Lakshmi Kumaran & Sridharan attorneys

INTERNATIONAL TRADE

amicus

An e-newsletter from Lakshmikumaran & Sridharan, New Delhi, India

December, 2012 / Issue–19

Contents

December
2012

Article

Higher US visa fees for companies hiring 50% foreign labour: Can the measure withstand WTO scrutiny?

By **Sagnik Sinha**

Introduction

If press reports are any indication, the decision of the Government of India to challenge at the WTO, the decision of the United States to increase visa fees for specified type of companies hiring more than 50% of foreign labor is gaining traction[1]. The decision is expected to affect Indian technology companies like Infosys, Wipro, Tata Consultancy Services and Mahindra Satyam[2]. The article presents a short analysis on whether the US measure will be able to withstand scrutiny before a WTO panel.

US Rules and legal basis for WTO challenge

The US provision which triggers possible liability is contained in the *Emergency Border Security Supplemental Appropriations Act, 2010.* Title IV [Section 402(a)] increases the L1 and H1-b visa fee by 2250 USD and 2000 USD respectively for companies which employ 50 or more employees in the US if more than 50% of the company's employees are on L or H-1b visa[3]. While the law itself does not specifically target Indian companies, Indian technology companies which send Indian citizens to the United States to work short term on client sites will be the worst affected.

Under the WTO system, a member (India) is permitted to challenge the laws and regulations of a fellow member (United States) if the measure contravenes that country's obligations under the WTO Agreements. One such agreement is the General Agreement on Trade & Services (GATS).

A word on GATS and US obligations

GATS regulates four kinds of services. One such service is the service offered by Indian companies in the US through the presence of natural persons (employees of Indian companies) in the US[4]. The US has undertaken an obligation under its Schedule of Concessions to provide market access to up to 65,000 persons annually on a worldwide basis in occupations set out in 8 US Code 1101 (a) (15) (H) (i)(b)[5]. Such occupation covers persons engaged in a specialty occupation who meet some educational requirements when the work undertaken in the US is one which requires application of highly specialized knowledge[6]. Indian engineers sent to the US seem to meet this criterion. The relevant GATS provisions which trigger liability are Articles XVI and XX of GATS. In the present article, the analysis is restricted to these provisions though it is possible that other

1 See India may move WTO against US visa fee hike by Oct end, Times of India, September 23, 2012 available at http://timesofindia.indiatimes.com/business/india-business/india-may-move-wto-against-us-visa-fee-hike-by-oct-end/articleshow/16518025.cms.

2 id

3 see Emergency Border Security Supplemental Appropriations Act, 2010, H.R. 6080, 111th Congress available at http://www.gpo.gov/fdsys/pkg/plaw-111publ230/html/plaw-111publ230.htm; also see Summary of the Bill available at http://thomas.loc.gov/cgi-bin/bdquery/z?d111:hr05875:@@@l&summ2=m&

4 see WTO General Agreement on Trade in Services (GATS), Article i:2(d)

5 see WTO US Schedule of Concession (Services) available at http://tsdb.wto.org/simplesearch.aspx (last visited November 28, 2012)

6 Id

provisions may also be breached. It is also unlikely that any of the Exceptions will save the US measure from a successful WTO challenge.

Likely issues that a Panel may confront

Under Article XVI, the US cannot provide less favorable treatment than that set out in its Schedule. Furthermore, under Article XVI (2) (d), the US is prohibited from maintaining *"limitations"* on the total number of natural persons that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service[7]. The limitation should be in the *"form"* of numerical quotas or the requirement of an economics need test. Therefore, the success of a WTO challenge will depend on the following:

(A) Whether the US measure is (a) a limitation and (b) the limitation is in the form of numerical quotas or requirement of an economic needs test?

(B) Whether the measure accords less favorable treatment than that specified in the US Schedule.

A. GATS, Article XVI(2)

It is relevant to bear in mind that the WTO Appellate Body in US-*Gambling* has stated, in the context of a similarly worded provision in Article XVI (a)[8] that the term "limitation...in the form of" would cover a limitation *in form or in effect*[9]. Though the Appellate Body included a caveat that the words "in the form of" should not be ignored or replaced by the words "that have the effect of", it maintained that the words "in the form of" must be read in conjunction with the words that precede them—*"limitations on the number of service suppliers"*—as well as the words that follow them, including the words *"numerical quotas"*[10]. The Appellate Body concluded that read in this way, it was clear that the thrust of sub-paragraph (a) was not on the *form of limitations, but on their numerical or quantitative, nature*[11].

Therefore, if the US measure imposes a limitation, which is in form or in effect a numerical quota, on entry of Indian software engineers who enter the US to offer their services, the measure could violate Article XVI (2) (d).

