Breaking the rules to prevent rule-breaking? The GATS and service mobility: drawing lines between genuine immigration control and protectionism

WTO law – GATS Mode 4 – immigration rules – US L-1 and H-1B visas – administrative obfuscation – GATS Mode 4 exemptions – Consultations DS503: US – Measures Concerning Non-Immigrant Visas

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Introduction

On the 3rd of March 2016, India filed a request for consultations with the United States (US) in relation to an increase in the fees for certain L-1 and H-1B categories of non-immigrant visas.[1] Additionally, the request addressed an alleged tightening of the quota scheduled in the US General Agreement on Trade in Services (GATS) commitment for H-1B visas.[2] To date, this dispute is still in the consultation phase. As such, this post will not cover any additional official information since the filing of the request early 2016. Nevertheless, the issue raised by India in response to a two-fold increase of these fees in two legislative steps (2010 and 2016) reveals various problematic issues related to the GATS rules in general, and specifically to Mode 4 commitments. Mode 4 commitments provide temporary mobility rights (entry and residence) for service providers from other World Trade Organization (WTO) Member States. These issues relate to uncertainty of the exact reading of GATS provisions, as well as to certain GATS exemptions for measures that are otherwise in conflict with the GATS.

While this issue is still under consultation and may never reach the Panel stage, the underlying issues will certainly remain. For instance, on the 23rd of October 2017, the US Citizenship and Immigration Services (USCIS) updated its policy guidance to 'apply the same level of scrutiny to both initial petitions and extension requests' for certain non-immigrant visa categories, including the H-1B visa category.[3] Naturally, such issues are not limited to US policy. The United Kingdom's (UK) Migration Advisory Board suggested a yearly charge of £1,000 for the skilled-worker entry route of the Points-Based System (Tier 2) to render the route more selective.[4]

The main issue, what is immigration policy?

The fee increase for visas directly affecting Mode 4 service suppliers is only one example in relation to a technical and complicated underlying question: how to draw the line between genuine immigration policy, which rightfully allows WTO Members to adopt measures which would otherwise contravene trade commitments, and administrative obfuscation, or even outright protectionism?[5] The actions of the US and the UK are sometimes accompanied by political rhetoric that points towards the latter. For instance, USCIS Director Cissna indicates:

'This updated guidance provides clear direction to help advance policies that protect the interests of US workers.'[6]

In relation to the UK, the idea since 2010, expressed during the election campaign of the Conservative party, was to reduce migration from the 'hundreds of thousands to the tens of thousands'.[7] Just to illustrate the difference between the idea of the GATS, trade liberalization and transparency, and the translation of this idea into the national legal order of, in this example the UK, the following statement accompanying the Points-Based System is exemplary:

'We are obliged to allow into the country to work a number of people as a result of a variety of international agreements.'[8]

To be clear, it is any WTO member's right to regulate and to introduce restrictive immigration policies. In relation to the extensive scrutiny of visa renewal by the US, I do not believe that this will be problematic from a GATS perspective. That is, if the initial scrutiny in itself does not lead to problems with the GATS, then renewal should be unproblematic as well. However, the GATS reduces this regulatory autonomy in relation to certain very specifically defined categories of service providers, or their employees. These reciprocal trade commitments are voluntarily offered and accepted by WTO Member States. Yet, various WTO Member States now face an interesting problem: they presumably like trade (though this seems to be shifting towards protectionism as well), but not when it impacts on immigration and 'access to the labour market' policies, as is the case with Mode 4.[9]

What happens in practice, is that various WTO Member States consistently tighten their immigration rules, including in relation to the Mode 4 service providers that are part of binding international commitments. The restriction of immigration control

usually is not specifically addressed at these categories. For instance, many EU (European Union) Member States such as Germany, the Netherlands and the UK have adopted measures restricting access in general, for non-EU citizens who have a previous criminal conviction.[10] However, without a specific exception adopted in the domestic policy for Mode 4 service suppliers falling within the scope of the GATS and the adopted commitments by the WTO Member State in question, such additional restrictions may indeed breach such commitments. The question now is, when such measures, adopted after the inscription of Mode 4 commitments as a result of the WTO Uruguay Round, indeed become too restrictive and breach these GATS commitments.[11]

A breach of GATS commitments?

For those of you now expecting an answer, I have to disappoint you. This matter is rather complex, requiring interpretation of GATS provisions and commitments, and there is hardly any WTO case law guiding the matter. This is why I, and probably others working on these issues, highly anticipate a potential Panel report in the India – US dispute.

