

Opening Up Indian Legal Services Sector For Foreign Lawyers & Foreign Law Firms: Issues And Impacts Thereof

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ABSTRACT: In a market, Competition promotes efficiency, offers wider choice, increases consumer welfare, better products and services and contributes to the growth of an economy. Free competition means total freedom to develop optimum size without any restriction. The Competition Act, 2002, provides the framework of competition law in India. The Indian Legal Services Sector is one the most growing services sectors of the Indian Economy. As per the estimates, this sector has the potential to reach US \$ 5 Billion by the end of 2011. At present, India has the 2nd largest number of lawyers in the world with the strength of more than one million lawyers. In India, according to available statistics, about 80,000 law graduates pass out every year from the country's 965 law schools. Legal Services is one of the services that can be opened up to trade under the General Agreement on Trade in Services (GATS) but subject to the commitments made by the Government of India in this regard. India has not yet included legal services in its schedule of commitments under the General Agreements on Trade in Services. However, there has been tremendous pressure from the members of the World Trade Organization to allow foreign lawyers and foreign law firms to set foot in India. The issue of opening up of the legal services regime has been a matter of considerable debate. The controversy arose in 1993 when three foreign law firms i.e. **Ashurst Morris** of UK and **White & Case and Chadbourne & Parke** of the US tried to open up their branch offices in India. The Lawyers' Collective challenged the practice of the above firms in Bombay HC alleging that they are practicing the profession of law in India illegally. However, in December, 2009 the Bombay HC disallowed their practices observing that their advisory services come under the ambit of the expression "practice the profession of law" as per the provisions of the Advocates Act, 1961 which prohibits the foreign lawyers and foreign law firms to practice the profession of law in India. Since this case, the prohibition on the entry of foreign lawyers and the foreign law firms in India has been debated vociferously along with other restrictions imposed on the legal services sector by the Advocates Act, 1961 and the Bar Council of India Rules, 1975. In this background, the author has strong speculation that such restrictions on the legal services sector are anti- competitive and hampering competition in the legal services market. Thus, the restrictions imposed under Advocates Act, 1961 and Bar Council of India Rules, 1975 on foreign lawyers and foreign law firms are ante competitive as per Competition Act, 2002 hence void. The Government of India should amend the provisions of advocates Act and Bar Council of India Rules so as to allow foreign lawyers and foreign law firms to practice the profession of law in India.

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1. INTRODUCTION

"India has benefited from opening up to foreign competition in many other areas, India should explore allowing foreign law firms greater access to the Indian market". ...Economic Survey: 2012-13

The Indian legal services sector is closed to FDI and therefore foreign lawyers are strictly prohibited from practicing, or offering, their professional services in India. It is to be noted here that India is currently involved in wide-ranging multilateral negotiations in respect of trade in services between 149 Members of the WTO and it is regulated by the General Agreement on Trade in Services (GATS). However, many countries namely, US, EC, Australia, Singapore, Japan have requested India for the

purposes of commitments in Legal Services Sector. Like Singapore and Indonesia, India has not done any commitments with any country in the legal services sector.

With the integration of economics of the world, it would naturally require gradual globalization of legal profession. In the global economic integration, it is very much difficult to ignore the significance of trade in services. In the WTO's "Services Sectoral Classification List", "legal services" are listed as a sub sector of "business and professional services". Legal services have been defined in UN CPC (United Nations Central Product Classification) which includes legal advisory and representation services. Professional services of the WTO include legal

services which are a part of GATS and it can be said that according to international scenario the FDI in legal services sector is possible.

In terms of Indian scenario, the FDI Circular 2013 expressly excluded some of the areas in which foreign investment is not possible and fortunately 'legal services' is not one of them. It means FDI in legal services is also possible as per Indian law.

Legal Services is one of the services that can be opened up to trade under the General Agreement on Trade in Services (GATS) but subject to the commitments made by the Government of India in this regard. India has not yet included legal services in its schedule of commitments under the General Agreements on Trade in Services. However, there has been tremendous pressure from the members of the World Trade Organization to allow foreign law firms to set foot in India. The issue of opening up of the legal services regime has been a matter of considerable debate.