Further guidance is available in the 1993 Scheduling Guidelines which has been used by the Appellate Body in US-Gambling where the US was the Respondent . In all likelihood, this document will be used in future WTO cases also, at least when the US is a Respondent. The document provides the following illustration of what "limitation" under Article XVI (d) could mean:

"foreign labor should not exceed X percent and/ or wages XY percent of total"[13]

---

[7] See GATS, Article xvi(d) (*limitations* on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service *in the form of* numerical quotas or the requirement of an economic test)

[8] See GATS, Article xvi(2)(a) [*limitations* on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test]

[9] WTO Appellate Body Report in *United States - Measures Affecting The Cross Border Supply Of Gambling And Betting Services* WT/DS285/AB/R (7 April 2005), [AB, US-Gambling], para 230

[10] AB, US-*Gambling, para 232*

[11] Id

[12] *See AB, US-Gambling,* para 207. The appellate body noted after examination that the US intended to follow the 1993 scheduling guideline while outlining its market access commitments.

[13] *see Scheduling of initial commitments in trade in services: Explanatory Notes,* para 6, MTN/ GNS/W/164 (3 Sep. 1993) *available* at http://www.wto.org/gatt_docs/english/sulpdf/92140039.pdf; *also see Guidelines for the scheduling of specific commitments under the General Agreement on Trade in Services (GATS), para 12,* S/l/92, [adopted on March 23, 2001]

A question which is likely to come up is whether the term "quota" is restricted to absolute prohibitions or can extend to limitations which increase the cost of procuring foreign labour if they "exceed X percent" of the total labour force. The 50% cap is quite clearly a numerical quota in form and in effect. It is a *limitation in effect*, as the higher visa fee will limit the total number of natural persons Indian companies send to the US. Even if the WTO Panel takes a narrow view of the term, the measure could still contravene the provisions of Article XVI (1).

B. GATS, Article XVI (1) read with Article XX(1)

The provisions of Article XVI (1) may be read in conjunction with Article XX of GATS. Article XX(1) (a) provides that with respect to sectors where commitments are undertaken, each Schedule shall specify terms, limitations and conditions of market access. The application of a discriminatory fee qualifies as a condition and limitation on market access, for reason of which it should be specifically included in the Schedule of Concessions. No such concessions have been specified in the US Schedule. Therefore, a limitation in the form of high visa fees not otherwise specified in the schedule breaches US obligations under Article XVI(1).

C. Possible defences that the US could raise

The US may raise defences under either Article XIV or under paragraph 4 of the Annexure on *Movement of natural persons supplying services under the Agreement (Annex)*. The applicable defences under Article XIV will be applicable if the measure is necessary to maintain public order, protect human life or secure compliance with laws or regulations. WTO jurisprudence indicates that a measure is *necessary* if no other less trade restrictive alternative is available to meet the objectives of the member state. The stated objective itself seems to be protectionism and therefore not a legitimate end which may be pursued. Even otherwise, it may be difficult to establish that no other trade restrictive measure was available.

The Annex, para 4 permits a member to *regulate the entry or temporary stay of natural person, in its territory provided that such measures are not applied in a manner which nullifies or impairs the benefits accruing to any Member under the terms of a specific commitment.* The verb "regulate" is defined in the Oxford Dictionary to mean "control by means of rules and regulations". Since the US is regulating the behavior of Indian companies rather than natural persons, this exception may not apply. In any event, nullification and impairment of specific commitments excludes the application of this exception.

Conclusion

It seems that the Government of India may actually have a strong case to present before a WTO panel. Like in all WTO cases, the Government needs to balance the law, economics and politics of trade. The law, at least, is unlikely to be a hindrance.

[*The author is a Senior Associate, International Trade Practice, Lakshmikumaran & Sridharan, New Delhi*]

Trade Remedy News

Trade remedy actions by India

Anti-dumping actions by India

Product	Country	Notification No.	Date of Notification	Remarks
Ceftriaxone Sodium Sterile	China	50/2012-Cus. (ADD)	29-11-2012	ADD extended up to 28-11-2013 as sunset review has been initiated
Digital Offset Printing Plates	China	51/2012-Cus. (ADD)	3-12-2012	Definitive ADD imposed. Provisional levy was imposed in respect of imports from Japan also but present notification excludes Japan.
Solar Cells	China, Malaysia, Chinese Taipei and USA	14/5/2012-DGAD	23-11-2012	ADD investigation initiated
Sodium Hydroxide (Caustic Soda)	Saudi Arabia, Iran, Japan and USA	49/2012-Cus. (ADD)	26-11-2012	Anti-dumping duties re-imposed for a period of 5 years, pursuant to sunset review

