

**LEGAL ANALYSIS: FEE INCREASE ON H-1B VISAS
LIKELY VIOLATES U.S. COMMITMENTS UNDER GATS**

BY STEPHEN CLAEYS

EXECUTIVE SUMMARY

This legal analysis shows that the significant increases in H-1B and L-1 fees enacted in Public Law 111-230, passed in August 2010, likely violate U.S. commitments under the General Agreement on Trade in Services (GATS).¹ The analysis takes no position on whether increasing these visa fees constitutes sound immigration policy. However, since Congress may look to raise such fees on the same or a broader set of employers in the future, the finding of a likely inconsistency with U.S. obligations under the GATS may be particularly important.

The legislation increased the filing fee and fraud prevention and detection fee by \$2,000 for H-1B visas and by \$2,250 for L-1 visas, but only for employers that employ 50 or more employees in the United States and more than 50 percent of the employees are in H-1B or L-1 status. The single fee must be included (i) the first time an H-1B or L-1 petition is filed on behalf of a foreign worker, and (ii) any time a petition is filed to allow an H-1B or L-1 worker to change employers.

The money from the new fees goes into the U.S. Treasury and was part of legislation to increase border security personnel, equipment, technology, infrastructure, and other resources along the United States southwestern border. However, the ultimate purpose of the new fees is not to cover expenses for increased border security. Senator Charles Schumer (NY-D), who introduced the amendment to include the higher fees in the legislation, explicitly stated that the purpose of the fees is to restrict the availability of L-1 and H-1B visas. Thus, Congress' overall intent was reducing the visas' availability, not budget neutrality.

The United States made a commitment under the GATS to allow the temporary admission of (nonimmigrant) specialty workers under the H-1B and L-1 visa provisions. This commitment generally reflects U.S. law as it existed in 1994 when the GATS and other World Trade Organization (WTO) agreements were finalized. Because the United States is bound by this commitment under GATS, it may not now adopt or maintain measures that would conflict with that commitment, or nullify or impair the benefits accruing to WTO members under the commitment. Accordingly, restricting the availability of H-1B and L-1 visas through the increased fees could violate this commitment under GATS.

Moreover, the additional visa fees may violate the United States' general commitment under GATS to ensure that "all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner." The increased visa fees certainly affect the provision of services, but the justification for the fees (restricting the availability of L-1 and H-1B visas) is unlikely to be found reasonable. Further, the increased fees could violate GATS if they nullify or impair benefits to a WTO Member under the terms of a sector-specific

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commitment. This violation is likely because the fees are targeted at only those companies with 50 or more employees in the United States and if more than 50 percent of those employees are nonimmigrants working on H-1B or L-1 visas. The combination of the amount of the fees and their limitation to certain companies makes it possible that they impede, if not entirely preclude, a company from a WTO Member from supplying services in a particular sector through the presence of natural persons, or establishing a commercial presence in the U.S.

Such violations could result in retaliation against U.S. exporters and otherwise diminish the United States' reputation on trade matters. If a WTO Member believes that another Member has violated its GATS commitments, the complaining Member may invoke the WTO dispute settlement mechanism for redress (private parties do not have this right). If the action is found to be inconsistent with the GATS, the WTO Dispute Settlement Body (DSB) will recommend that the Member bring its measure into conformity with GATS. If the Member fails to bring the measure into conformity with the GATS, the Complainant may seek authority from the DSB to retaliate against the other Member. The amount of retaliation is equal to the amount that the complaining Member's benefits are impaired. Thus, if the additional fees are found to violate U.S. commitments under GATS, the United States must be prepared to either compensate other WTO Members to the extent that their benefits under the GATS are diminished, or face retaliation from those Members to that same extent. Retaliation could be in the form of other WTO Members limiting U.S. service companies' access to those countries' markets, increased duties on U.S. goods, or other actions.

