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LEGAL SERVICES IN INDIA: IS THERE AN OBLIGATION UNDER THE GATS OR ARE THERE POLICY REASONS FOR INDIA TO OPEN ITS LEGAL SERVICES MARKET TO FOREIGN LEGAL CONSULTANTS?

Arno L. Eisen

I. INTRODUCTION

The globalization of trade and business has led to a globalization of legal services¹ and a growing demand for legal advice that transcends the borders of one jurisdiction. Clients often prefer to have one legal adviser rather than several in different jurisdictions. This has led to the development of international law firms with offices around the world that provide their clients with legal services for all their international ventures. In this context, foreign legal consultants (FLCs) have become a common feature of the legal profession. FLCs are foreign lawyers supplying legal services abroad by advising on international law, their home country's laws, or on the laws of a third country where they are qualified.²

Some jurisdictions, such as India, restrict access for foreign lawyers and law firms to their legal services market. India is particularly interesting because it is one of the world's strongest developing economies. India has become a major global force, especially in the services sector and continues to attract large amounts of foreign direct and indirect investment. In 2004 and 2005, India's services exports reached \$39.6 billion, and their services imports reached \$40.9 billion, making the country the sixteenth largest services importer and exporter in the world during that period.³

Against this background it is interesting to examine the reasons why India will not allow foreign law firms to provide legal services within the country. Further, it is necessary to examine if India has an obligation to open its legal services market as a founding member of the World Trade Organization (WTO) under the General Agreement on Trade in Services (GATS). In addition, this paper will explore

¹ Krishnendu Sen & Ritankar Sahu, *Need for FLCs in India with Respect to Honoring GATS*, 6 J. INT'L TRADE L. & POL'Y 25, 27 (2007).

² GOV'T OF INDIA, DEP'T OF COMMERCE, TRADE IN LEGAL SERVICES: A CONSULTATION PAPER ON LEGAL SERVICES UNDER GATS (2006), <http://commerce.nic.in/trade/consultation-paper-legal-services-GATS.pdf> [hereinafter GOV'T OF INDIA]; Sen & Sahu, *supra* note 1, at 27.

³ GOV'T OF INDIA, *supra* note 2, at III.2.

whether policy arguments support this restriction or, rather, point in the opposite direction.

In Part II, this paper will examine the status quo of legal services regulation with regard to foreign law firms in India. Part III will address whether there is an obligation under GATS for India to open its legal service market to foreigners. Part IV will examine the policy arguments and whether they argue for or against opening the Indian legal services market to foreigners. Part V will present conclusions, a proposal for the liberalization of India's legal services market, and an outlook.

The current state of this issue is highlighted by a recent case decided by the Division Bench of the Mumbai High Court; with its decision, the court effectively denied foreign law firms entry into India.⁴ Furthermore, a new case has been filed with the Madras High Court by the Lawyers' Collective and was heard on April 8, 2010. The case alleged violations of the Advocates Act of 1961 and Indian Immigration Law by several foreign law firms and a legal process outsourcing firm (LPO) that have a presence in India in the form of a back office service provider or alliance agreement.⁵ The case broadened as more lawyers' associations joined it.⁶ This, along with an obvious interest on the side of the Indian government to move the matter to the Supreme Court,⁷ demonstrated this case was of high interest to both the Indian and the international legal communities. The international law firms are lobbying actively to change the domestic situation, and the matter was reportedly raised by British Prime Minister David Cameron with Indian law minister Veerapa Moily during a visit to India with Stuart Popham, a partner with the London-based global law firm Clifford

⁴ *14-Year Epic Battle Draws to a Close as Bombay High Court Rules Against Liaison Offices for Foreign Firms*, BAR & BENCH (Dec. 16, 2009), <http://www.barandbench.com/index.php?page=brief&id=400&full=> [hereinafter BAR & BENCH].

⁵ *Writ Petition Filed Against 31 Foreign Law Firms and an LPO – Immigration Law Violations Also Alleged*, BAR & BENCH (Mar. 22, 2010), <http://www.barandbench.com/index.php?title=writ%20Petition%20filed%20against%2031%20foreign%20law%20firms%20and%20an%20LPO%20%E2%80%93%20Immigration%20law%20violations%20also%20alleged&page=brief&id=597&gn=0>.

⁶ *Foreign Law Firms Case Heats Up: Women Lawyers Association and TN Advocates Association Join; More Foreign Firms to be Added to the List*, BAR & BENCH (Apr. 16, 2010), <http://barandbench.com/brief/2/646/foreign-law-firms-case-heats-up-women-lawyers-association-and-tn-advocates-association-join-more-foreign-firms-to-be-added-to-the-list>.