Safeguard action by India

Product	Country	Notification No.	Date of Notification	Remarks
Dioctyl phthalate	All countries other than developing countries, except Malaysia	G S R D1-22011/13/2011/ Part A	16-11-2012	Definitive Safeguard duty recommended as follows: 1st Year: 15% 2nd Year: 10%

Trade remedy actions against India

Circular welded carbon-quality steel pipe from India, Oman and UAE – Negative injury finding by USITC: The United States International Trade Commission (USITtC) has held that US industry has not been materially injured or threatened with injury by imports of circular welded carbon quality steel pipes from India, Oman and UAE. As per News Release 12-116, dated 14-11-2012, anti-dumping duty or countervailing duty will not be imposed on such imports.

Synthetic silica gel from China and India - Brazil initiates anti-dumping investigation: Brazil has, on 26 October 2012, initiated an anti-dumping investigation against imports of synthetic silica gel from China and India. The product is classifiable under 2811.22.10 in MERCOSUR´s Harmonized Tariff System.

WTO News

WTO adopts ruling on electrical steel

WTO's Dispute Settlement Body, on 16th November 2012, adopted the Panel report as upheld by the Appellate Body and the report of the Appellate Body in DS414 pertaining to dispute over anti-dumping and countervailing duties imposed by China on grain oriented flat-rolled electric steel from USA. The Panel in the said dispute had concluded that China had acted inconsistently with respect to Article 11.3 of SCM Agreement, which requires an investigating authority to assess the accuracy and adequacy of the evidence in an application to determine whether it is sufficient to justify initiation. The Panel had also given the finding on violation of Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement by China inasmuch as it failed to require the applicants to submit adequate non-confidential summaries of the information. The Appellate Body had also upheld the Panel's finding with respect to inconsistencies in practices of China in applying Anti-Dumping Agreement and SCM provisions.

China requests consultations with EU, Greece and Italy on domestic content restrictions

China has, on 5th November, 2012 requested consultations with the European Union, Greece and Italy on certain measures which include domestic content restrictions affecting the renewable energy generation sector relating to the feed-in tariff programs of EU member States, Italy and Greece. China considers that the measures are violative of Articles I, III:1, III:4 and III:5 of the GATT 1994; Articles 3.1(b) and 3.2 of the SCM Agreement as well as Articles 2.1 and 2.2 of the TRIMs Agreement. Japan, Australia and Argentina have also requested to join the consultations.

Food security – Developing countries propose amendment to Agriculture Rules

India along with many developing countries has proposed amendment to the WTO's Agriculture Rules on public stockholding for food security purposes and for domestic food aid. As per the proposals, circulated in WTO on 13th November, if a developing country government purchases food for its stocks or for its domestic aid, at administered prices in order to support low-income, resource-poor producers, they should not have to count the same towards the aggregate measure of support they provide, which is capped for each country under the WTO rules. There is also a proposal that certain farm programs of developing countries should be exempt from the subsidies-ceiling. The proposals which were initially part of the Doha round of talks are being seen in some quarters as controversial in the absence of consensus on the definition of "low income, resource poor producers".

EU settles banana dispute with Latin American countries

The European Union and ten Latin American countries have put end to a dispute, pending for about 20 years, over the import tariffs on banana as imposed by the EU on imports from the specified countries. The mutually agreed solution was notified to the DSB on 8th November, 2012 and covers the Geneva Banana Agreement signed by the said countries in 2009. The measure will bring down the tariff from Euro 148/tonne to Euro 114/tonne by January, 2017. Earlier, the Panel and the Appellate Body of the DSB had found that the European Communities' banana import regime and the licensing procedures for the importation of bananas were inconsistent with the GATT 1994.

Brazil proposes rules to deal with currency fluctuations

Brazil has, on 5th of November, proposed that WTO Rules should include a system for dealing with currency misalignments. As per the proposal, WTO rules though contain safeguards against trade related distortions caused by exchange rate instability, practices and restrictions, but have no adequate instruments to

provide solutions to compensate for or redress such currency fluctuations that impair commitments. It states that while Agreement on Subsidies and Countervailing Measures (ASCM) does not offer clear guidance on how and whether WTO Members could use it to address the impact of exchange rate misalignments, the Anti Dumping Agreement (ADA) provides for countermeasures against individual producers who by themselves have no power to establish, manipulate or correct macroeconomic policy and the same is not designed to address the wide ranging impact and possible bilateral nature of the effects deriving from currency misalignments. As per latest reports, China, however has dismissed the proposal.