Arguments by supporters of the increased fees against the above GATS-related concerns are not convincing. One argument is that the fee increases can easily be borne by those companies applying for the visas, so they do not constitute much of a restriction. However, the fact that the increased fees were explicitly imposed to restrict the availability of certain L-1 and H-1B visas undermines this argument. Other arguments raise the policy reasons for changing the availability of L-1 and H-1B visas and ending the alleged abuse of the visas by certain companies. These arguments, regardless of whether they have merit, are irrelevant as to whether the United States is violating its GATS commitments. Finally, some supporters of the higher H-1B and L-1 fees argue that the WTO Members who are more likely to assert that the higher fees violate GATS may not themselves be fulfilling their obligations under GATS or other WTO agreements. This argument is likewise not relevant. The fact that some believe another WTO Member may not be living up to its commitments under GATS or another WTO agreement does not allow the United States to unilaterally violate its own commitments under GATS.

Even if Congress were to expand the number of employers subject to these new fees to include companies that employ a smaller percentage of H-1B and L-1 visa holders in their workforces, the United States would still be restricting the availability of H-1B and L-1 visas to a greater extent than they were available when the U.S. joined the GATS in 1994. As a result, the United States would continue to be in violation of its GATS commitments.

BACKGROUND

On August 13, 2010, President Obama signed Public Law 111-230.² The legislation's stated aim is to increase border security personnel, equipment, technology, infrastructure, and other resources along the United States southwestern border. However, it also contains a provision to offset these additional border security expenses by significantly increasing the fees for certain H-1B and L-1 visas. These types of visas are used to allow skilled foreign nationals to temporarily work in the United States. The legislation increased the filing fee and fraud prevention and detection fee by \$2,000 for H-1B visas and by \$2,250 for L-1 visas, but only for employers that employ 50 or more employees in the United States and more than 50 percent of the employees are in H-1B or L-1 status. The single fee must be included (i) the first time an H-1B or L-1 petition is filed on behalf of a foreign worker, and (ii) any time a petition is filed to allow an H-1B or L-1 worker to change employers. The fee will remain \$500 for other employers but \$2,500 and \$2,750, as noted above, for employers falling into the "50/50" designation. Public Law 111-230 calls for the fee increase to expire on September 30, 2014,³ but subsequent legislation aimed at funding healthcare for 9/11 first responders extended the fee increase an additional year to 2015.⁴

OVERVIEW OF GATS

The General Agreement on Trade in Services (GATS) went into force in January 1995 and establishes the multilateral rules governing trade in services.⁵ The GATS is part of the Marrakesh Agreement establishing the World Trade Organization (WTO) and is binding on all WTO Members, including the United States.⁶

Generally, the GATS covers all measures applied by WTO Members affecting trade in services that fall into four categories or "modes."⁷ The relevant modes for this analysis are: *Mode 3* (the supply of a service by a service supplier of one Member, through commercial presence in the territory of another Member), and *Mode 4* (the supply of a service by a service supplier of one Member, through the presence of natural persons of a Member).

WTO Members have both general obligations and specific commitments under GATS. The general obligations include the obligation to administer laws, regulations, or administrative actions affecting service sectors for which a Member has made specific commitments, reasonably, objectively and in an impartial manner. These specific commitments, in turn, are set forth in each Member's schedule⁸ and fall into two categories: market access⁹ and national treatment.¹⁰ Generally, market access commitments relate to *entry into* the market, while national treatment commitments relate to equal competitive opportunity *within* the market.

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GATS also has a specific annex on the movement of natural persons supplying services under Mode 4. The Mode 4 Annex clarifies that Members retain the right to regulate the entry and temporary stay of individuals within their borders, *provided* that such measures are not applied in such a manner as to nullify or impair benefits accruing under the terms of a specific commitment.¹¹ Many Members, including the United States, chose to have their Mode 4 commitments in the form of “undertakings,” rather than in the form of market access limitations. Often referred to as a “positive list” approach to scheduling commitments, this means that the United States has no commitments except those specified in its schedule.¹²

