

Indian Protectionism in the Global Marketplace

It seems inevitable that India will open its borders to allow foreign law firms to establish offices in the country, despite recent non-activity indicating otherwise. The global recession has placed liberalization policies on the backburner of the Indian agenda. However, after India's voters gave a strong mandate to Prime Minister Manmohan Singh and his moderate Congress in May of 2009, the country's stock market bubbled "on the expectation that Singh would liberalize the nation's economy." Zach Lowe, "Still No Passage to India for Foreign Law Firms," *The American Lawyer*. 18 June 2009. No such action has been taken, but analysts like Reena Segupta, of RSG consulting, remain cautiously optimistic, "Liberalization of the legal sector isn't going to be top on the government's priority agenda, but with its strong mandate, we may see it in two years rather than five." *Id.* Under the General Agreement of Trade in Services (GATS), which is an organ of the World Trade Organization (WTO), each signatory is to facilitate the free flow of services across the world. In addition, member states are under an obligation to open up their service sectors, including the legal profession to other member states. Since India is a prominent member to this multilateral arrangement it must endeavor to abide by its own commitment to the WTO. This article seeks to uncover the rationale behind India's protectionism and why so many local attorneys are averse to foreign firm practice within the country. It also discusses the potential benefits that could come to India and foreign (particularly American) firms if they are allowed to establish themselves in the country. Lastly, the paper concludes with a discussion of possible changes that will make the inevitable transition a much smoother one for both foreign and Indian firms.

The Bar Council of India has made it very clear that it is opposed to foreign lawyers and law firms practicing in the country. This sentiment is not without support, as one Indian lawyer recently quipped, "outside India, legal services are a business . . . Here it is a profession-we still have archaic rules." "Legally Barred: Lawyers in India," *The Economist*. 26 April 2008; U.S. Edition. These rules can be rather nebulous at times, and clear answers to legal questions are not always available necessitating the services of local attorneys who have a proverbial finger to the pulse of Indian change. Melissa Maleske, "Outside Counsel; In a Legal System Undergoing Rapid and Massive Change, Indian Counsel Can Help Clear the Hurdles," *InsideCounsel*. November 2007, p.57.

Despite the economic recession impacting numerous countries across the globe, India's economy has remained relatively stable and continues to grow. Over the last 10 years India's growth has astounded both economists and lawyers alike. Analysts at Goldman Sachs predict that within a decade India will overtake Italy, France and the United Kingdom as the world's fifth largest economy if it keeps its current rate of expansion; by 2050 India's economy could be larger than the United States, and only second to China. Damian Grammaticas, "Indian economy 'to overtake UK,'" *BBC News*. 24 January 2007. Unfortunately, massive growth often leaves service industries scrambling to keep up. According to Tom Britt, partner in Debevoise & Plimpton's Hong Kong Office, "regulatory and legal changes are working their way through the (Indian) system at a pace that is unprecedented . . . It's a struggle for lawyers in any country to keep pace with a rapidly changing legal and regulatory landscape." Melissa Maleske, "Outside Counsel; In a Legal System Undergoing Rapid and Massive Change, Indian Counsel Can Help Clear the Hurdles," *InsideCounsel*. November 2007, p.57. Britt goes on to note that a good

Indian attorney is vital to success in an evolving environment, explaining that, “There’s nothing an outsider can do to make the process easier . . . It all comes down to hiring counsel that you have confidence in and hiring them off the basis of a trusted recommendation.” *Id.*

Britt’s assertions coincide with many Indian lawyers’ beliefs that the Indian legal marketplace evolves constantly and is simply too complex for an outsider to practice effectively. However, this notion is not entirely truthful and retains a hint of skepticism or fear that liberalization of legal opportunity will disparately impact Indian lawyers economically. Other practitioners within the country are concerned for different reasons, most notable among them being the idea that Indian lawyers “occupy an important position in Indian society as the guardians of democracy and are associated with independence from the old British Empire. Tampering with that role is seen as a threat to India’s sovereignty.” “Legally Barred: Lawyers in India,” *The Economist*. 26 April 2008; U.S. Edition.

