#### Inside U.S. Trade

### March 10, 2016

# India Takes First Step Toward Challenging U.S. Visa Policy At WTO

Escalating a longstanding complaint over U.S. visa policies, India has requested formal World Trade Organization consultations over certain visa fees and numerical limits the United States imposes in a way that overwhelmingly applies to U.S.-based companies employing highly skilled Indian workers.

The Indian consultation request charges that the fees that have been increased twice over the past five years violate U.S. commitments under the General Agreement on Trade in Services (GATS), particularly with respect to market access and national treatment in GATS articles XVI and XVII respectively.

Cato Institute analyst Simon Lester said India's argument on national treatment will likely boil down to the fact U.S.-based companies with a majority of their employees being U.S. citizens would never be subject to the fees, and that under no circumstances could employing U.S. nationals create the conditions for a foreign company to pay the visa fees.

Whether India can prevail on its claim that the fees violate U.S. market access commitments depends on whether it can prove that economically, companies would be unwilling or unable to afford those visas, said Ted Alden, a senior fellow at the Council on Foreign Relations who specializes in trade, immigration and visa issues.

His assessment was backed by Stuart Anderson, executive director for the <u>National Foundation</u> for American Policy (NFAP) as well as Lester. In its March 3 request for consultations, India alleged the U.S. visa measures violated a slew of GATS obligations, but did not spell out its legal arguments backing up its claim.

India singled out U.S. measures that impose 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 its consultations request.

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 targets Sections 411 (a) and (b) of the 2016 omnibus funding bill that President Obama signed into law in December that increased certain visa fees beyond the level to which

they rose in 2010. 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 increased to \$4,000 and the L-1 fee increased to \$4,500 -- essentially doubling the 2010 fees. Those higher fees will be in place through September 2025.

India is also claiming that commitments made by the U.S. in its free trade agreements with Singapore and Chile to provide a certain number of H-1B visas to those countries violates the United States' commitment under GATS to annually provide 65,000 H-1Bs worldwide. However, the U.S. GATS schedule specifically states that it will offer "up to" 65,000 H-1B visas for persons annually on a worldwide basis. It also committed in its GATS schedule to allow entry for an unlimited number of qualifying L-1 visa holders.

Opponents and proponents of the fee hike both concede that the conditions required for companies to pay the fee increase in practice applies mostly to Indian-owned companies operating in the United States and entirely to companies where the majority of the H-1B and L-1 employees are Indian nationals.

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."

Critics of India's claim that the visa fees are a market access violation point to a 2010 statement by an executive at the Indian information technology company Infosys -- which has U.S. operations that meet the conditions for being subject to the disputed visa fees -- in the Hindu Business Line. He said that that the initial fee increase in 2010 would not have an impact on the company's bottom-line, and that the fees could double -- which occurred in the 2016 omnibus bill -- and still have no substantive impact on the company's profit margin.

One Senate aide also said that because Indian companies could still obtain H-1Bs despite the fee hikes, and that the fee hikes did not apply only Indian companies -- although only Indian companies meet the conditions for being subject to the cost increase -- the measures do not limit market access.

But a private-sector source expressed confidence that the fee hikes would negatively impact the profits of Indian companies. That source said Indian investments in the U.S. were "built on an understanding of an open business and investment environment," and that the fee hikes may throw caution to the wind for Indian businesses.

A June 2010 study by commissioned by 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.

On India's national treatment claims, the Senate aide said that some companies owned by U.S.-nationals are hit with the visa fee hike as well, because they employ enough H-1B or L-1 holders to reach the threshold. The aide said the fact that a U.S.-owned company like Cognizant Technology Solutions consistently applies for and obtains a high number of H-1Bs and now must pay the same increased fee that applies to Indian companies under the same conditions proves the fee hikes are not discriminatory.

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 when the initial request is received, 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 a dispute settlement panel. That deadline is May 2.

Proponents and critics of the visa fee did agree that if the U.S. were faulted by the WTO, a proposal to either remove the visa fee hike or increase the amount of H-1B's awarded annually would be politically dead on arrival in Congress. But due to the lack of disputes on Mode 4 and GATS, sources generally were hesitant to predict overall how a WTO panel would resolve the dispute.