LDCs request for more time to comply with TRIPS provisions

The proposal put forth by Haiti to extend the deadline for Least Developed Countries (LDCs) to provide intellectual property rights protection was one of the highlights of the TRIPS Council meeting held last month. The deadline for an LDC to apply provisions other than Articles 3, 4 and 5 of the TRIPS agreement is set to expire on 1-7-2013 or the earlier date on which it no longer remains an LDC. This has been sought to be extended *'for as long as the WTO member remains a least developed country'*. Articles 3, 4 and 5 deal with National Treatment, Most Favoured Nation treatment and procedures provided in multilateral agreements concluded under the auspices of WIPO.

The proposal document mirrors the existing wording of the relevant Article 66. It states that the special economic, financial and administrative constraints and need for flexibility to create a viable technological base continue to be a relevant factor and that the situation of LDCs has not changed significantly since the last extension decision in 2005. The other relevant deadline is in respect of implementing the provisions of the agreement as per Sections 5 and 7 of Part II, on patents and protection of undisclosed information (data protection) in respect of pharmaceutical products. LDCs need not implement the same till 1-1-2016 as per the decision of the Council on 27-6-2002.

News Nuggets

EU suspends new carbon emission tax on airlines

European Union has temporarily suspended implementation of its new tax on airlines based on their carbon emissions. The suspension, which must be endorsed by the European Parliament and the European Council, will be effective for a period of one year which means that airlines would not be required to surrender their carbon credits for flights operating in 2012. As per the scheme, the airlines, moving into and out of the European Union, were required to surrender carbon credits in respect of their full journey, to the EU.

The move, as per the reports, is due to some positive steps in the International Civil Aviation Organisation's meeting earlier this month where it has been agreed to establish a high-level group to develop a global system to tackle airlines' carbon emissions by the time of its next general assembly in September 2013. The scheme, aimed to reduce environmental pollution, is seen in some quarters, as exercise of extra jurisdictional powers by the EU inasmuch as carbon emissions by the airlines while in the territory of another nation is to be counted towards the airlines obligations.

Earlier, India along with USA, China, Brazil, Russia and 25 other countries had opposed the EU's unilateral decision raising fears of global trade wars. The group has already chalked out number of retaliatory measures against the EU which included barring national airlines to participate in the EU's scheme, reviewing bilateral service and open skies agreements with European countries and also imposing similar levies on European airlines. Presently, while India and China have already

asked their airlines not to participate, US House of Representatives has only last month cleared the bill to protect US airlines from this new EU tax.

Canada and China FIPA

Canada and China concluded the Foreign Investment Promotion and Protection Agreement (FIPA). Canada has not yet ratified the treaty though the mandatory period of 21 days after tabling the agreement ended on first of November. Though there has been no parliamentary debate, the agreement has evoked a host of negative responses in Canada. While any investment protection agreement with clauses for Most Favoured Nation (MFN), National Treatment and governments submitting to international arbitration draws voices of concern, some unique clauses in the Canada-China FIPA have been centre of attention. For instance, the agreement states that public access to details of award, hearings and documents in an investor state dispute will be as decided by a disputing party. The agreement also carves out exception from MFN and national treatment in respect of establishing or expanding a free trade area or customs union pursuant to existing or future bilateral or multilateral agreement and procurement, subsidies and grants provided by a contracting party. The MFN clause will not be applicable to dispute resolution mechanisms in other international investment treaties and agreements.

Ratio Decidendi

Anti-dumping duty - Principle of proportionality to be followed for withdrawal of price undertaking

The European Court of Justice in its recent judgment has upheld the order of the General Court which had held that the appellant (Usha Martin) had failed to comply with its anti-dumping undertaking, first, by not providing quarterly reports of sales of the product concerned not covered by the undertaking and, secondly, by issuing undertaking invoices for products not covered by the undertaking. The appellant had earlier, pursuant to an ADD investigation, given an undertaking to the EU authorities that they would sell steel wire ropes and cables at prices fixed to eliminate injury to the EU's domestic industry. Appellant's challenge to the finding of the General Court, that the terms of the undertaking were not complied with, was rejected by the ECJ since the argument sought to review the finding of fact which was not within the ECJ's jurisdiction.

The ECJ, however, reversed the finding of the General Court that there was no need to quantify the magnitude of the breach and that any breach of the undertaking would automatically trigger withdrawal of acceptance of undertaking. It held that the Commission has discretion in determining whether, in accordance with the principle of proportionality, it is necessary to withdraw acceptance of the undertaking. It however, considering facts of the case, held there was no infringement of the principle of proportionality when the Commission withdrew acceptance of the said undertaking. [*Usha Martin Ltd. v. Council of the European Union* - Case C552/10 P, Order dated 22-11-2012].