⁷ Kian Ganz, *Madras Writ Petition v. Foreign Firms Will be Moved to Supreme Court for "final decision," Says Moily*, LEGALLYINDIA.COM (July 20, 2010), <http://www.legallyindia.com/201007201116/Law-firms/madras-writ-petition-v-foreign-firms-will-be-moved-to-supreme-court-for-qfinal-decisionq-says-moily>.

Chance.⁸ United Kingdom Secretary of State for Justice Kenneth Clarke raised the issue again during a visit to India in September 2011.⁹ After several postponements the case was scheduled to be heard by the Madras court on February 1, 2012.¹⁰

II. CURRENT ACCESS FOR FLCS TO THE INDIAN LEGAL SERVICES MARKET

The Indian legal services market is the second largest in the world with somewhere between 600,000 and over 800,000 practicing lawyers.¹¹ The legal profession in India is regulated by the Advocates Act of 1961 and the Bar Council of India Rules of 1975. Under these rules, legal services can only be provided by natural persons¹² who are on the rolls of the advocates in the states where the service is being provided. To be enrolled as an advocate, the candidate has to be a citizen of India or a country that allows Indian nationals to practice.¹³ As per reciprocity treatment, these individuals must hold a degree in law from an institution/university recognized by the Bar Council of India and must be at least twenty years old.¹⁴

In India, legal service providers may operate within the partnership context provided profits from legal work are shared with other licensed attorneys.¹⁵ Partnerships also include limited liability partnerships (hereinafter “LLP”) since the Limited Liability Partnership Act of 2008 was passed and subsequently took effect on March 31, 2009.¹⁶ The maximum number of partners for a partnership in India is fixed at twenty.¹⁷ Whether this also applies to new LLPs remains un-

⁸ *Madras High Court: Foreign Law Firms Get Time Till August 19 to File Objections; US Firms Choose Dua; Government Needs 8 Weeks*, BAR & BENCH (Aug. 5, 2010), <http://barandbench.com/brief/2/898/madras-high-court-foreign-law-firms-get-time-till-august-19-to-file-objections-us-firms-choose-dua-government-needs-8-weeks>.

⁹ Nikhil Kanekal, *Kenneth Clarke: UK Pushing for Indian Legal Sector Reform*, LIVEMINT.COM (Sept. 29, 2011), <http://www.livemint.com/2011/09/28221451/Kenneth-Clarke—UK-pushing-fo.html>.

¹⁰ Kian Ganz, *Corporate Law 2011: The Year That Was*, LIVEMINT.COM (Dec. 23, 2011), <http://www.livemint.com/2011/12/22214808/Corporate-Law-2011-The-year-t.html>.

¹¹ FALI S. NARIMAN, *INDIA’S LEGAL SYSTEM: CAN IT BE SAVED?* 117 (2006) (stating over 800,000); GOV’T OF INDIA, *supra* note 2, at IV.3 (stating 600,000).

¹² The Advocates Act, No. 25 of 1961, INDIA CODE (1961), §§ 24, 29, 33, *available at* <http://indiacode.nic.in/>.

¹³ *Id.* § 24(1)(a).

¹⁴ *Id.* § 24(1)(b)-(c).

¹⁵ The Bar Council of India Rules, Pt. VI, Ch. III (2).

¹⁶ The Limited Liability Partnership Act, No. 6 of 2008, INDIA CODE (2008).

¹⁷ The Companies Act, No. 1 of 1956, INDIA CODE (1956), § 11(2).

clear. Section 64(1) of the Limited Liability Partnership Act of 2008 requires the Indian Central Government to notify any application of the Companies Act of 1956 to all or specific LLPs; however, section 71 of the Limited Liability Partnership Act of 2008 declares that the Act is supplementary and not derogative in relation to any existing acts.¹⁸ The Mumbai High Court held in its decision in *Lawyers' Collective* that the words "practicing the profession of law" in section 29 of the Advocates Act of 1961 include advisory legal services provided in non-litigation matters.¹⁹ Thereby, the court made clear that FLCs are barred even from doing transactional or other non-litigation work in India.²⁰

Hence, foreign lawyers or law firms effectively cannot establish themselves in India because they will not fulfill the requirements.²¹ This has been true since 1995 when the Mumbai High Court ended a brief window when the licensing of foreign law firms seemed possible in India.²² The firms White & Case, Chadbourne & Parke, and Ashurst had gained licenses from the Reserve Bank of India to open liaison offices during that period.²³ These firms were parties in the proceeding that ultimately ended in the final 2009 decision by the Mumbai High Court after the Supreme Court of India remanded the case back.²⁴ White & Case and Chadbourne & Parke closed their Indian operations after the ruling of the Mumbai High Court in 1995.²⁵ Ashurst closed its Delhi office after the recent ruling when its license expired on February 22, 2010.²⁶

Beyond these barriers, market access is further limited by the ban of advertisements for legal services under section 36 of the Bar Council of India Rules. Under the new case brought by the Lawyers' Collective, it is alleged that the claims of some law firms on their web-

¹⁸ The Limited Liability Partnership Act, *supra* note 16, at §§ 64(a), 71.

