

MOVEMENT OF NATURAL PERSONS UNDER THE GATS IN THE SOFTWARE SERVICES SECTOR

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Nishith Desai Associates (“**NDA**”) is a research based international law firm based in Mumbai and Palo Alto, Silicon Valley, specializing in information technology, e-commerce, telecommunications, media and entertainment laws, international financial and tax laws and corporate and securities laws. It has acted as strategic and legal counsel to premier corporates in their Internet forays, including IL&FS, GE Capital, Jasubhai Group, software majors such as i2 Technologies, Mahindra British Telecom and communication companies such as Space Systems/Loral, New Skies Satellite, Flag and WorldTel. Apart from structuring and acting for a large number of private equity funds in India, NDA has been involved in American Depositary Receipt (ADR) offerings of Indian companies, representing Wipro, Rediff.com and Silverline Technologies and acting as underwriter’s counsel in Infosys Technologies and Satyam’s ADR offerings. NDA was involved in the first cross-border stock swap merger from India - BFL’s acquisition of Mphasis besides Silverline’s recent acquisition of Seranova Inc in an ADR stock swap deal. It has also advised the Government of India and Internet Service Providers Association on e-commerce issues in the WTO regime. NDA was recognized as the “**Indian Law Firm of the Year 2000**” and “**Asian Law Firm of the Year 2001 (Pro Bono)**” by the International Financial Law Review, a Euromoney Publication. It has also been ranked as having a **leading practice in Private Equity, Media and Entertainment and IT and telecommunications law** for 2001-02 by the Global Counsel 3000.

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1. INTRODUCTION

The General Agreement on Trade in Services (“**GATS**”) was the outcome of ongoing negotiations for a multilateral trading system during the Uruguay Rounds, which gave birth to the World Trade Organisation (“**WTO**”). The dawn of GATS in 1994 heralded a new era in the globalisation of trade in services.

The GATS, as we know, aims at progressive liberalization of trade in services through four modes of supply namely, cross-border supply (Mode 1), consumption abroad (Mode 2), commercial presence (Mode 3) and movement of natural persons (Mode 4). While several member nations have made specific commitments under the GATS to liberalize various services sectors, liberalization under Mode 4 is of immense concern, especially for

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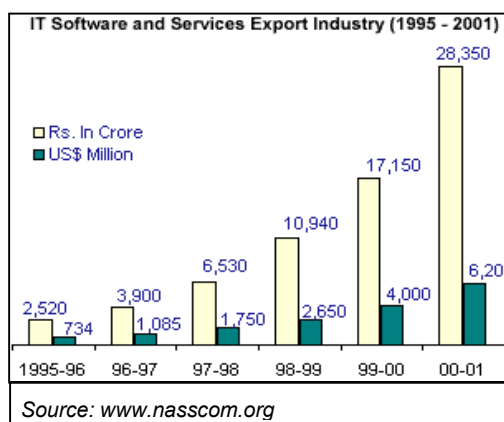
developing nations, who can capitalize on their labour-intensive services to increase and benefit international services trade.

This paper addresses the needs for liberalization in Mode 4 from the Indian viewpoint, in the Computer and Related Services Sector, particularly in the Software sector, which is one of the most crucial and booming sectors in the Indian economy. The paper outlines some of the issues and constraints that the software industry faces with respect to movement of natural persons and some of the policy reforms / initiatives which can be undertaken to mitigate these problems.

2. THE INDIAN SOFTWARE SERVICES SECTOR

Before delving into the need for liberalization in the software sector, it would be useful to have a bird's eye view of this flourishing sector.

- The Indian software sector accounts for 16% of the country's overall exports, provides jobs to half a million people and accounts for USD 1.6 billion in investments.
- While the domestic software market in 2000-2001 was USD 2.06 billion, software exports amounted to USD 6.2 billion.
- 62% of the software exports go to U.S.A. and 24% go to Europe.
- The NASSCOM – McKinsey Report has predicted that software exports from India will reach USD 50 billion and domestic software market will expand to USD 27 billion by 2008.