In the wake of globalization and privatization, Indian enterprises started facing the heat of competition from domestic players as well as from global giants, which called for level playing field and investor-friendly environment. Hence, need arose with regard to competition laws to shift the focus from curbing monopolies to encouraging companies to invest and grow, thereby promoting competition while preventing any abuse of market power. The Competition Law prevents artificial entry barriers and facilitates market access. The provisions of Advocates Act and the BCI Rules by imposing 'artificial entry barriers' and hence it is in contravention of Competition law.

In this background, the author has strong speculation that such restrictions on the legal services sector are anti-competitive and hampering competition in the legal services market. India has benefited from opening up to foreign competition in many other areas, and given that Indian lawyers are offering services across the world through LPO, India should explore allowing foreign law firms greater access to the Indian market.

2. DEFINE 'LEGAL SERVICES' IN TERMS OF FOREIGN INVESTMENT:

What are the 'legal services' exactly for the purposes of foreign investment in legal services sector? In the WTO's "Services Sectoral Classification List", "legal services" are listed as a sub sector of "business and professional services". But the WTO services classification list does not define legal services. A legal service has been defined in UNCPC (United Nations Central Product Classification) which includes legal advisory and representation services and is as follows:

- i. Legal advisory and representation services concerning criminal law
- ii. Legal advisory and representation services in judicial procedures concerning other fields of law
- iii. Legal advisory and representation services in statutory procedures of quasi-judicial tribunals, boards, etc.
- iv. Legal documentation and certification services,
- v. Other legal advisory and information services
- vi. Arbitration and Conciliation services.

In 2000, The United States presented a proposal on legal services to WTO. The United States suggested that the legal services should be understood to include the provision of legal advice or legal representation in such capacities as counselling in business transactions, participation in the governance of business organizations, mediation, arbitration and similar non-judicial dispute resolution services, public advocacy, and lobbying.

Lawyers provide legal advice, represent clients, prepare contracts and other legal documents, and may act as executor or trustees in estate matters. Sectors such as corporate restructuring, privatization, cross border, mergers and acquisition, intellectual property rights etc. require more and more sophisticated services, thereby facilitating trade in legal services.

3. TRADE IN LEGAL SERVICES AND GATS:

India is the founder member of the GATS/WTO and hence India may facilitate free flow of services across the world. GATS classifies 12 sectors for which member country may make a commitments with other country for trade in services. Out of 12 sectors one is business sector and business sector is further classified into 6 sectors of which one of them is legal services. The author is meant to say that GATS clearly makes provision about the legal services for which foreign investment is possible. Thus GATS applies to all services including legal services. However, India has made commitments with other country relating to engineering and medical services but fortunately or unfortunately India has not made any commitments in legal profession till now.

4. RELEVANT PROVISIONS

Article- 1 of the GATS makes provision which specifies four different modes for supplying of services:

- **Cross-border supply:** the supply of services from the territory of one member into the territory of another member.
- **Consumption abroad:** the supply of service in the territory of one member to the service consumer of any other member.
- **Commercial presence:** the supply of service by a service supplier of one member through the commercial presence in the territory of any other member.
- **Presence of natural persons:** the supply of service by a service supplier of one member through the presence of natural person of a member in the territory of any other member.

Technically, “it is possible to supply legal service through all four modes mentioned above and the legal service is one of the issues on the agenda of service negotiations. In context of India the commercial presence and presence of natural person that is the establishment of foreign law firms in India and opportunities for Indian legal profession abroad”. For this the member countries have to make commitments with any other country for the purposes of trade in legal services.

Article- XVII of the GATS makes provision about the “National Treatment”. **Article- XVI** entitles “Market Access” which enumerates six limitations which a host country cannot impose upon Foreign Service providers, unless such limitations are specified in the schedule of commitments. These limitations are as follows:

- Number of service suppliers;
- Total value of service transactions;
- Total number of service operations;
- Total number of natural persons
- Measures which restrict or require specific types of legal entity through which services may be supplied, and
- Participation on foreign capitals.

From this provision it has been clear that if any member country does commitments with any other member country then there is possibility of free flow of trade in services in legal services sector. No country can impose unreasonable restrictions on such trade as per Article XVI of the GATS.