¹⁹ See Writ Petition No. 1526/1995 at ¶¶ 47, 49, *Lawyers Collective v. Bar Council of India* (Bombay H.C. 2009), available at <http://barandbench.com/userfiles/files/File/Lawyers%20Collective%20foreign%20firms%20Bbay%20HC.pdf> [hereinafter *Writ Petition No. 1526/1995*].

²⁰ See *id.*; BAR & BENCH, *supra* note 4.

²¹ See Sen & Sahu, *supra* note 1, at 27, 29.

²² Cf. Zach Lowe, *Still No Passage to India for Foreign Law Firms*, THE AM LAW DAILY (June 16, 2009), <http://amlawdaily.typepad.com/amlawdaily/2009/06/waiting-on-india.html>.

²³ *Id.*

²⁴ BAR & BENCH, *supra* note 4.

²⁵ Douglas Wong, *India's 'Not For Sale' Legal Market Draws U.S., U.K. Law Firms*, BLOOMBERG NEWS (June 16, 2009), <http://www.bloomberg.com/apps/news?pid=20601109&sid=AHz8zYy8.Vdg>.

²⁶ Kian Ganz, *Ashurst Shuts Down Indian Office; Not Unhappy*, LEGALLYINDIA.COM (Feb. 19, 2010, 04:13 AM), <http://www.legallyindia.com/20100218517/Law-firms/ashurst-shuts-down-indian-office-not-unhappy>.

sites to have an “India practice” amount to advertisement and, therefore, violate the Bar Council of India Rules.²⁷ The ban on advertising is even understood to encompass entries in directories.²⁸

The existing alliances, or “best friends agreements,” between leading Indian law firms and international law firms, which are sometimes referred to as joint ventures, are reported to be merely non-exclusive referral agreements.²⁹ Most of the Indian practice of international law firms, therefore, is performed offshore from Singapore, London, New York, Hong Kong, or elsewhere.³⁰

III. IS THERE AN OBLIGATION FOR INDIA TO OPEN ITS LEGAL SERVICES MARKETS TO FOREIGNERS?

As a WTO founding member, India is bound by the GATS. The GATS sets out several general obligations which could create an obligation for India to open its legal services market. The GATS applies to all trade in services, including legal services.³¹ The three major principles relevant to the situation at hand are most favored nation (MFN) treatment,³² market access,³³ and progressive liberalization.³⁴

1. Market Access under Article XVI of GATS

While market access is a general principle under GATS, Article XVI does not contain a general obligation to grant market access to nationals of other WTO members.³⁵ This is due to GATS’s development-friendly approach, which allows the WTO member to make specific commitments for the service sectors that it wants to submit to the GATS regime and to determine to what extent these service sectors are subject to Article XVI market access obligations.³⁶ Such a commit-

²⁷ BAR & BENCH, *supra* note 4.

²⁸ GOV’T OF INDIA, *supra* note 2, at IV.4.

²⁹ Cf. Jonathan Ames, *Currying Favour*, EUR. LAW., Oct. 2008, at 28, 31; Desh Gaurav Chopra Sekhri, *Column: Liberalise Legal Services*, FIN. EXPRESS (Jan. 30, 2009), <http://www.financialexpress.com/news/column-liberalise-legal-services/416706/>.

³⁰ See Ames, *supra* note 29, at 28.

³¹ Laurel S. Terry, *GATS, Legal Services and Bar Examiners: Why Should You Care*, THE BAR EXAMINER, May 2002, at 25, 26; cf. Sen & Sahu, *supra* note 1, at 26; Kenneth S. Kilimnik, *Lawyers Abroad: New Rules for Practice in a Global Economy*, 12 DICK. J. INT’L L. 269, 282 (1994).

³² General Agreement on Trade in Services art. 2, Apr. 15, 1994, 1867 U.N.T.S. 187 [hereinafter GATS].

³³ *Id.* art. XVI.

³⁴ *Id.* art. XIX.

³⁵ Kilimnik, *supra* note 31, at 284.

³⁶ Kasturi Das, *GATS Negotiations and India, Evolution and State of Play ix*, (CENTAD, Working Paper No. 7, 2006).

ment only becomes an obligation once a member makes a commitment in its schedule to GATS.³⁷ Because India has not made any commitment with regards to legal services in its schedules to the GATS,³⁸ it is under no obligation to open its legal services market under its schedules to Article XVI of GATS.³⁹

2. MFN Treatment under Article II of GATS

If India granted the nationals of another nation, whether a WTO member or not, a certain treatment in a bilateral agreement, then it would have the obligation to treat all nationals of other WTO members in accordance with the MFN treatment under Article II of GATS.⁴⁰ The obligation to grant MFN treatment under Article II(1) of GATS is a general obligation that India has, notwithstanding the lack of any scheduled commitments for a specific service sector such as legal services.⁴¹

None of the bilateral investment treaties (BITs) or free trade agreements (FTAs) that India has concluded with other countries contains any rights with regards to legal services.⁴² The only document referring to “trade in services” as a category within the scope of a forthcoming joint study group is the free trade agreement between Chile and India in Article 4(2)(ii)(b).⁴³ Legal services are not mentioned in any of the treaties. Hence, there is no right contained in any of these instruments that could give rise to an obligation to India to provide these rights to FLCs from other GATS member countries under the MFN treatment principle.