There are general exceptions to the GATS for the adoption and enforcement of certain types of measures. These include measures necessary to ensure compliance with GATS-consistent laws and regulations, such as to safeguard against deception and fraud. However, these exceptions are “[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services[.]”¹³ In addition, the GATS does not prohibit regulation of the entry and movement of persons, including measures to ensure orderly movement of persons and the integrity of a Member’s borders, *provided* such measures do not nullify or impair the benefits under a specific commitment.¹⁴ The GATS also does not apply to measures affecting natural persons seeking employment in the United States (as opposed to providing services), or governing citizenship, residency or permanent employment.¹⁵

If a WTO Member believes that another Member has violated its GATS commitments, the complaining Member may invoke the WTO dispute settlement mechanism for redress.¹⁶ If the action at issue is found to be inconsistent with the GATS, the Dispute Settlement Body will recommend that the Member bring its measure into conformity with the Agreement.¹⁷ If the Member fails to bring the measure into conformity with the GATS, the Complainant may seek authority from the Dispute Settlement Body (DSB) to retaliate against the other Member. The amount of retaliation is equal to the amount that the complaining Member’s benefits are impaired.

H-1B AND L-1 VISAS AND THEIR RELATIONSHIP TO GATS

H-1B and L-1 visas are temporary visas used by employers to enable skilled foreign nationals to work in the United States. The H-1 nonimmigrant category was first created under the Immigration and Nationality Act (INA), in 1952, to assist U.S. employers needing temporary workers.¹⁸ The Immigration Act of 1990 amended the law by, among other things, creating the H-1B category for nonimmigrants (temporary visa holders) who intend to work in specialty occupations or as fashion models “of distinguished merit and ability.”¹⁹

A wide range of highly skilled foreign nationals potentially qualifies for the H-1B visa category. The INA defines “specialty occupation” as an occupation that requires “(A) theoretical and practical application of a body of highly

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specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States."²⁰ The foreign national's prospective employer submits the application for an H-1B visa.

There is an annual statutory cap of 65,000 on H-1B nonimmigrant visas for foreign professionals. There are exemptions from the 65,000 cap for workers employed by institutions of higher education, related or affiliated nonprofit organizations, and nonprofit research or governmental research organizations. In addition, legislation in 2004 provided for exemptions from the H-1B cap for up to 20,000 foreign nationals who graduated from U.S. universities with a Master's or higher degree.²¹

The L-1 visa classification enables international companies to transfer employees to the United States temporarily to continue to work for a parent branch, affiliate, or subsidiary of the same company. Under the INA, the sponsoring employer must demonstrate that the worker, within the three years preceding the transfer, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized capacity, for one continuous year.²² The L-1A category is for workers coming to the United States to fill a managerial or executive position; workers coming to work in a position that requires specialized knowledge are eligible for the L-1B visa category. There are no statutory numerical limits on the number of L-1 nonimmigrants that may be admitted each fiscal year, as there are on H-1B visas.

The United States commitments under the GATS allow the temporary admission of nonimmigrant specialty workers under the H-1B and L-1 visa provisions. Specifically, the U.S. GATS Schedule states that the United States has no commitments (*i.e.*, the U.S. is "unbound") with respect to Mode 4, except for specified market access commitments relating to the temporary entry and stay of certain categories of individuals. These commitments include:

- Intra-corporate transfers of managers, executive and specialists for a period of up to 5 years (three years initially, with the possibility of a two-year extension);
- Managers or executives engaged in establishing a commercial presence, with operations to begin within one year; and
- Entry of up to 65,000 persons annually (worldwide) who are engaged in "specialty occupations" as set out in 8 USC § 1101(a)(15)(H)(i).

