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India Requests WTO Consultations With U.S. Over Visa Policy, Citing GATS Violations

Escalating a longstanding complaint, India has formally requested consultations with the United States at the World Trade Organization over certain visa policies it alleges violate U.S. obligations under the General Agreement on Trade in Services (GATS).

In its March 3 request for consultations, India singled out U.S. measures that imposed increased fees on certain applications for L-1 and H-1B non-immigrant temporary working visas as well as measures relating to quota commitments for H-1B visas, according to Geneva sources.

H-1B visas are for highly skilled workers from foreign countries that want to work in the U.S. L-1 visas allow companies to transfer employees to the U.S. to work for a parent branch, affiliate or subsidiary.

India's complaint appears to target Sections 411 (a) and (b) of the 2016 omnibus funding bill that President Obama signed into law in December. Those sections require hikes in H-1B and L-1 visa application and renewal fees for applicants who will work for companies that employ 50 or more persons and in which over half of those workers are H-1B or L-1 visa holders. The H-1B fee increase is \$4,000 and the L-1 fee increase is \$4,500 -- more than doubling the previous fees. Those higher fees will be in place through September 2025.

In a Dec. 29, 2015 press release, the Confederation of Indian Industry (CII) described the limited application of the new fee hikes as “highly discriminatory and punitive” and “specifically geared towards India and Indian-centric technology companies.” The group also said “visa fees should be applied in a non-discriminatory, non-protectionist manner to all companies that use the visa programs.” Even supporters of the fee hikes argue they affect Indian firms more than any other companies.

In its consultation request, India alleged the U.S. visa measures violated a slew of GATS obligations, but did not spell out its legal arguments for why that is the case.

Among the violations India claimed is that the visa measures violated U.S. market access commitments under its GATS schedule relating to Mode 4, which is the movement of natural persons. That is one of the four modes of service delivery. The GATS rules on market access are contained in Article XVI.

The U.S. committed in its GATS schedule to allow entry of up to 65,000 persons annually under the H-1B visa program and entry for an unlimited number of qualifying L-1 visa holders.

A June 2010 study commissioned by the **National Foundation for American Policy (NFAP)** argued that high visa fees imposed without reasonable justification could violate Mode 4 market access commitments by diminishing the ability of services to be provided through the presence of natural persons.

India also alleged that the visa measures violated commitments the U.S. made on national treatment in its GATS schedule relating to Mode 4 for sectors including computer and related services. The GATS rules on national treatment are contained Article XVII.

A spokesman for the Office of the U.S. Trade Representative said that the U.S. is looking forward to discussing the H-1B visa program with India, but that its policies, including the December fee increase, are in line with WTO rules.

“We are confident that the United States’ visa program, which was recently updated on a bipartisan basis by Congress, is fully consistent with our WTO obligations,” the spokesman said.

India in 2012 [considered launching a WTO case](#) against the U.S. over fee hikes for H-1B and L-1 visas attached to a border security appropriations bill that Congress passed in August 2010. That bill also established that the fees increases only applied to companies with over 50 workers of whom 50 percent were H-1B or L-1 visa holders.

At that time, sources said India believed that these criteria, while not explicitly discriminatory against Indian firms, have that effect in practice. This has been a longstanding issue, and one that has been raised repeatedly by CII and U.S. groups like the U.S. Chamber of Commerce.

Under WTO rules, the U.S. must respond to the consultation request within 10 days and consultations must occur within 30 days of receipt, meaning consultations must kick off by April 2. If the dispute is not resolved within 60 days after the receipt of the consultation request, the complaining party may request that the Dispute Settlement Body establish a panel to review the case. That deadline is May 2.

In addition to the market access and national treatment obligations, India claimed the U.S. violated five other GATS provisions, according to Geneva sources. These include GATS Article VI, which requires that “all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.”

India also alleged a violation of paragraphs 3 and 4 of the GATS Mode 4 Annex. Paragraph 3 states that members may schedule specific commitments on Mode 4, while paragraph 4 provides that the GATS does not prevent WTO members from regulating entry or temporary stay of persons as long as those measures do not nullify or impair the benefits accruing to other members.

In addition, India said the U.S. violated Article XX, which specifies how parties schedule their specific commitments; Article III.3, which obligates members to notify the Council for Trade in Services when they make domestic changes which significantly affect trade in services; and

Article IV.1, which generally seeks to facilitate developing country participation in global services trade.

The NFAP study argued that raising visa fees could potentially violate GATS Article VI if they were proven to be applied in a manner that is not reasonable, objective or impartial.

With regard to paragraph 4 of the Mode 4 annex, the study suggested that prohibitively high visa fees could “nullify or impair” benefits awarded to WTO members under the terms of sector-specific commitments.