3. Obligation of Progressive Liberalization

Under Article XIX(1) of GATS, India seems to be under the obligation to move progressively toward liberalization of the services sector.⁴⁴ Hence, the strict restriction on market access for foreign lawyers and law firms in place in India would have to be softened at

³⁷ Kilimnik, *supra* note 31, at 284.

³⁸ *India, Services Database*, WORLD TRADE ORGANIZATION, <http://tsdb.wto.org/Default.aspx> (last visited Apr. 6, 2010); *see also* GOV'T OF INDIA, *supra* note 2, at IV.3.

³⁹ Kilimnik, *supra* note 31, at 284; *see also* GOV'T OF INDIA, *supra* note 2, at IV.3.

⁴⁰ *Cf.* GATS, *supra* note 32, art. II(1) (“any other country”).

⁴¹ *Id.*; *see also* GOV'T OF INDIA, *supra* note 2, at IV.3, V.5.

⁴² GOV'T OF INDIA, *supra* note 2, at IV.3.

⁴³ Free Trade Agreement to Promote Economic Cooperation between the Republic of Chile and the Republic of India, Chile-India, Jan. 20, 2005, *available at* <http://www.eximguru.com/exim/Trade-Agreement/India-Chile-Free-Trade-Agreement.aspx>.

⁴⁴ GATS, *supra* note 32, art. XIX(1).

one point. Nonetheless, this “obligation” comes in the form of an obligation to negotiate about new specific and more liberal commitments. While the GATS sets a five-year deadline to start new negotiations, there is no binding schedule as to when there must be further liberalizations and which services should be liberalized further. Similarly, Das has also interpreted this provision as an “understanding that periodical negotiations will be undertaken.”⁴⁵

Adding to this assessment, Article XIX(2) of GATS stipulates that the process of liberalization, which is the aim of Article XIX(1), “shall take place with due respect for national policy objectives and the level of development of individual members.”⁴⁶ Therefore, one cannot derive an obligation of India to open its legal services market from Article XIX(1) of GATS.⁴⁷

IV. POLICY REASONS FOR AND AGAINST OPENING THE INDIAN LEGAL SERVICES MARKET FOR FOREIGNERS

1. *Benefits for India from Opening its Legal Services Market*

Opening its legal services market would allow India to profit from the advantages of the globalization of trade services.⁴⁸

a. *Swift Development of the Legal Services Market Due to Strengthened Competition*

The competition that is created at an international level speeds up the economic development of the domestic market.⁴⁹ Access to the international market of world-class services increases creativity and innovation in the home market.⁵⁰

b. *Growth of the Legal Services Market in India Through Foreign Investment*

Foreign investment will cause the domestic legal services market to grow.⁵¹ In general, the Indian services sector is already the big-

⁴⁵ Das, *supra* note 36, at 5.

⁴⁶ GATS, *supra* note 32, art. XIX(1), (2).

⁴⁷ *Id.*

⁴⁸ *Benefits of International Trade*, ECONOMYWATCH (June 30, 2010), available at <http://www.economywatch.com/international-trade/benefit.html>.

⁴⁹ *Id.*

⁵⁰ See, e.g., *A Vision and Strategy for the Future*, MICROSOFT, <http://www.microsoft.com/about/diversity/en/us/vision.aspx> (last visited Mar. 20, 2011).

⁵¹ Karl P. Sauvant, Wolfgang A. Maschek & Geraldine McAllister, *Foreign Direct Investment By Emerging Market Multinational Enterprises, The Impact of the Financial Crisis and Recession and Challenges Ahead*, in ORG. FOR ECON. CO-OPERATION AND DEV. GLOBAL FORUM ON INT'L INV. 2 (2009), available at <http://www.oecd.org/dataoecd/9/2/44246197.pdf>.

gest contributor to the Indian economy.⁵² In 2007, services contributed 54% to the Indian economy, and the sector was projected to grow at 7%, resulting in a projected contribution of about 60% to the Indian economy.⁵³