These commitments generally reflect U.S. law as it existed in 1994 when the WTO agreements were finalized.²³ The first two commitments describe persons who would fall within the U.S. L-1 visa category, and the third is specifically tied to persons that qualify for an H-1B visa. Because the United States is bound by these specified

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commitments under GATS, it may not adopt or maintain measures that would conflict with those commitments, or nullify or impair the benefits accruing to WTO members under those commitments.²⁴

LEGISLATION INCREASING H-1B AND L-1 FEES

The main purpose of Public Law 111-230 is to strengthen enforcement along the U.S. southwest border. However, to remain budget neutral, the legislation also increases the fees for certain H-1B and L-1 visas. Specifically, Title IV of the legislation states that the filing fee and fraud prevention and detection fee required for an L-1 visa is increased by \$2,250 if the applying company has 50 or more employees in the United States and if more than 50 percent of that company's employees are nonimmigrants working under H-1B or L-1 visas.²⁵ The legislation likewise increases the filing fee and fraud prevention and detection fee required for an H-1B visa by \$2,000 if the applying company has 50 or more employees in the United States and if more than 50 percent of those employees are nonimmigrants working under H-1B or L-1 visas.²⁶ These additional fees remain in effect until September 30, 2014.²⁷

The money collected from the fee goes to fund additional Border Patrol agents and other enforcement personnel and assets along the Southwest border of the United States. A June 2010 legal analysis performed for NFAP by Jochum Shore & Trossevin, PC raised questions about raising fees on H-1B and L-1 visas. The analysis concluded, "High visa fees could raise concerns about potential inconsistency with GATS Article IV."²⁸ The analysis questioned even increases to the existing scholarship and training fees, since such fees bear no connection to administrative functions.

The H-1B and L-1 fee provisions were first included in the Senate version of the legislation, which was introduced by Senator Charles Schumer of New York.²⁹ During floor deliberations, Senator Schumer explained that the increased fees would be assessed on companies, specifically naming the Indian company Infosys, "that outsource good, high-paying American technology jobs to lower wage, temporary immigrant workers from other countries."³⁰ He went on to state that, in his view, such companies "abuse" the H-1B visa system.³¹

Senator Schumer provided similar comments when the visa fees were later considered as part of the House of Representatives version of the legislation.³² He reiterated that the extra visa fees are targeted at "companies who hire foreign workers in a manner contrary to the original intent of the H-1B visa program."³³ Senator Schumer referred to these companies as "body shops," "chop shops" and "multinational temp agencies" that provide "cheap labor," and suppress wages and jobs for U.S. citizens.³⁴ He then quoted statements from Indian company executives saying that these increased fees would cause the executives' companies to hire more American citizens.³⁵ Senator Schumer said that this is the outcome envisioned in the legislation, stating, "Exactly, that is what we want."³⁶

*Fee Increase on H-1B Visas Likely Violates U.S. Commitments Under GATS***POTENTIAL NON-COMPLIANCE OF LEGISLATION WITH GATS**

Significantly increasing the fees for certain H-1B and L-1 visas may be likely to violate U.S. obligations under GATS. As discussed above, the United States specifically committed in its GATS schedule to allow the temporary entry and stay of individuals under the H-1B and L-1 visa provisions, as they existed when the United States joined the GATS in 1994. Accordingly, additionally restricting the availability of H-1B and L-1 visas could violate this commitment.

An important issue is whether increasing the fees for L-1 visas by \$2,250 and for H-1B visas by \$2,000 does indeed restrict the availability of these visas. Before this legislation, the anti-fraud fee was \$500 for both L-1 and H-1B visas, and remains so for all employers except those targeted in this legislation.³⁷ Thus, with the new fees, the fees for certain H-1B and L-1 visas increases by approximately four times. These are significant increases in the fees required for L-1 and H-1B visas and arguably reduce their availability.

Moreover, reducing the availability of L-1 and H-1B visas to certain employers was the only reason expressed by Congress for increasing the fees. Senator Schumer's floor statements in support of the higher fees explicitly indicated that the fees would restrict the availability of certain L-1 and H-1B visas. Thus, Congress certainly intended for the increased fees to reduce the availability of L-1 and H-1B visas.

Supporters of the increased fees may argue that these increases can easily be borne by those companies applying for the visas, so they do not constitute much of a restriction. If a WTO Member alleges that the increased fees violate the United States' GATS commitments, whether or not the higher fees have such a commercial impact as to constitute an additional restriction could be an issue that the WTO Dispute Settlement Body will need to decide. However, the fact that the increased fees were explicitly imposed to restrict the availability of certain L-1 and H-1B visas makes such a commercial effects analysis less relevant.