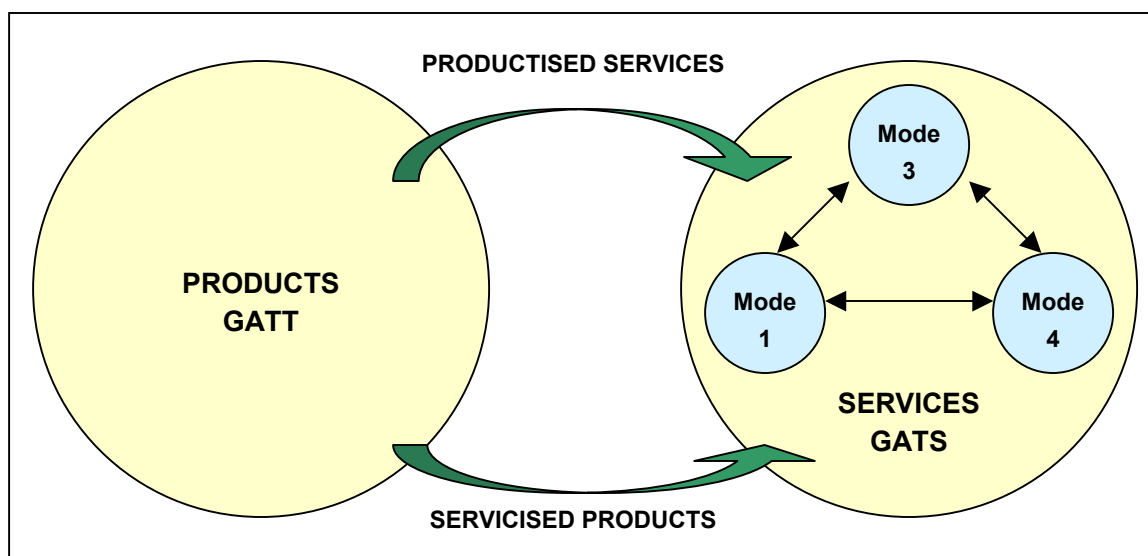
The above figures indicate the importance of the software sector in the Indian economy. However, while the future of the Indian software sector seems bright, lack of proper implementation of the GATS provisions and inadequate liberalization in Mode 4 may dampen the prospects in this sector.

3. NEED FOR THE MOVEMENT OF NATURAL PERSONS

In a book titled "Blur" by Stan Davis and Christopher Meyers, the authors had stated that in the future, the distinction between products and services would become blurred and there would be *productised services* and *servicised products* rather than stand-alone products or services. Today, with the advancement of technology, it can be said that what the authors stated is becoming a reality.¹

¹ Microsoft.net platform is a move in this direction.

While the GATS deals with trade in services, and the General Agreement on Tariffs and Trade, 1994 (“GATT”) regulates trade in goods, there is a strong interdependence and co-relation between these two multilateral instruments.



To ensure that the GATT is properly implemented, services under the GATS too have to be progressively liberalized. Moreover, the different modes of supply under the GATS are also co-related. For example, in the software sector, in an offshore project for supplying software services (Mode 1), it may be necessary for some software professionals to be present onsite (Mode 4) for various reasons including:

- (i) client comfort;
- (ii) emergency or critical application;
- (iii) regular monitoring; and
- (iv) obtain around the clock productivity (keeping in mind the time differences).

If there is adequate liberalization under Mode 1, but inadequate liberalization in Mode 4, there could be a situation wherein the liberalization under Mode 1 may be rendered ineffective.

4. ISSUES / CONSTRAINTS FACING THE MOVEMENT OF NATURAL PERSONS

However, there are several quantitative and qualitative constraints, which are imposed on the movement of natural persons that hinder the liberalization of services as envisaged by the GATS. While addressing these issues, it is understandable that some of the constraints imposed by countries may be due to reasons of national security, social obligations, cultural differences and public policy reasons. The idea here is to present the significant issues so that it can facilitate a purposive and thorough discussion on the subject.

Amongst them, the most significant issues are:

- (i) Immigration related issues;

- (ii) Inadequate recognition of qualifications, training and experience; and
- (iii) Differential treatment of foreign service providers.