Furthermore, the opening up of the legal services market would facilitate international transactions, as there would be increased expertise available on the foreign, international, and third country law problems arising in international transactions.⁵⁴ This would create growth chances by expanding the practice in legal services in the region of Central and South Asia. With its vast resources of legal professionals and the know-how of international law firms, India could become the legal services hub of the region.⁵⁵

c. Qualitative Increase of the Services Rendered by the Legal Profession

New techniques and knowledge brought in by foreign market participants spill over into the domestic market.⁵⁶ The competition and the inflow of foreign expertise will increase the quality of work in parts of the legal services sector, where local lawyers and firms are currently delivering inadequate services.⁵⁷ Competition would increase the legal profession qualitatively and make it more effective.⁵⁸

d. Loss of Work for Indian Lawyers in Advisory Services on Domestic Law would be Minimal

Advisory legal services on domestic law and litigation play only a marginal role in the practice of foreign lawyers and law firms in foreign countries.⁵⁹ Indeed, reports emphasize the main aim of foreign law firms is to establish a presence in India but not to advise on Indian law.⁶⁰

⁵² Dr. Arjun S. Sirari & Narendra S. Bohra, *Foreign Direct Investment (FDI) in India Service Sector (A Study of Post Liberalization)*, 2(2) INT'L J. ECON. RES. 10, 10-18 (2011), available at [http://www.ijeronline.com/documents/volumes/Vol2issue2/ijer20110202\(2\).pdf](http://www.ijeronline.com/documents/volumes/Vol2issue2/ijer20110202(2).pdf).

⁵³ Sen & Sahu, *supra* note 1, at 26.

⁵⁴ See Michael J. Chapman & Paul J. Tauber, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services under the General Agreement on Trade in Services*, 16 MICH. J. INT'L. L. 941, 956 (1995) (discussing the benefit of liberalizing legal services in general).

⁵⁵ Cf. Jeremy Fleming, *The Barred Pavilions*, EUR. LAW., Oct. 2007, at 34, 37, 72.

⁵⁶ Cf. Sen & Sahu, *supra* note 1, at 25.

⁵⁷ Chandra Krishnamurthy, *Legal Education and Legal Profession in India*, 36 INT'L J. LEGAL INFO. 245, 263 (2008).

⁵⁸ Chapman & Tauber, *supra* note 54, at 954-55.

⁵⁹ Cf. Sen & Sahu, *supra* note 1, at 27.

⁶⁰ Fleming, *supra* note 55, at 34-35.

The number of foreign lawyers that would enter India on a permanent basis would be limited.⁶¹ Mostly, such legal services would be limited to major commercial centers such as Mumbai and New Delhi where the demand for the specific services in international law, etc., would be the highest. The establishment of permanent offices of foreign law firms would lead to openings for new lawyers, too, as firms would be full service. Even in a fully liberalized market, Indian lawyers are better suited to cover the advisory services on domestic law. Therefore, foreign law firms will want to hire Indian attorneys as local counsel.

e. Enhanced Potential for Indian Lawyers and Law Firms to Expand Abroad

By opening the legal services market to foreigners, Indian lawyers and law firms will have the opportunity to branch out internationally and build up a worldwide representation of the Indian legal profession. Indian law firms may offer legal advice on an international level, and will be in a better position to cater to both major Indian companies investing worldwide and multinational companies. Entering the international market will allow Indian firms to participate in the highly profitable legal services market.

f. Increase in Remuneration Packages and Job Opportunities for Indian Legal Professionals

The influx of foreign firms and heightened competition for top graduates and professionals, resulting from the liberalization of legal services, will create a market in which remuneration packages will necessarily rise above the current Indian standards. Additionally, there will be an increase in job opportunities through the establishment of new law firms and the expansion of existing ones. This in turn will increase the opportunities for Indian legal professionals to become partners in a law firm. These partnerships are harder to obtain in a family-run or smaller partnerships, which are limited to twenty partners.⁶²

⁶¹ Chapman & Tauber, *supra* note 54, at 27.

⁶² *Cf.* Fleming, *supra* note 55, at 35.

2. *Additional Policy Reasons for Opening the Indian Legal Services Market*

a. *Rapid Integration of India into the Global Economy Creates the Need for Capacity Building*

India is rapidly integrating itself into the global economy, becoming a major destination for services exports.⁶³ Indian businesses are frequently buying foreign companies, and foreign companies are acquiring Indian companies. Foreign acquisitions by Indian companies increased from \$4.5 billion in 2005 to \$13.9 billion in 2008.⁶⁴ In 2007, there were more than 600 cross-border mergers and acquisitions involving an Indian element.⁶⁵ These numbers reveal the need for legal advice on international law, third country law and on issues like the international protection of intellectual property in cross-border legal transactions. Indian lawyers and law firms need to start building capacity now to meet future needs. One way to achieve this, apart from legal education, is to allow foreign law firms to practice in the country. These firms bring an expertise in third country law and international law, and Indian lawyers who are hired by these firms will profit from their experiences.