While I am aware that this topic is not just one-sided, and that the raising of the fees involved is arguably to prevent abuse of the H-1B visa category, to get cheap foreign labour into the US (whereas this category relates to highly trained workers), this post does not concern these issues. The GATS certainly does not prevent measures to ensure wage parity, nor measures to enforce labour laws. In fact, the WTO approach is liberalization in the form of non-discrimination. What this blog post addresses are the legal aspects involved from a GATS perspective. Phrased differently, if indeed the US H-1B visa category is used in contravention to the commitments, leading to entry of those not fulfilling its conditions, the solution is not to raise the fee for visas (if indeed this is found to breach the commitments), in order to fund the administration to target such abuse, as is now claimed by the US.

In essence, WTO members have promised access to their market for GATS Mode 4 service suppliers, under the conditions specified in their commitments. As Mode 4 requires mobility, these commitments inherently entail access to, and residence on, the territory of the WTO Member State in question. As an example, the US has indicated in its commitment to allow 'up to 65.000 persons annually on a worldwide basis in occupations as set out in 8 U.S.C. section 1101(a)(15)(H)(i)(b)'.[12] The conditions for entry are set out in the commitment as well:

‘(ii) persons engaged in a specialty occupation, requiring (a) theoretical and practical application of a body of highly specialized knowledge; and (b) attainment of a bachelor's or higher degree in the specialty (or its equivalent) as a minimum for entry into the occupation in the United States. Persons seeking admission under (ii) above shall possess the following qualifications: (a) full licensure in a US state to practice in the occupation, if such licensure is required to practice in the occupation in that state; and (b) completion of the required degree, or experience in the specialty equivalent to the completion of the required degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty. Entry for persons named in this section is limited to three years.’[13]

This specific entry route is practically often used by firms, many of which are based in India, performing technical services. As a starting point, the visa requirement in itself is unproblematic. The GATS provides a carve-out for measures addressing:

‘measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders.’[14]

In fact, the only example of such measures provided by the GATS is exactly the example of visa requirements. As such, genuine immigration measures fall outside the scope of the GATS. However, such immigration measures must not nullify or impair commitments.[15] Through exaggeration this becomes self-evident, if the US would require a fee for a H-1B visa of a million dollars, the commitment allowing entry of 65.000 highly skilled service providers essentially becomes useless and would nullify or impair the commitment. It should be kept in mind that this commitment inscribed by the US is the result of the Uruguay Round negotiations. All other WTO members have offered trade commitments in return. As such, commitments are binding international law, based on reciprocal trade deals, which cannot just be modified unilaterally.[16]

And thus, it is required to draw a line between genuine immigration measures and other measures that may indeed be adopted in an immigration Act, yet have little to do with the orderly movement of natural persons across borders. In defence, the US indicates that the changes to the H-1B visa are to protect American jobs and to pay for an administrative system to enforce labour laws.

Drawing a line with little specific guidance

The GATS does not just prohibit obstructive measures. In order for India to successfully convince the Panel that the US measures violate the GATS, a material breach of one of the GATS obligations must be established. This indeed may be the claim that the fee nullifies or impairs the commitment itself. The example of an outrageous visa fee would fit that claim.[17] The second option, required if immigration conditions are less clearly breaching commitments, is to claim a breach of one of the GATS provisions, which is far more complex. In my opinion, elaborated extensively elsewhere, measures that do not genuinely concern immigration measures, yet nevertheless are presented as such, at a certain point violate the national treatment obligation of the GATS.[18]

Again, a simplified example may explain this, though in reality, determining whether GATS provisions are violated is not simple.[19] In many developed countries, immigration rules in general are quite restrictive. This means that a Mode 4 service provider (which entails mobility) established in another WTO Member State has to comply with these immigration rules. As such, adopting administrative hurdles in immigration law makes it more difficult for foreign service providers to compete with domestic service providers. From a GATS perspective, this is unproblematic if such measures indeed genuinely entail measures addressing the orderly movement of natural persons across border. Another option to justify measures is for such measures to serve a purpose falling within the scope of the general exemption grounds, such as public policy.[20] Without these exemption grounds, the simple fact remains that measures not genuinely addressing immigration concerns, make it more difficult to provide a service, as a foreign service provider. This is the case if WTO members create administrative hurdles. Note that even if such measures do fall within the scope of an exemption ground, they still need to pass a non-discrimination and a non-protectionism test. As such, the measures again must genuinely serve the aim claimed as the exemption ground. Any competitive disadvantage, while no exemption can be invoked, breaches the national treatment provision, and as such violates this obligation.