(i) Immigration related issues

Visa related issues are the most critical barriers affecting the Indian software professional. Immigration regulations impose quantitative restrictions on the movement of natural persons with an aim to create a protected labour market. Not only do the regulations change depending on the economic and political situation prevalent in the regulating country without considering the needs of other countries, but there is also a lack of adequate transparency in the immigration procedures. Let us consider some of the major issues in this context.

a. Prior adequate search in national markets

The laws of some WTO member countries mandate that the employer's carry out a thorough job search in the country before availing of the services of foreign employees or service providers. Therefore, even though an Indian software professional may possess better qualifications or work experience, if there is a local person who can satisfy the needs of the employer, that local person must be given preference over the Indian. Due to this a company that requires the services of a better skilled professional may be at a loss.

b. Wage-parity requirement

This requirement mandates that a foreign service provider must be paid wages equal to those being paid to domestic service providers. While this requirement ultimately aims at providing a non-discriminatory environment, it often tends to erode the cost-advantage of hiring software professionals from India. For example, if a software professional in the US is paid USD 60,000, an Indian software professional may be willing to work in the US for half or two-third the amount. However, the immigration regulations would prevent the employer from giving lower wages for such labour-intensive services.

c. Differentiation in processing of visas

Generally, in many countries, the time required for processing higher level visas is much less as compared to processing visas for lower level software professionals. It is believed that higher level professionals can add more value to the host country's economy than lower level professionals which leads to discrimination between the treatment of the two categories.

d. Cumbersome and non-transparent immigration procedures

Often, the lack of transparent immigration procedures makes it difficult and discouraging for software professionals to obtain visas in a short span of time. Sometimes applications to obtain work visas can take several weeks or even months to process. The long process of reviewing visa applications could sometimes render the purpose of the visit meaningless.

e. Quantitative limits

Several countries also place quantitative limits on the number of visas they will issue for a certain category.² Not only can these quantitative restrictions can be a cap on the economic expansion of the country itself, but they can also restrict cross-border trade in services. For example, in the US, quotas generally commence in October every year and normally get exhausted within a few months. Companies who then wish to send their software professionals overseas have had to wait till the next October, when the new quotas start. This sometimes causes difficulties to the companies.

f. Restrictions on flexibility

Limitations imposed on visa-holders from switching jobs or changing their status sometimes restricts their flexibility. While these limitations are in the interests of the regulating country, it can cause a lot of problems to software professionals, especially when they have to move from one site to another.

g. Limited duration of stay

The work permits that are issued by countries are of a limited duration. While these permits are extendable or renewable, the procedure for the extension or renewal is cumbersome, expensive and stringent. This often discourages companies from hiring foreign nationals.

h. Economic Needs Test (“ENT”)

The widespread use of ENT has emerged as one of the artificial barriers preventing free movement of service providers. The discretionary nature of ENT reduces the predictability of trade through Mode 4 and actually nullifies the opportunity for market access.

(ii) Inadequate recognition of qualifications, training and experience

The inadequate recognition of qualifications, training and experience restrict the opportunities for software professionals from India to provide services overseas. Several countries have certain restrictions concerning issuance of visas based on the qualifications and experience of the applicant. However, though the applicant may not satisfy the criteria, he may still qualify for the job.

For example, at times the particular nature of the work may not require the qualifications or experience required to obtain a visa. Therefore, even if the software professional is competent enough to complete that work, he/she may not be granted the visa because it does not meet the eligibility criteria for the visa. It could also happen that a software professional with lesser experience / qualifications in India may be capable of performing more complex work in another country. But due to the eligibility criteria, he may not be able to obtain the visa.

² For eg., the US has a quota of 195,000 visas in the H-1B category (for workers in specialty occupations).

(iii) Differential treatment of foreign service providers

Trade in Mode 4 is also restricted due to the policies, which differentiate against foreign service providers. Some of the issues in this area include the following:

- a. Several stringent conditions are imposed for eligibility conditions concerning residency or citizenship
- b. Social Security Contributions and Taxes

In the United States, foreign service providers have to pay social security taxes and other taxes for which they do not get adequate tax credits in their home country due to the absence of any treaty between the US and the home country. Further, the service provider also continues to pay taxes in the home country. This leads to double taxation and tends to erode the cost advantage of working in the US.

- c. Priority in Government Procurement

Domestic service providers are often given a preference over foreigners in government procurements. While this area is still not under the GATS, it should be included so as to facilitate freer movement under Mode 4.

- d. Government Approval

The nature of government approval that is required by foreign service providers in setting up operations and even in remitting monies to their home country is severe and many a times, inflexible. This discourages software professionals from rendering services abroad.

Besides the above-mentioned issues, problems regarding commercial presence (Mode 3) including foreign investment restrictions, limitations on the nature of entities and the manner in which they can be set up and the conditions on staffing people could pose problems in fully realizing the potential of liberalising Mode 4.