b. *Keeping the LPO Business and Guarding its Growth in India*

Opening up the legal services market in India will protect the big market share that India has in the global LPO market. In a recent case filed by the Lawyers' Collective before the Madras High Court, one of the defendants is an LPO firm. The Lawyers' Collective alleges this firm was not only doing back office work for international law firms but was also providing legal services, thereby violating the Advocates Act of 1961.⁶⁶ A negative outcome for the LPO firm in this case could have a negative impact on the legal services market and its growth potential. As a Mode 1, Cross-border service under Article I(2)(a) of GATS, the LPO falls within one of the areas of GATS in which India is aggressively looking for growth potential.⁶⁷ By opening up its legal services market, India could diffuse any doubts about the potential benefits of LPO for India.⁶⁸

⁶³ See *supra* Part IV.1.b.

⁶⁴ Wong, *supra* note 25.

⁶⁵ Ames, *supra* note 29, at 28.

⁶⁶ BAR & BENCH, *supra* note 5.

⁶⁷ Das, *supra* note 36, at 34-35.

⁶⁸ See *Global Services Location Index (GSLI) 2009 Report*, A.T. KEARNEY, <http://www.atkearney.com/index.php/Publications/global-services-location-index-gsli-2009-report.html#> (last visited Mar. 19, 2012) (rating India as the most attractive location in the world for outsourcing in 2009).

3. *Detriments to be Suffered by India from Opening its Legal Services Market*

a. *Shrinking Opportunities for Local Indian Lawyers*

The Bar Council of India, along with various members of the Indian legal profession, has expressed concern that even a limited opening of the legal services market would lead to a decrease in opportunities available to local Indian lawyers.⁶⁹ Therefore, the protections of the local Indian legal professionals have to be kept in place.

b. *“Brain Drain” of Top Indian Legal Talent*

Critics also argue opening the legal services market will lead to a “brain drain,” taking the top legal talent away from Indian firms and sending it to foreign law firms. As the most talented attorneys migrate to foreign firms, Indian firms would begin to lose major business to those foreign law firms.⁷⁰

c. *Indian Firms Being “Pushed” Out of the Legal Services Market*

If the legal services market in India is opened up to international law firms, critics fear these firms will push Indian firms out of the market. Once these international firms are established, they will take over the most lucrative mandates from local Indian firms because of their international brand name and expertise. This especially will be the case if a mandatory joint venture phase is implemented in the opening up procedure. This was allegedly the experience in Singapore. In Singapore, informal reports allege that once foreign law firms began independently operating and advising on Singaporean law as well as foreign and international law, the foreign firms terminated their joint venture agreements, under which they were operating prior to the liberalization. In doing so, they took the most valuable clients with them into their independent Singaporean practice.⁷¹

⁶⁹ GOV'T OF INDIA, *supra* note 2, at IV.3.

⁷⁰ *Cf.* Lowe, *supra* note 22.

⁷¹ *Cf.* Weng Meng Meng, *President's Message, Foreign Lawyers in Singapore: Any Future for Singapore Law Firms?*, SINGAPORE LAW GAZETTE, <http://www.lawgazette.com.sg/2012-03/> (last visited May 1, 2012) (stating the general view regarding this risk for Singapore); Mack Ross, *Liberalization of India's Legal Services Market and the Impact on the Legal Process Outsourcing Industry*, LEGAL PROCESS OUTSOURCING (July 5, 2007), <http://blog.law-scribe.com/2007/07/liberalization-of-indias-legal-services.html> (reporting on the general perception of such risk in India).

4. *Additional Reasons not to Open up the Indian Legal Services Market*

a. *Domestic Liberalization is Necessary Before Opening the Legal Service Market to Foreign Lawyers and Law Firms*

Some argue it is first necessary to liberalize the domestic legal service market before opening the market to foreign legal professionals. This entails removing the prohibition on advertisements by lawyers and law firms, the limitation on the available forms of associations of legal professionals,⁷² the limit on the number of partners in a partnership, and the bar on multidisciplinary partnerships. Removing these limitations will liberalize the Indian domestic legal services market before it is further opened to foreign legal professionals.

b. *Indian Law Firms Would be Deprived of the Chance to Benefit from the Domestic Liberalization*

Indian firms should not be deprived of the chance to profit from the opportunities created by liberalizing the domestic legal services market. Once restrictions like the ban on advertisement, the limit of twenty partners per partnership, and the ban of multidisciplinary partnerships are lifted, Indian law firms could expand and develop to a level more similar in size and revenue to larger international firms. Therefore Indian law firms should receive a chance to profit from this liberalization before facing the international competition in the domestic legal services market.

c. *Indian Legal Services Market is Already Highly Competitive*

Some critics claim opening the legal services market will lead to lower prices for clients because better competition in a closed market raises prices. They are wrong. The Indian legal services market is highly competitive, and price pressures are enormous.⁷³ Opening up the legal services market will further reduce market prices and create an environment in which smaller law firms cannot survive without the financial backing of a large international firm, thus pushing them out of the market.