The additional visa fees may also violate the United States' general commitments under GATS. GATS Article VI requires Members to ensure that "all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner." The term "affecting" trade in services has been interpreted broadly.³⁸ Thus, the increased visa fees could be found to affect the provision of services through the presence of natural persons, or the establishment of a commercial presence. Such a restriction could be allowed if it has a reasonable justification, but the justification for the fees given on the Congressional floor of restricting the availability of L-1 and H-1B visas is unlikely to be found reasonable.

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In addition, the increased fees could violate GATS if they nullify or impair benefits to a WTO Member under the terms of a sector-specific commitment. The likelihood of this violation is increased by the fact that the fees are targeted at only those companies with 50 or more employees in the United States and if more than 50 percent of those employees are nonimmigrants working under H-1B or L-1 visas. The combination of the amount of the fees and their limitation to certain companies makes it possible that they impede, if not entirely preclude, a company from a WTO Member from supplying services in a particular sector through the presence of natural persons, or establishing a commercial presence in the United States. Senator Schumer asserted that the higher visa fees apply regardless of whether a company is from “Bangalore, Beijing, or Boston.”³⁹ This is facially true, but if the effect of the fees is in fact to impede or preclude companies from Bangalore from supplying services in a certain sector, then the United States could face a GATS violation in this regard as well.⁴⁰

Supporters of the higher fees mostly focus on the policy reasons for changing the availability of L-1 and H-1B visas and ending the alleged abuse of the visas by certain companies. This argument, however, is irrelevant as to whether the United States is violating its GATS commitments. During the negotiation of the GATS, the United States made a commitment as to the availability of L-1 and H-1B visas. Other countries took the U.S. commitment into account and relied on that commitment (as well as other U.S. commitments) in formulating their own commitments in the GATS negotiations and in the ongoing negotiations of other WTO agreements.

The fact that the United States may now want to change the L-1 and H-1B visa programs for what may or may not be legitimate policy reasons does not change the fact that the U.S. made this commitment. It also does not change the fact that other WTO Members relied on this commitment and that their benefits under the GATS may be impaired if the United States does not meet its commitment.

This does not mean that the United States is barred under GATS from changing the L-1 and H-1B visa programs. However, to the extent that the changes violate U.S. commitments under GATS, the United States must be prepared to either compensate other WTO Members to the extent that their benefits under the GATS are diminished, or face retaliation from those Members to that same extent. Retaliation could be in the form of other WTO Members limiting U.S. service companies’ access to those countries’ markets, increased duties on U.S. goods, or other actions.

Another option for the United States is to change its GATS commitments regarding the L-1 and H-1B visa programs as part of the current negotiations to revise GATS under the Doha Round of WTO negotiations. Of course, this approach would likely result in other WTO Members reducing their commitments under GATS or other WTO agreements under negotiation. As in any negotiation, the United States would then have to weigh the potential costs and benefits of changing its GATS commitments.

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Another argument by supporters of the higher H-1B and L-1 fees is that the WTO Members who are more likely to assert that the higher fees violate GATS may not themselves be fulfilling their obligations under GATS or other WTO agreements. This argument is likewise irrelevant. The fact that another WTO Member may not be living up to its commitments under GATS or another WTO agreement does not allow the United States to unilaterally violate its own commitments under GATS. If indeed another WTO member is violating its WTO obligations, then the appropriate action is for the United States to bring a case before a WTO dispute settlement panel.

CONCLUSION

The provision in Public Law 111-230 to increase the fees for certain H-1B and L-1 visas may likely violate U.S. commitments under the General Agreement on Trade in Services. As a result, a WTO Member whose companies use H-1B and L-1 visas to perform services in the United States may challenge this provision at the World Trade Organization. Such a challenge could result in retaliation against U.S. exporters and limit market access for U.S. goods and services.