Article- VII entitles ‘recognition’ which deals with the recognition and standards or authorization, licencing or certification of service suppliers. A

member country has right to stipulate the required educational qualifications or work experience on the part of foreign service suppliers in order to serve in the domestic market. However, clause (3) of this Article also stipulate that this right shall not be exercised in such a way as to constitute “disguised restriction on trade in services”

Article- VI entitles “Domestic Regulation”. It means the government of a member country shall not make any regulations which affect the trade in services. The member country, however, impose restriction on such trade in services provided it must be reasonable and impartial etc.

Article III entitles “transparency” which means the member country shall not hide anything regarding the services of which commitments are made. There must be transparency on part of each member country.

5. GATS AND INDIAN SCENARIO:

India is signatory member of the GATS which is an organ of the WTO and hence India is under obligation to open up professional/service sector in the territory of member nations. We know that The Indian legal services sector is not opened to FDI and foreign lawyers are not allowed to practice, or offer, their professional services in India.

The FDI policy does not expressly prohibit the Foreign Investment in legal profession. However, there are strict and direct prohibition under the Advocates Act, 1961 and the BCI Rules, 1975. Advocates Act makes provision that only advocates can practice law in India. The advocate shall be a person who is a citizen of India, obtained a degree from an institute/University recognized by the BCI etc. Further an advocate cannot enter into a partnership or any other arrangement for sharing remuneration with a person not an advocate. There are many other provisions such as Rule 3&4 of BCI Rules, 1975 which makes provision to the some extent to allow foreigner to practice law in India on the reciprocal basis. Foreign advocates may be engaged as an employee or consultant of a local law firm but they cannot be appointed as a partner of the law firm in India but subject to restriction imposed by FERA. Finally, regarding India we can say that the Indian law strictly prohibits the entry of foreign law firm and hence no Foreign Direct Investment is possible in Indian legal services sector.

6. IMPACT OF PERMITTING FOREIGN LAWYERS AND FOEREIGN LAW FIRMS IN INDIAN LEGAL SERVICES MARKET:

Now the question before us is ‘what would be the impact if we allow foreign lawyers and foreign law firms in legal services market of India?’

BANE

As per the proposed research work, the author found that the disadvantages are not many. It is to be mentioned here that the domestic law firms, being over powered in performance and revenue, will be affected by its counter foreign law firms. "The size, power, influence and economical standards of these large international law firms would definitely affect the share of the domestic law firms. It can be said that the Indian law firms cannot, at the present scenario, match, howsoever far they may stretch it, the foreign law firm's size, power and most importantly economical standard." Furthermore, we can say that the domestic law firms are precluded from entering into any kind of co-operation with non-lawyers. We can say that there are fewer disadvantages regarding the entry of foreign law firms into India.

"The domestic law firms which are not strong enough to face the competition, many of them collapse and they get bought out for ridiculously low values and as the result the domestic players, they shrink in size."

Bar Council of India Chairperson Jaganath Patnaik said: "We are opposed to opening up the sector as this would ruin the Indian legal profession. We have already submitted our comments to the government of India regarding our opposition to the foreign law firms".

BOON

If we allow FDI in legal services sector in India, it will bring in competition and raise the standards of service in the legal profession. Poor people will get justice at the door step as guaranteed by the Indian Constitution. There would be tremendous flow in employment avenues for the Indian lawyers and law graduates. Our familiarity with English language and common law tradition is a great advantage which we can exploit fully. The Corporate legal activities in India are a new/recent phenomenon which Foreign Law Firms provide better service. Therefore, without any hesitation we should allow foreign law firms into India and exploit their services. Entry of foreign law firms will enable the junior lawyers to grab a handsome pay package and law student's easy access to internship programs; which is evidently not their catch in the present scenario.

"We support the move to open the legal sector...entry of foreign law firms will enhance the level of service currently offered in India and there would be more responsibility and accountability towards clients."

It can also be said "apart from the 'friendship agreements' Foreign Law Firms have already started hiring fresh law graduates from India. They are

giving them monetary benefits which are much more than the average that Indian law firms are providing. Their message is clear, if you don't allow us to work in your country then we will take your brightest law graduates and camp them in our country and charge you in pounds or dollars or whatever".