**India also 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 GATS 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 trade vis-a-vis GATS.

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

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## India Charges U.S. H-1B Visa Commitments Made In FTAs Violate GATS

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In its consultation request at the World Trade Organization sent last week, India is alleging that commitments made by the U.S. to provide a certain number of H-1B visas to Chile and Singapore under their respective free trade agreements violates U.S. obligations under the General Agreement on Trade in Services (GATS), including its pledge to provide 65,000 H-1Bs annually to WTO members.

The U.S. agreed to provide Chile up to 1,400 H-1Bs annually under their bilateral FTA, while the U.S. committed to provide Singapore 5,400 H-1Bs annually under its trade deal. The U.S. committed in its GATS schedule to allow entry of up to 65,000 persons annually under the H-1B visa program.

India argues that those FTA commitments "modified" the concessions made by the U.S. under GATS, ultimately undermining the U.S. pledge to annually provide 65,000 H-1Bs worldwide. India charges this move violated seven provision of the GATS, including U.S. commitments on market access, most-favored nation treatment and Article V:4, which requires that trade agreements shall not raise the overall level of barriers to trade in services to members outside the trade agreement compared to the level applicable prior to such an agreement.

But the U.S. has already argued in the WTO that its bilateral commitments to Chile and Singapore do not violate its GATS commitments. It did so in response to questions at the WTO Committee on Regional Trade Agreements in April 2005 and August 2005.

In both rounds of questioning, the U.S. said it "confirms that it continues to grant at least 65,000 visas under the referenced category to WTO Member nationals." One Senate aide following the India visa dispute said this offers a clear preview of what the basis for the United States' defense at the WTO will be.

That aide and Ted Alden, a senior fellow at the Council on Foreign Relations who specializes in trade, immigration and visa issues, were skeptical that India's arguments relating to numerical commitments would stand up to scrutiny at the WTO for three other reasons.

First, the numerical commitment made by the U.S. under its GATS Schedule of Specific Commitments sets 65,000 H-1Bs as a ceiling, not a floor for the amount of visas the U.S. is obligated to give out annually. The schedule says the U.S. must provide those visas for "up to 65,000 persons annually on a worldwide basis."

Second, even if that commitment was read to mean that the U.S. must provide "at least" 65,000 H-1Bs annually, the U.S. far exceeds that requirement on an annual basis. In FY 2015, the U.S.

approved 275,317 H-1B visa applications and renewals, according to a 2016 report published by the Department of Homeland Security and U.S. Customs and Immigration Services. In FY 2014, the U.S. approved 124,326 H-1B applications and 191,531 renewals, according to a 2015 report by those agencies.

Notably, 66 percent -- 82,263 out of 124,326 -- of new H-1B visas were awarded to Indian citizens in FY2014. China in that same year was provided the second largest percentage of new H-1B visas -- 11 percent, or 13,708.

Third, Chile and Singapore in FY2014 did not fill the H-1B quota allocated to them under their respective FTAs, according to those reports. This means India would have an extremely difficult time proving that those countries' allocations cut into the 65,000 H-1B quota, much less at the expense of India or any other country.

Alden and the Senate aide said this would make it difficult for India to prove the U.S. FTA commitments resulted in any harm to India in the context of what it was guaranteed by the United States under GATS.

But Simon Lester, a trade policy analyst at the Cato Institute, said India would not have to prove that the FTA commitments cut into the 65,000 H-1B visa quota; instead, India would only have to prove that those commitments had the potential to do so.

Lester also argued that even if the U.S. shows it provides India the vast majority of H-1Bs it offers annually, that may not undercut an argument by India that the U.S. is still not living up to its overall commitment to provide 65,000 H-1Bs globally.

Related to this potential argument, Lester said some WTO disputes involving commitments under the General Agreement on Tariffs and Trade have revolved around whether or not is acceptable for countries to carve up global quotas for goods and give allocations to specific countries. But overall, Lester was hesitant to predict whether these arguments would hold up in front of a dispute settlement panel.

Additionally, India is arguing that the visas promised to Chile and Singapore -- as well as increased fees for H-1B visas -- violated U.S. commitments under GATS Articles XVI, XX, III:3, IV:1 and paragraphs 3 and 4 of the GATS Mode 4 Annex.