APPENDIX

Excerpt from Public Law 111–230

TITLE IV

GENERAL PROVISIONS

SEC. 401. Each amount appropriated or otherwise made available under this Act is designated as an emergency requirement and necessary to meet emergency needs pursuant to sections 403(a) and 423(b) of S. Con. Res. 13 (111th Congress), the concurrent resolution on the budget for fiscal year 2010.

SEC. 402. (a) Notwithstanding any other provision of this Act or any other provision of law, during the period beginning on the date of the enactment of this Act and ending on September 30, 2014, the filing fee and fraud prevention and detection fee required to be submitted with an application for admission as a nonimmigrant under section 101(a)(15)(L) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(L)) shall be increased by 2,250 for applicants that employ 50 or more employees in the United States if more than 50 percent of the applicant's employees are nonimmigrants admitted pursuant to section 101(a)(15)(H)(i)(b) of such Act or section 101(a)(15)(L) of such Act.

(b) Notwithstanding any other provision of this Act or any other provision of law, during the period beginning on the date of the enactment of this Act and ending on September 30, 2014, the filing fee and fraud prevention and detection fee required to be submitted with an application for admission as a nonimmigrant under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(i)(b)) shall be increased by \$2,000 for applicants that employ 50 or more employees in the United States if more than 50 percent of the applicant's employees are such nonimmigrants or nonimmigrants described in section 101(a)(15)(L) of such Act.

(c) During the period beginning on the date of the enactment of this Act and ending on September 30, 2014, all amounts collected pursuant to the fee increases authorized under this section shall be deposited in the General Fund of the Treasury.

Approved August 13, 2010.

END NOTES

¹ Pub. L. No. 111-230, 124 Stat 2485 (2010).

² *Id.*

³ *Id.* at §402(c).

⁴ James Zadroga 9/11 Health and Compensation Act of 2010, H.R. 847, 111th Cong. § 302 (2010).

⁵ A more detailed description of the GATS is contained in Jochum Shore & Trossevin, PC, *Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major U.S. Trade Commitments*, National Foundation for American Policy (June, 2010), found at http://nfap.com/pdf/GATSLegalAnalysis_NFAPPolicyStudy_June2010.pdf.

⁶ The World Trade Organization (WTO) is an international body, which oversees the regulation of trade among its signatories. As such, the WTO provides its Member States with the framework to: (1) negotiate and formalize trade agreements; and (2) resolve disputes arising from them.

⁷ See GATS Article I:2.

⁸ The US Schedule is contained in WTO documents GATS/SC/90, GATS/SC/90/Supp.1, GATS/SC/90/Supp.2 and GATS/SC/90/Supp.3. A consolidated version of the US Schedule, compiled for negotiating purposes, is contained in S/DCS/W/USA (27 February 2003).

⁹ See GATS Article XVI, which states: "With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule." Schedules are interpreted in accordance with the customary rules of treaty interpretation. See *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (April 7, 2005), paras. 159-60. These rules are found in Article 31 of the Vienna Convention on the Law of Treaties, which requires a treaty to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

¹⁰ See GATS Article XVII, which states: "In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers."

¹¹ The Annex on Mode 4 is as follows:

(1) This Annex applies to measures affecting natural persons who are service suppliers of a Member, and natural

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persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service.

(2) The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.

(3) In accordance with Parts III and IV of the Agreement, Members may negotiate specific commitments applying to the movement of all categories of natural persons supplying services under the Agreement. Natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment.

(4) The Agreement shall not prevent a Member from applying 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, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.

¹² See Scheduling of Initial Commitment in Trade in Services: Explanatory Note Addendum, MTN.GNS/W/164/Add.1, at para. 4. In contrast, under a “negative list” approach a Member makes a general commitment to market access in a sector or mode, except for scheduled restrictions.

¹³ See GATS Article XIV.

¹⁴ Mode 4 Annex at para. 4.

¹⁵ Mode 4 Annex at para. 2 (“The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.”)

¹⁶ See WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”).