7. STAND TAKEN BY LAW COMMISSION AND BAR COUNCIL OF INDIA:

In the Chapter relating to "Entry of Foreign Legal Consultants and Liberalisation of Legal Practice", the Law Commission had pointed out that India was a party to the General Agreement on Trade and Services (GATS) and within a period of five years from January 1,1995, it would be under an obligation to enter into successive rounds of negotiations periodically with a view to achieving a progressively higher level of liberalisation which includes free trade and services without regard to national boundaries. The Law Commission had, in this connection, referred to the guidelines prepared by the International Bar Association with which the Executive Committee of the Bar Association of India was broadly in agreement. The executive Committee of the Bar Council of India is of the view that Indian legal system ought to integrate internationally under an appropriate regulatory system which would ensure the following:

1. a general reciprocity of rights and non-discrimination;
2. foreign lawyers/firms should be subject to the same disciplinary jurisdiction as Indian lawyers; and
3. there should be greater opportunities for the future development of the entire legal profession in India

In this connection, it may also be noted that as the law in India stands today, proviso to clause (a) of sub-section (1) of Section 24 of the Advocates Act says that "subject to the other provisions contained in this Act, a national of any other country may be admitted as an advocate on the said roll, if citizens of India duly qualified are permitted to practice law in that country". Accordingly, even under the existing law, subject to the reciprocal arrangements with other countries, the foreign lawyers can be admitted as advocates in India.

The Law Commission in its Working Paper has itself suggested some of the safeguards which could be adopted. In this connection, it has referred to article XIX(2) of the GATS which allows the process of liberalisation to take place with due respect for national policy objectives and level of development

of individual members, both overall and individual sectors. There shall be appropriate flexibility for developed country members for opening fewer sectors, liberalising fewer types of transactions, progressively extending market access in line with their developing situation and, attaching appropriate conditions, while making access to their markets available to foreign service suppliers keeping in view these objectives. The Commission has also pointed out that most of the law firms in India are family controlled and very few firms provide 'single window services' meaning service which not only includes legal but also accountancy, financial and other advice to their clients. In light of these facts, the Commission wanted the legal community to apply its mind to devising a proper legal framework for regulating the legal profession in the context of emerging internationalisation of legal services. The Law commission has indicated that the Bar Council of India has to choose appropriate model suiting conditions of our country so that appropriate amendments could be made in the Advocates Act, 1961 which would arm Bar Council of India with necessary powers to meet the challenges ahead.

The Law Commission of India hopes that all concerned would carefully go through the material contained in this Working Paper in the proper perspective and offer their comments without any pre-conceived notions. No one should assume that Law Commission of India is less concerned about the welfare of the legal profession in India. Its only concern is that the legal community should prepare itself for the future challenges.

8. ALLOWING FOREIGN LAWYERS AND FOREIGN LAW FIRMS IN INDIA: A COMPETITION LAW ISSUE:

The most controversial issue that has been the cause of tremendous protest is the entry of foreign law firms into India. The Advocates Act, 1961 and the BCI Rules, 1975 are the laws which regulate the legal services sector in India. These regulations ensured that the Indian legal services sector is protected from external competition. Free competition is total freedom to develop optimum size without any restriction. Therefore, restrictions imposed on the legal services sector are anticompetitive and the regulatory mechanism is contrary to the goals and purposes of the competition policy. The Competition Law prevents artificial entry barriers and facilitates market access. The provisions of Advocates Act and the BCI Rules by imposing 'artificial entry barriers' and hence it is in contravention of Competition law. The artificial entry barriers such as:

- Nationality requirement

- Residency requirement
- Degree recognized by BCI requirement

It is clear from Sec. 60 of Competition Act, 2002 which gives overriding effect over any other law to the extent of its contravention that Competition Act, 2002 is having overriding effect on the Advocates Act. Thus trade restrictive aspects of Advocates Act, 1961 and BCI Rules, 1975 which deny consumers access to services are in contravention of the Competition policy and its goals.