Scholars have argued that several rationales justify Indian protectionism. First, the opening of the Indian legal market is not only prejudicial to the interests of the Indian legal profession, but to the nation as a whole. Shyama Charan Vats, “Internationalisation of the Indian Legal Services Market,” *Articlesbase: Free Online Articles Directory*. 28 August 2008. Second, to permit foreign firms to encroach on this important institution of democracy is contrary to public interest; a symbiotic system of co-existence in India has succeeded in meeting clients’ needs and there is no reason why it will not work in the future. *Id.* Third, liberalization will dramatically affect Indian firms that provide services to corporate clients regarding commercial law. *Id.* These firms will find themselves in severe and direct competition with foreign firms, who have more resources at their disposal, and by resources we mean money. Corporate firms in India could soon find themselves out of business because they cannot compete with outside counsel. *Id.* At the very least, these firms believe that the proposal to open up the legal service sector is premature as many Indian firms are in the early stages of development. *Id.* Finally, scholars have noted that there exists a major difference between the natures of legal tradition in India and those in the United States, which some Indian lawyers see as a league of “ambulance chasers.” *Id.* In India, lawyers are truly seen as advisors who provide a valuable service to society; hence, restrictions percolate regarding solicitation and advertisement. *Id.*

Despite the myriad rationales behind Indian protectionism, there is growing sentiment among the world’s legal community that India will inevitably open its legal marketplace to foreign firms. Such an event will undoubtedly be beneficial to foreign interests who have sought to tap into the Indian economy for decades. Global law firms see India as one of the last untouched goldmines on the international legal front. “Legally Barred: Lawyers in India,” *The Economist*. 26 April 2008; U.S. Edition. India has a booming economy and is the largest democracy, by population, on earth. Indian corporations continue to develop and, as Mr. Britt has observed, “The pace of transactions in India is growing much more rapidly than the pace of new lawyers entering the market.” Melissa Maleske, “Outside Counsel; In a Legal System Undergoing Rapid and Massive Change, Indian Counsel Can Help Clear the Hurdles,” *InsideCounsel*. November 2007, p.56. Furthermore, those involved in the corporate world would likely prefer foreign firms over Indian ones because they have more experience in corporate transactions.

In addition, Indian companies seem poised to venture into the open market. “The recent purchase of Jaguar and Land Rover, two luxury car brands, by Tata Group, [a giant Indian conglomerate], is the latest sign that Indian companies are ready to do the kind of deals that get international lawyers salivating.” “Legally Barred: Lawyers in India,” *The Economist*. 26 April 2008; U.S. Edition. Moreover, “the type of economic activity that foreign law firms are likely to profit from – such as cross border deals – is growing even faster (in India). A greater number of foreign clients are now involved in Indian transactions, which is why these firms want to establish a stronghold in India, to better serve their clients.” Shyama Charan Vats, “Internationalisation of the Indian Legal Services Market,” *Articlesbase: Free Online Articles Directory*. 28 August 2008.

One justification for allowing foreign firms to enter the Indian legal marketplace is the lack of competition. The practice of prohibiting foreign law firms from entering the area leads to stagnation on the part of Indian firms. Protectionist measures generally lead to limited growth since competition is not an issue. In time, less productive firms are allowed to survive much longer (even in perpetuity) than they would have in an open market. In contrast, competition allows the market to dictate the winners and losers. Additionally, foreign firms will grant Indian companies the advantage of foreign expertise in corporate matters. Global experience has taught us that liberalizing legal services has led to growth. “In India those service sectors that have fully liberalized have experienced much higher growth than those that are still closed.” Som Mandel, “Liberalising Indian Legal Services,” *The Economic Times*. 31 December 2008. For example, biotechnology, IT and telecom services achieved growth rates over 30% in 2005-06 following their liberalization, while closed services like legal, accounting and railways achieved only single digit growth in the same fiscal period. *Id.* If liberalized, both Indian and U.S. firms will have the opportunity to learn from one another, exchange ideas, and strengthen existing bonds, leading to further economic integration in an increasingly global world.