¹⁷ DSU, Article 19.

¹⁸ Immigration and Nationality Act of 1952 (McCarran-Walter Act), Pub. L. No. 82-414, June 27, 1952, c.477, 66 Stat. 163, Title 8 U.S.C. 1101 et. seq. (As Amended).

¹⁹ See Immigration Act of 1990, Pub. L. 101-649, Nov. 29, 1990, 104 Stat. 4978.

²⁰ 8 U.S.C. § 1184(i)(1).

²¹ Pub. L. No. 108-447.

²² 8 U.S.C. § 1101(a)(15)(L).

²³ The agreements entered into force January 1, 1995.

²⁴ See GATS Article XVI and Mode 4 Annex.

²⁵ Pub. L. No. 111-230, §402(a), 124 Stat 2485, 2487 (2010).

²⁶ *Id.* at §402(b).

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²⁷ *Id.* at §402(c). As previously noted, the James Zadroga 9/11 Health and Compensation Act of 2010, H.R. 847, extended the extra fees an additional year to September 30, 2015.

²⁸ Jochum Shore & Trossevin, PC, *Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major U.S. Trade Commitments*, 14.

²⁹ See S. 3721, 111th Cong. (2d Sess. 2010).

³⁰ 156 Cong. Rec. S6839 (Aug. 5, 2010).

³¹ *Id.* Although Senator Schumer never specifically mentioned the L-1 visa system, the fact that fees for certain L-1 visas were also increased indicates that he has the same concerns about the L-1 visa system also being abused.

³² See H.R. 6080, 111th Cong. (2d Sess. 2010).

³³ 156 Cong. Rec. S6997 (Aug. 12, 2010).

³⁴ *Id.* at S6998.

³⁵ *Id.* at S6998-99.

³⁶ *Id.* at S6999.

³⁷ Department of Homeland Security, U.S. Citizenship and Immigration Services, *Instructions for Form I-129, Petition for a Nonimmigrant Worker* at 21. The \$320 filing fees included in these amounts will increase to \$325 on November 23, 2010. U.S. Citizenship and Immigration Services Fee Schedule, 75 F.R. 58961, 58964 (Sept. 24, 2010).

³⁸ See, Canada – *Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R (31 May 2000) at para. 158.

³⁹ 156 Cong. Rec. S6998 (Aug. 12, 2010).

⁴⁰ Senator Schumer later directly stated that the visa fee increases were aimed at foreign companies. A press release from Senator Schumer and Senator Kirsten Gillibrand (D-NY) regarding the subsequent one-year extension of the extra visa fees under the James Zadroga 9/11 Health and Compensation Act of 2010 states that the fees affect “outsourcing companies”, such as the Indian firms of “Wipro, Tata, Infosys, {and} Satyam,” but not “American companies such as: Microsoft, Oracle, Intel, {and} Apple{.}” See Press Release, Gillibrand, Schumer: New Momentum For 9/11 Health Bill (Dec. 19, 2010), found at <http://gillibrand.senate.gov/newsroom/press/release/?id=768cdb0c-7259-4762-8bf8-2cf11e1ebc27>.

ABOUT THE AUTHOR

Stephen Claeys is President of Cadence Global Strategies PLLC, which provides comprehensive legal and government affairs services to U.S. and foreign companies regarding trade-related government affairs, U.S. and foreign government trade remedies, and other international economic issues. He is also an adjunct professor at the American University School of International Service, where he teaches about globalization and international economic competitiveness. Mr. Claeys was previously the Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations in the U.S. Department of Commerce, where he managed and provided policy leadership for the enforcement of the U.S. unfair trade laws. Before then, Mr. Claeys was a special advisor on national security affairs to the Vice President of the United States. He focused on U.S. international economic and trade policy, and U.S. foreign relations and national security policy regarding South Asia, including Afghanistan. Mr. Claeys previously held other positions in the Department of Commerce and was an international trade attorney in private practice. He obtained his law degree from Northwestern University and his Bachelors of Arts degree in government and international studies from the University of Notre Dame.

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