised is the economic necessity test(ENTs). This test focuses on the case-by-case domestic labour market needs with relations to individual’s skill. Because of this test, the application for immigration is limited only to the skilled labour and the unskilled workforce are left without any laws. ‘This along with the labour market test should be banned as it is inconsistent with the spirit of WTO.’²⁵ Also these requirements are kind of border measures that are trying to protect the domestic workforce and also a violation of MFN principle. The developed countries do not open certain sectors where they can protect the domestic workforce. This create a huge gap because the developing countries have an obligation to open up their sectors where they already have a huge low skilled labour force. Therefore, the working of Mode 4 is not suitable for the functioning of migration issue.

- **Exceeding the power of WTO:**

Historical evidence shows that WTO has been one of the most successfully implemented agreement of international organization. It has a lot of weightage wherein every member country abides by its decision and

²¹ *ibid*

²² Agreement establishing the WTO, The WTO Agreements Series, https://www.wto.org/english/res_e/booksp_e/agrmtseries1_wto_e.pdf

²³ WTO Document S/L/92, Scheduling Guidelines of 28 March 2001, para.34

²⁴ Magdeleine, Joscelyn and Maurer, Andreas, ‘Measuring GATS Mode 4 Trade Flows’, WTO staff working Paper ERSD-2008-05

²⁵ Mark Hatcher, “Mode 4 Trade- The protagonists’ View,” Paper presented at the Joint WTO-World Bank Symposium on Movement of Persons (Mode 4) under GATS, April 2002

follow its rules. But there the recent years have shown that WTO along with regulating trade and commerce has also venture itself into other fields like environment, migration etc. This has given the World Trade Organization immense power in its functioning.

One of the important critique that lawyers and authors of intentional law have agreed upon is that the functioning of the WTO is not as transparent as it is portrayed. They make certain regulations that are in favour of the developed countries like United States. The best reason for these regulations are the interest of the multinational corporations, who defend their part. According World Investment Report 1998, the Multinational Corporations(TNCs) control 70% of world trade and 80% of foreign investment²⁶. ‘The world leaders are funded by these organizations and they collectively develop strategies that are communicated to the officials.’²⁷ The best examples are “Nestle’ board members are also registry of WTO dispute panel members, the European Roundtable of Industrialists has former GATT Director-General Peter Sutherland as chair of its group on foreign economic relations, also US and EU corporations were behind important new agreements in Uruguay Round of trade talks so that they can actively influence their countries’ stances at WTO.”²⁸. Therefore, this shows how the exceeding scope of international organizations is a strategy to protect the hierarchy system that was present historically. It is just that the form of hierarchy i.e. capitalism which has changed but the concept still remains. ‘The new theory is that all the elites across the world dominate over the other lower class which is also called as Maxist power relation.’²⁹ The reason behind WTO’s exceeding power in the field of migration is about the power play too.

Percentage of governments aiming to restrict immigration (Government Immigration Policies) Table 1³⁰

YEAR	1976	1986	1996	2001
All Countries	7	20	40	40
More Developed countries	18	38	60	44
Less Developed	3	15	34	39

²⁶ World Investment Report 1998, UNCTAD (United Nations, New York and Geneva, 1998)

²⁷ More power to the World Trade Organization? The international trade controversy, November 1999

²⁸ Towards a World Transnationals’ Organisation?’ by Myriam Vander Stichele, WTO Booklet Series, vol 3 (Transnational Institute, Amsterdam, 1998) and ‘The WTO Millennium Bug: TNC Control over Global Trade Politics’, Corporate Europe Observer, no 4—special WTO edition (July 1999)

²⁹ David P.Fidler, A kinder, gentler system or capitulations? International law, structural adjustment policies, and the standard of liberal, globalized civilization, Indiana University Maurer School of Law, Article by Maurer Faculty, h p://www.repository.law.indiana.edu/facpub/598

³⁰ United Nations (2002), p. 18

Countries				
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The table above shows that how the immigration restriction among the governments have increased in the past years. There was a time when labour was a scarce commodity and developed countries in the world encouraged a work force along with residents to cultivate the untouched areas. Similarly, in the industries there was a need for more labours because machines were not capable enough to work on their own. But today the development in every field of the world is reducing the need for human manual labour and the same countries that once craved for work force and have earned huge finances from these, portrays migration issue as a problem of the world. With the coming of globalization and use of technology, the multinational corporations realized that they are in no more need of huge labour force (both skilled and unskilled). Therefore, they started viewing immigration as a world problem and included it under the WTO regime, so that they can regulate the same.

VI. CONCLUSION:

The idea behind this paper is to identify the problem in generalizing the migration issue under WTO. The motive behind the formation of World Trade Organization is to facilitate a smooth trade flow throughout the world, whereas migration issue is not limited to the economic needs of human. The problem with the idea of migration is that the immigrants are seen as a threat to the world. WTO includes the movement of person from one territory to another under Mode 4 of article 1 of GATS. But under mode 4 only the temporary movement of workers is liberalized without even defining the duration of the stay. Also the market access commitments given under the 'schedule of commitments' can be conditioned and the members (especially the developed countries) do not open certain service sectors or limit others. This is also used by the countries for the protection of their domestic workforce and the existing commitments favour the high-skilled individuals.

WTO and other international organizations have not specifically agreed upon one single definition of migration. The only description given is under Mode 4 of GATS. Adding to this also the negotiations at the international forums including the Hong Kong Ministerial Conference of Dec 2005, a plurilateral model of mode 4 in march 2006, have all failed. The migration issue is different from that of trade issues and the main reason behind this difference is that, migration is based on the principle of absolute advantage whereas trade is based on the principle of comparative advantage. Behind this difference is the huge economic gap which will always prevail. Another important reason is the lack of reciprocity, which the trade laws can easily achieve. Therefore, the linkage of migration issue with that of trade may not be a good idea. Another aspect discussed in this paper is that 'development causes migration' because the more the idea of development will flow in the world, people will be attracted to migrate in search of better quality of life. But in reality the whole idea of development is a hoax. Along with this also the idea of development and statehood are used to maintain the hierarchy in the

world. The third argument put forward in this paper is about the application of WTO. There is no doubt that WTO is not the agreement for migration per se and its application is also very limited. But still its article is used for the regulation of immigration worldwide. Through this practice of using Mode 4, there are certain tests like the economic necessity tests, labour market tests which are implemented. But such tests are always criticized for being inconsistent with the spirit of WTO. The reason behind this argument is that migration is not limited to economic needs of people.

Above all of these arguments, there is a critic of WTO which tells that the power of WTO or any other international organization has exceeded immensely in the recent past. There was a time when labour in the world was a scare commodity and the world encouraged work force. There was this time when the humans were needed for the functioning of the machines. But due to the globalization and the advancement of technology, the need for workforce was reduced drastically. It was a strategy of international organization who started portraying the migration issue as a threat to the world. This became possible through the power play that is still persistent in the world through these international organizations. According to the reports, the multinational corporations control 70% of world trade, who are also behind the funding of world leaders. These leaders in return develop strategies to protect the hierarchy in the world. Therefore, including the regulation of migration under WTO, is not the correct form of handling the issue. There is a greater scope for negotiations in this field which should happen before coming to any conclusion.