⁷² This is less a factor after the passage of the Limited Liability Partnership Act 2008. Cf. Anirudh Hariani, *Foreign Law Firms in India, Advocates Act Insufficient*, HARIANI & Co. (Feb. 2, 2010), http://www.hariani.co.in/newsletter_February_Foreign_Law_Firms_10.php; Ross, *supra* note 71.

⁷³ Ames, *supra* note 29, at 31.

d. Opening the Door to Lawyers from All WTO Member Countries

Through the MFN clause in Article II of GATS, India would open its door to FLCs from all WTO members with greatly varying backgrounds.⁷⁴ This risks undermining the quality control of legal services by the Bar Council of India and domestic authorities.⁷⁵ Nonetheless, scheduling a commitment for legal services when opening the legal services market and listing MFN exemptions for certain countries in the Annex on Article II exemptions to the GATS counterbalances this risk.⁷⁶

V. CONCLUSION, PROPOSAL, AND OUTLOOK

1. Conclusion

India currently does not allow FLCs to provide any legal services in India.⁷⁷ It had no obligation to change this situation under GATS, but there are considerable policy reasons that suggest India should open its legal services market to FLCs.

Despite this, the global situation does not provide many reasons to be optimistic about multilateral discussions. For example, the Doha rounds and the GATS 2000 negotiations were suspended in July 2006 and have stalled since being resumed.⁷⁸

2. Proposal for Liberalization

In the light of the current situation, I propose a step-by-step approach for India to liberalize its legal services market and integrate into the global legal services market.⁷⁹

This step-by-step approach is in line with the concept of Progressive Liberalization in Article XIX(1) of GATS.⁸⁰ Furthermore, a similar step-by-step approach has been successfully implemented in other jurisdictions, such as Singapore and Japan.⁸¹ There is a pool of experience from other countries to draw upon when working out the details of the three liberalization steps.

⁷⁴ GATS, *supra* note 32, art II.

⁷⁵ Chapman & Tauber, *supra* note 54, at 969.

⁷⁶ *Id.* at 970.

⁷⁷ Sen & Sahu, *supra* note 1, at 27.

⁷⁸ *Services Negotiations*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm (last visited Mar. 20, 2012).

⁷⁹ *Cf.* Sen & Sahu, *supra* note 1, at 25 (discussing the necessity for such liberalization).

⁸⁰ GATS, *supra* note 32, art. XIX.

⁸¹ Arfat Selvam, *Cross Border Legal Services in Asean Under WTO*, ASEAN L. ASS'N, http://www.aseanlawassociation.org/docs/w2_sing.pdf (last visited Mar. 20, 2012).

a. Liberalizing Domestic Legal Services Market and Allow Joint Ventures of Foreign Lawyers and Law Firms with Indian Firms

Liberalizing the domestic legal services market does not conflict with the first step of opening the legal services market to foreign lawyers and law firms. They will have local partners in a good position to adapt to the domestic changes. Therefore, there is no need to conclude domestic liberalization before commencing to open the legal services market.

Liberalizing the domestic market should include passing new legislation amending The Companies Act of 1956 to allow partnerships with more than twenty partners, and ensuring the applicability of this new rule to limited liability partnerships (LLP). This would allow Indian law firms to scale up their number of partners and scale in general, thereby reaching new revenue levels. It is important to note that a Companies Act Bill is currently pending in the Indian Parliament.⁸² This Bill raises the maximum number of partners to 100.⁸³

Furthermore, the Bar Council of India should amend its Rules to allow lawyers and law firms to advertise, which would provide an avenue for market access to new firms and would facilitate competition. At the same time, India should permit multidisciplinary practices to allow lawyers and law firms to provide a broader range of services to their clients. By taking these measures, India would start the process of elevating its own domestic legal profession to a level playing field with the rest of the international legal community.

Taking this step would open the door for FLCs to enter into joint ventures with local law firms. The regulation could, at this step, allow the foreign joint venture partner to acquire a maximum of 49% of the joint venture, ensuring Indian control of the entity. It also would allow FLCs within these joint ventures to provide legal advice on international law, their respective domestic law, and third country law for which they qualify. The government would have to amend the Bar Council Rules of India to allow FLCs to partner with domestic lawyers. Through joint ventures, the FLCs could offer their international clients full service in India, because Indian joint venture partners could advise on domestic law and could appear in front of Indian courts. This would enable international law firms to enhance their existing alliances, which some have called “merely non-exclusive referral agreements.”⁸⁴ As a result, international law firms could establish a real practice in India, within the limitations of the specific fields of law. It

⁸² The Companies Bill, 2009, No. 59, Acts of Parliament, 2009 (India), *available at* <http://www.mca.gov.in> (follow “Acts, Bills, & Rules” hyperlink; then follow “The Companies Bill, 2009” hyperlink) (last visited Mar. 20, 2012).