Proponents of liberalization also contend that foreign firms are not interested in litigation within the country in any way. “They feel that Indian companies are now investing in several countries worldwide and if foreign firms are present in India, they can guide the Indian companies [more efficiently], in relation to their investments outside India.” Som Mandel, “Liberalising Indian Legal Services,” *The Economic Times*. 31 December 2008. Thus, if a U.S. law firm has an office in India, any Indian company wishing to invest in the U.S. need only visit the American firm in India, instead of traveling to the U.S. to seek advice. “As more and more Indian companies begin to do business outside India, foreign legal advice is increasingly needed. The availability of foreign lawyers in India would greatly minimize costs to Indian business enterprises.” *Id.*

Another reason for liberalization of the Indian legal marketplace is the dilemma/phenomenon of the “Brain Drain” scenario. There is increasing evidence that top students from Indian law schools are being recruited out of the country to foreign firms in a manner reminiscent of top students in the fields of engineering and computer science. “A record 40 percent of law graduates (in 2008) . . . from the National Law School of India University have taken up training contracts with international law firms, compared with just 20 last year.” “Firms Scoop Top Talent From India,” *Lawyers Weekly*. 7 November 2008, p. 4. If India allows these same foreign firms to open branches in the country offering similar opportunities they offer

elsewhere, than the problem of “poaching” and the “Brain Drain” dilemma will be partially solved. The proverbial “best and brightest” will remain in India providing valuable services to the Indian economy which will lead to continued growth.

When India decides to open its legal marketplace it will need to do so in a somewhat limited fashion, which may draw the ire of certain firms. Initially, there are several statutory hurdles that must be overcome to let in foreign lawyers. “These include restrictive rules based on a lawyer’s citizenship, recognition of foreign law degrees, limits on the size of partnerships between lawyers and non-lawyers, and a prohibition of advertisements by law firms. “Foreigners at the Door,” *The Economist: Business India Intelligence*. 22 February 2006, p. 8. The Advocates Act of 1961 has to be amended in order for foreign firms to establish offices within the country. This congressional Act has provided the impetus for Indian protectionism for nearly five decades. However, it could easily be amended to include a reciprocal arrangement within its text; “allow our lawyers to practice in your country and in return we will let in yours.” *Id.*

In the end “the entry of foreign lawyers will ultimately be driven by India’s need to fulfill its WTO obligations; by reciprocal arrangements set up between legal professions in different countries; by the growing amount of outsourced legal services being provided from India; and by the increasing number of Indian lawyers who study and qualify in foreign jurisdictions and work with international law firms.” *Id.*

The Indian government must also build a consensus among the legal fraternity before liberalizing its legal service industry. *Id.* “Luckily, there is little evidence to show that the foreign law firms present in India and providing advisory services have adversely affected their Indian counterparts. India has a rich legal tradition and world-class legal practitioners who can withstand competition from foreigners.” *Id.* Moreover, as explained briefly above, “the entry of foreign law firms may even promote the quality of legal work. In any case, a foreign law firm should create employment, as it is likely to be staffed mainly by Indians rather than expatriates.” *Id.*

As long as the basic principles elucidated in the International Bar Association guidelines are met concerning fairness, uniform and non-discriminatory treatment, clarity and transparency, foreign law firms should not pose a serious threat to Indian ones. Shyama Charan Vats, “Internationalisation of the Indian Legal Services Market,” *Articlesbase: Free Online Articles Directory*. 28 August 2008. After all, Indians have a distinct advantage; they know themselves and will generally have a greater understating of their own culture and its people.

In closing, the prospects for foreign law firms establishing offices within Indian borders are very good. However, obstacles still remain and the protectionist measures that have been in place for decades must be amended. It is important to reiterate that India is a signatory to GATS and is under an obligation to open up portions of its service sector, including its legal profession. Since India is a prominent and founding member of this multilateral trading system, it must endeavor to abide by its own commitment to the WTO; one only hopes that this commitment is addressed sooner rather than later.