Conclusion

The intention of this blog is not to provide an exhaustive overview of the legal aspects of the US – India case. Importantly, to my knowledge, the idea that immigration measures at a certain point become mere obstructive hurdles which do not relate to genuine immigration concerns is novel. The issue is not addressed in WTO case law, and the literature so far does not address what practically happens at the domestic

law level of immigration law. Yet, to my mind, there is little doubt that the consistent tightening of immigration rules since the adoption of the GATS commitments goes against the intention of the GATS, and some measures likely do breach the obligations derived from it. While it stands to reason to prevent abuse of commitments (service providers entering a territory while not complying with the conditions listed in commitments) or addressing circumvention of labour law rules (providing a lower wage to foreign service providers), this should be a matter of domestic enforcement. Creating a more restrictive immigration law system is not the solution, as that also targets those that do not abuse the Mode 4 commitments. Phrased differently, administrative obfuscation or raising fees to levels no longer related to the actual processing of visas is not the correct way to go.

[1] The H-1B visa category is intended as the implementation of the trade commitments here under discussion. The L1 visa category implements the commitment relating to intra-company transfers.

[2] WTO case DS503 *US – Measures Concerning Non-Immigrant Visas*, S/L/410; WT/DS503/1 and WTO, S/L/410; WT/DS503/1/Add.1. The quota issue will not be addressed here.

[3] USCIS Policy Memorandum PM-602-0151, 23 October 2017, available at: https://www.uscis.gov/news/news-releases/uscis-updates-policy-ensure-petitioners-meet-burden-proof-nonimmigrant-worker-extension-petitions, accessed on 1 December 2017.

[4] See for instance: http://www.zdnet.com/article/uk-immigration-skills-charge-may-hit-indian-it-industry, accessed on 1 December 2017.

[5] The term administrative obfuscation is borrowed from Dawson, who uses it to indicate that developed WTO Member States seem to accept Mode 4 commitments to appear development friendly, yet in practice then use administrative obfuscation to ensure that low skilled workers still have difficult access: L. Dawson 'Labour Mobility and the WTO: The Limits of GATS Mode 4' (2013) 51:1 *International Migration*, p. 5. In my opinion, administrative obfuscation is used in relation to highly-skilled workers as well, such as the category addressed in this blog.

[6] http://money.cnn.com/2017/10/25/technology/business/h1b-visa-renewal-uscis/index.html, accessed on 1 December 2017.

[7] UK Coalition Programme for Government, 20 May 2010, immigration paragraph; see also D. Seddon (ed) *Guide to the Points-Based System* (JCWI, London 2010), p. 22.

[8] UK Government Department Home Office Command Paper 'A Points-Based System: Making Migration Work for Britain' Cm (2006) 6471, par. 155.

[9] This topic is extensively addressed in: S. Tans, *Service provision and migration*. EU and WTO Service Trade Liberalization and their impact on Dutch and UK immigration rules (Brill Nijhoff, Leiden 2017). The underlying problem is explained in par. 1.1.

[10] The topic of past criminal convictions used as a refusal ground for migrants is addressed in a study performed for the EU Commission by the author: S. Tans *et al*, *The interaction between trade commitments and immigration rules, admitting contractual service suppliers and independent professionals in Germany, the Netherlands and Sweden* (forthcoming, EU Commission, Brussels 2018).

[11] The current GATS Mode 4 commitments became binding in 1996, as the Mode 4 negotiations continued after the completion of the Uruguay Round. This continuation was due to developing states in general being unsatisfied with the initial Uruguay Round results, which saw a very poor result in service mobility commitments.

[12] World Trade Organization, Council for Trade in Services, Communication from the United States of America, Schedule of Specific Commitments GATS/SC/90, horizontal commitment Mode 4, available online: www.wto.org, accessed on 1 December 2017.

[13] *Ibid*.

[14] GATS Annex on movement of natural persons supplying services under the agreement, par. 4.

[15] *Ibid.*

[16] The GATS is based on progressive liberalization, once a commitment is provided it cannot be removed unless compensation is offered by the Member wishing to withdraw the commitment, see Article XXI GATS.

[17] Article XXIII:3 GATS.

[18] Article XVII GATS; this provision is extensively elaborated upon by the Panel and the Appellate Body in one of the few GATS cases: WTO DS 363 *China – Measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products*.

[19] S. Tans, *Service provision and migration*. EU and WTO Service Trade Liberalization and their impact on Dutch and UK immigration rules (Brill Nijhoff, Leiden 2017), chapter 7.

[20] Article XIV GATS, various limitative grounds are listed for instance: public morals, public order, protection of human, animal or plant life or health. There is also a specific ground for measures 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement (...)'. While this ground may indeed be used to target circumvention of the conditions of the H-1B visa, the manner in which the US targets abuse itself is inconsistent with the Agreement, as it also raises the fees for those not abusing the H-1B visa.