⁸³ *Id.* at § 422(1).

⁸⁴ Sekhri, *supra* note 29.

would also help clear up the situation created by the Bombay High Court, when it held foreign firms could not practice law, even in non-litigious matters, in India.⁸⁵

b. Allowing Independent Practice by FLCs in India

The Indian government should allow FLCs to operate independently in the country, providing legal advice on international law, their respective domestic law, and third country law for which they qualify in India.

c. Fully Liberalizing the Legal Service Market in India

The Indian government should adjust the qualification requirements and procedure for FLCs in a way that would allow FLCs to join Indian bar associations. This would permit FLCs to advise on Indian law and to appear before Indian courts.

d. Benefits of This Approach for India, the Indian Legal Profession, and the International Legal Profession

India and its legal profession will benefit from opening the legal services market. By taking this approach, India can further develop its status as “one of the champions of services trade liberalization.”⁸⁶ The joint venture structures will lead to a knowledge transfer in the fields of law in which the FLCs can practice. In turn, this will lead to capacity building through the expertise that FLCs bring into the joint ventures. Secondments, or temporary reassignments, of Indian legal professionals with the international offices of the foreign joint venture partner will further this knowledge transfer.

From a young legal professional’s perspective, the heightened competition and extended scope of legal services offered yield more job opportunities and better payment packages. With rising competition and demand for young legal professionals, offers will increase as well.

By following this approach, India will eventually fulfill the bilateral and multilateral requests by the United States, the European Union, Australia, Singapore, Japan, the People’s Republic of China, Switzerland, New Zealand and Brazil to commit under the GATS in legal services.⁸⁷ This will create some negotiation mass for future

⁸⁵ *Bombay High Court on the Entry of Foreign Law Firms*, INDIAN CORP. L. (Dec. 18, 2009), <http://indiakorplaw.blogspot.com/2009/12/bombay-high-court-on-entry-of-foreign.html> (discussing the results of *Lawyers Collective v. Bar Council of India*).

⁸⁶ Samar Verma, *Foreword to Kasturi Das, GATS Negotiations and India: Evolution and State of Play* (CENTAD, Working Paper No. 7, 2006), available at <http://ssrn.com/abstract=1587370>.

⁸⁷ GOV’T OF INDIA, *supra* note 2, at V.5.

WTO negotiations. India could promote its own interests in the GATS negotiations, such as other WTO members' further opening for services of Indian nationals.⁸⁸ This commitment to opening its legal services market would come at a low risk of suffering from a serious obstacle to the domestic legal profession and a high likelihood of increasing the quality of the domestic legal profession. It also would increase legal jobs in India and would expand the Indian legal profession internationally, both independently and as new parts of international law firms.

India presents a vast market with great opportunities for FLCs. As Brooks Entwistle, head of Goldman Sachs Group in India, implied at a 2009 International Bar Association conference in Mumbai, "India's a place you have to be from a global business franchise standpoint."⁸⁹ Coupled with the fact that India already is among the top ten largest economies in the world⁹⁰ and with its vast growth potential, India provides a lucrative future market for legal services, especially for international law firms that advise on cross-border transactions.⁹¹

3. Outlook

Opening up the legal services market will be a great bargaining chip for India in future negotiations, as it seeks to achieve its goals with regard to its services interests in Modes 1 and 4 of Article I of the GATS. Despite the discussion of the subject in India and beyond in the wake of the Mumbai High Court decision of December 2009, however, the parties are not even approaching the negotiating table at the moment. Currently, there seems to be no major incentive for the Indian government to put the issue high on its agenda. Indeed, the foreign lawyers' case pending at the Madras Court has been dragging on for some time now. Still, the reality of the legal services market's needs is being recognized. The Indian government released a consultation paper on the subject in 2006,⁹² and the government has experienced the disadvantages of its strict regulation when having to hire foreign coun-

⁸⁸ See GATS, *supra* note 32, art. I(2)(d).

⁸⁹ Wong, *supra* note 25.

⁹⁰ THE WORLD BANK, <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf> (last visited Apr. 6, 2010) (reporting the GDP of India in 2010 was the world's ninth largest by producing \$1,729,010 million); *World Economic and Financial Surveys: World Economic Outlook Database*, IMF, <http://www.imf.org/external/pubs/ft/weo/2009/02/weodata/index.aspx> (last visited Mar. 28, 2010).

⁹¹ See *supra* Part IV.2.a. for the growth in foreign acquisitions by Indian companies.

⁹² GOV'T OF INDIA, *supra* note 2.

sel for legal advice on the privatization of two airports.⁹³ At the very least, there seems to be a greater awareness of the necessity to eventually open up the Indian legal services market.

⁹³ Fleming, *supra* note 55, at 35.