9. THE LEGAL SERVICES MARKET IN INDIA: AN OVERVIEW:

The expressions 'Legal services' includes within its domain advisory and representation services, legal or judicial procedures and legal documentation. Lawyers offer legal advice, represent clients, and prepare legal documents. The Bar Council of India constituted under the Advocates Act is the regulating body. Bar Council of India has imposed as many restrictions on the legal services sector in India. As per the provisions of the Advocates Act, foreign law firms are not allowed to establish their branches/offices in India and also prohibited to give any legal advice because that would constitute practicing the 'profession of law' in India. The controversy arose in 1993 when three foreign law firms i.e. *Ashurst Morris of UK and White & Case and Chadbourne & Parke of the US* opened up their branch offices in India with the permission of RBI under Section 29 of the FERA, 1973. The Lawyers Collective, a legal service provider in the matter of public interest, through a Writ Petition before Bombay HC, challenged the practicing profession of law by the above law firms and the power of RBI to grant permission for the same. The Bombay HC disallowed the practice of law of the above law firms stating that even non litigious work come under the ambit of 'practicing the profession of law' and furthermore, as per Section 29 of the FERA, 1973 the RBI has power to grant permission to open up liaison offices in India with respect to trade, commerce, industry etc. It is extremely import to mention here that in a catena of cases it has been established that legal profession is neither trade nor commerce but a profession. Further, the Supreme Court has asked the Reserve Bank of India not to grant permission to or register foreign law firms to set up liaison offices in India under Section 29 of the Foreign Exchange Regulation Act, 1973, for fighting litigation in the country. Thus, it is crystal clear that RBI has no power under Section 29 of FERA to grant permission to foreign law firms to open up their liaison offices in India with respect to legal services. On the basis of judgment in Lawyers

collective case, a PIL (5614/2010) has been filed before Madras HC by A.K. Balaji (a practicing lawyer) against 31 foreign law firms practicing the profession of law in India. The allegations made against them are that they are practicing the profession of law in India illegally. Though the High Court held that foreign law firms or foreign lawyers could not practice in India either on the litigation or non-litigation side unless they fulfilled the requirement of the Advocates Act and the Bar Council of India Rules. HC further said “There is no bar for foreign law firms or foreign lawyers to visit India for a temporary period on a ‘fly in and fly out’ basis, for the purpose of giving legal advice on foreign law to their clients in India.” The High Court held that foreign lawyers could not be debarred from coming to India and conducting arbitration proceedings in disputes involving international commercial arbitration. Against the above judgment of Madras HC an appeal before SC is still pending.

Restrictions Imposed on Legal services in India:

The legal services market in India is regulated by the Advocates Act, 1961 and the Bar Council of India Rules, 1975. As per the provisions of the Advocates Act, an Indian citizen having a law degree recognized by the BCI and who is enrolled as an Advocate with Bar Council of any State is entitled to practice the profession of law in India. Furthermore, the Advocates Act, 1961 along with BCI Rules, 1975 impose as many restrictions on the legal profession in India with respect to maintain the quality of profession. These restrictions are as follows:

- As per the provisions of Section 29 of the Advocates Act provides “only one class of persons are entitled to practice the profession of law in India, viz. the Advocates”.
- As per the provisions of Section 24 read with Sections 29 and 33 of the Advocates Act, 1961 only ‘natural person’, who is a citizen of India, can practice the profession of law in India. It means that an artificial body cannot act as an Advocate. A national of other country can be admitted as an Advocate in India if the rule of reciprocity is satisfied. It is pertinent to note here that India has not yet made any reciprocal agreement with other countries.
- As per the provisions of Section 24(1) (c) of the Advocates Act, 1961 a person shall be qualified to be admitted as an Advocate who has obtained a law degree from any University recognized by Bar Council of India.

- As per the BCI Rule II made under Section 49 (ah) of the Advocates Act, 1961 an Advocate cannot inter into a partnership or any other arrangements for sharing remuneration with non Advocates.
- The Bar Council of India has passed a resolution prohibiting the foreign lawyers and foreign law firms from practicing the profession of law in India.
- As per Rule 36 of the BCI Rules, 1973, in India there is an absolute bar on advocates advertising or soliciting for any purpose, and even indicating the area of their specialization.
- Section 11 of Companies Act, 1956 provides that a partnership or any association with more than 20 members if not registered as a company shall be an unlawful assembly. This provision has the effect of limiting the size of legal establishment in India.