5. POLICY REFORMS AND INITIATIVES

India has already been suggested to the WTO, that in order to improve the liberalization in Mode 4, countries would have to re-look at and solidify the existing GATS commitments under Mode 4 and also remove or curtail the other limitations imposed by them on movement of natural persons. Some the significant issues are summarized hereunder.

(i) Improving the structure of GATS commitments

- a. Horizontal Commitments

Member nations of the GATS should improve their horizontal commitments in Mode 4 in the following manner:

- Specifically include individual professionals
- Clear eligibility criteria for entry should be determined
- There must be a uniformity in definitions of different classes
- Further expansion to include middle and lower level professionals in the category of “other persons” or “specialists”

b. Sectoral Commitments

All developed countries should make specific and binding commitments in the computer and related services sector. Moreover, if there are any limitations, these limitations must be clearly laid down in the schedule of commitments.

(ii) **Removal of existing limitations**

a. Visa requirements to be relaxed

- Countries should ensure that their visa application procedures are transparent
- Countries should also try and simplify visa application procedures
- Less stringent norms should be imposed for entry and stay of software professionals in the country
- Labour tests and conditions for software professionals should be waived or removed
- Proper guidelines should be formulated for wage parity conditions to ensure that the cost-based advantage is not lost
- Conditions should be imposed to prevent exploitation of foreign workers
- Temporary visas must be de-linked from permanent visas and there should be separate criteria, which need to be satisfied to obtain temporary visas. Many a times, the immigration laws of countries permit temporary visa holders to convert to permanent status, if they satisfy certain conditions. At the same time, these countries may not wish to encourage permanent migration into their territory. Due to this paradoxical situation, seekers of temporary visas may not be granted the visas, as host countries may feel that the intention of the visa seekers is to permanently settle in the country. Moreover, sometimes it may be necessary for software professionals to stay in the host country for a longer period than allotted in order to complete their assignments. However, they may not be allowed to do so because then they may have an opportunity to convert their temporary status to a permanent one.

Also occasionally, home countries have been worried about brain drain. One solution to this problem that can be discussed is to separate temporary migration from permanent migration by creating a special category of visas (like the GATS visa). Persons must not be allowed to convert this special visa into a permanent one and the persons must also be asked to return their home country once the visa expires.

b. Clear Criteria for ENT

The ENT under Article 16 of the GATS has often been used as a market access barrier under Mode 4. However, there are no clear-cut guidelines for the ENT. Member nations must therefore, try and come together to establish definitive criteria under which the ENT will be applied and what will be the impact of applying this test on foreign service providers.

Further, a consensus could be reached whereby the ENT will not be applied to software professionals or at least be minimally applied. Even the administrative and procedural formalities for application of the ENT must be transparent and complete information should be available to the public at large.

c. Totalisation Agreement

While this section is particularly relevant to the US, it can also be applied to other countries where foreign service providers have to pay taxes and make social security contributions in the host country.

As discussed earlier, foreign service providers have to contribute towards social security purposes in the US, but do not get any consequent tax credits in their home country. As a result, they land up paying double taxes. This double taxation can be avoided by entering into totalisation agreements with the US, and other countries, if any.

d. Recognition of qualifications and experience of IT professionals

Member nations must also try and evolve certain criteria for the recognizing the qualifications and experience of IT professionals. These criteria should also be reflected in the sectoral and horizontal commitment schedules of the respective members.

Member nations could also try and establish norms whereby work experience could be substituted for accredited educational qualifications. This would be advantageous in the software industry where skills are developed and polished on the job rather than in only educational institutions.

6. CONCLUSION

Considering that liberalization in Mode 4 has not received enough coverage as the other three modes of supply, it is essential that every effort should be made to reduce trade barriers under this mode. Moreover, whilst Mode 4 liberalisation has been more on a horizontal approach, it would be more effective to have specific sectoral commitments under this mode, especially for skilled professionals and workers.

Future multilateral discussions in this area must focus on the movement of implementation of the GATS norms at a domestic level. Unless countries independently modify or amend their local regulations to enforce their specific horizontal and sectoral commitments, discussions and negotiations will be endless and futile.

Members of the WTO can also consider the possibility of a GATS visa for service professionals working overseas on a temporary basis based on their horizontal and sectoral commitments. While this would require considerable deliberation and debate, it could ultimately streamline the movement of natural persons and also remove the scope for discretion and uncertainty.

Let's hope that at the next GATS rounds of negotiation, member nations reach at an amicable consensus on Mode 4.

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