Effect of restrictions on competition law:

It has been crystal clear that the Advocates Act, 1961 along with BCI Rules, 1973 bans the entry of foreign lawyers and foreign law firms from practicing the profession of law in India. This has the effect of limiting the competition in the legal services market in India and thus such restrictions are anti-competitive and go against the spirit and principles of Competition Law.

The Competition Act 2002 applies to “any enterprise” engaged in “any activity” relating *inter alia* to the “provision of services of any kind”. It is extremely important to note here that allowing foreign lawyers and foreign law firms in India would definitely bring in competition and increase the standards of legal service sector but most lawyers and Indian law firms are not ready to face it.

The 3rd OECD Workshop on the Professional Services was of the view that market access should be fair, discrimination between foreign and local service providers should be avoided and domestic regulation should not impede the competition.

Mr. S.V.S. Raghwan in his report observed that the present legal system limits the competition by restricting new entrants into the legal profession in India. Further, it was also observed “the legislative restrictions in terms of law and self-regulation have the combined effect of denying opportunities and growth of professional firms restricting their desire and ability to compete universally, preventing the country from obtaining advantage of India’s considerable expertise and precluding consumers from opportunity of free and informed choice”.

❖ ***The restrictions imposed on the legal services market in India are anti-competitive agreement as per Section 3 of the Competition Act, 2002***

Section 3 of the Competition Act, 2002 prohibits an association of persons from entering into an agreement in respect of provision of services which causes or is likely to cause an appreciable adverse effect on competition in India. A decision taken by any association of persons engaged in identical or similar provision of services that limits or controls the provision of services shall be presumed to have an appreciable adverse effect on competition and shall be void. Further, this Act provides for several factors that shall be considered in inquiring whether an agreement has an appreciable adverse effect on competition. These factors include creation of barriers to new players into the market, foreclosure of competition by hindering entry into the market, accrual of benefits to consumers, improvements in production or distribution of goods or provision of services and promotion of technical, scientific and economic development by provision of services. Now it has been crystal clear that the Competition Act prevents artificial entry barriers and facilitates market access and compliments other competition promoting activities. These restrictions are anti-competitive in terms of Section 3 read with Section 19 of the Competition Act, 2002.

❖ ***The Bar Council of India appears to be abusing its dominant position under Section 4 of the Competition Act, 2002***

According to Section 4 of the Competition Act, 2002 no enterprise or group shall abuse its dominant position. This prevents the practices which arise from the abuse of dominant position held by a group or an enterprise. Such practices include the limiting of supply of goods or services, denial of market access, etc thereby restricting or eliminating competition. Now as it has been established and pointed out before that the rules of the Bar Council of India are anti-competitive, it appears that the Bar Council of India is abusing its dominant position as per Section 4 of the Competition Act, 2002 and hence can be seen as violating the provisions of the Competition Act, 2002 by restricting and eliminating competition in the legal services market by abusing its dominant position in the same market.

CONCLUSION & SUGGESTIONS

On the basis of the above discussion the author concludes this proposed research paper by stating that the Business Process Outsourcing going on in respect of information technology and other technical services including legal services clearly demonstrate that we have the cost advantage as for as

the skilled labour is concerned. We should be prepared to through upon our legal service through all the four modes given under the GATS. While allowing the commercial presence for foreign law firms in India, we must insist upon the access to foreign legal services by our individual professionals. We have to modify our domestic laws to facilitate the growth of multidisciplinary law firms. The centres of our education system have demonstrated our capabilities but we have failed to expand the scope of these circle. The GATS is probably one of the most flexible agreements of the WTO. It definitely enables us to celebrate the process of opening up of our national economy in national interest. Finally, the author is of opinion that India should allow foreign law firms and foreign lawyers to invest into India their services irrespective of some of the disadvantages. The Government of India should amend the provisions of advocates Act and Bar Council of India Rules so as to allow foreign lawyers and foreign law firms to practice the profession of law in India.

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