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Globetrotting Law Firms

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Globetrotting Law Firms*

By
Jayanth K. Krishnan**

Abstract

Despite the current financial crisis, prestigious American and British law firms continue to maintain a presence in Continental Europe, Latin America, and China. Yet, in one economically fertile, democratic country – India – such global legal powerhouses are scarcely found.

This study seeks to understand empirically why there is a general absence of these and other foreign law firms practicing in India. Based on fieldwork and compiled interview data of lawyers, judges, government officials, activists, and clients from India, the United States, and Britain - the latter two being the foreign countries most interested in gaining access to the Indian legal market - I show that the conventional wisdom on this subject is inadequate, and that there are multiple layers to this debate. But as I also show, what makes this story so fascinating is how both supporters and opponents of foreign law firms in India have strategically coupled their policy arguments with potent symbolic rhetoric to champion their perspectives. The study concludes by outlining a set of preliminary proposals that would permit American, British, and other foreign law firms gradually to enter India but would also incorporate the concerns held by opponents and could serve as the foundation for reaching a comprehensive resolution.

* The title of this piece was inspired in part by its usage in a news-story by the journalist, Jon Robins, East Meets West, LAW SOCIETY GAZETTE, Oct. 19, 2006 (referring how until recently certain countries “have not been high on the agenda of globe-trotting law firms.”) http://www.lawgazette.co.uk/features/ltbgteast-meets-westltbgt. But perhaps more importantly, the title was also inspired by the fact that throughout the course of my interviews, various lawyers from India, Britain, and the United States routinely used this term – some employing it with great pride, others with great disdain.

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Introduction

The current global financial crisis has adversely affected a range of
sectors across the world economy, including the legal labor market. Law firms in
both the United States and Britain, for example, have retracted offers to incoming
associates and initiated lay-offs and pay-freezes, and there seems little chance of
a respite any time in the near future. Still, despite the economic turmoil, elite
firms, in particular, such as Baker & McKenzie, Skadden Arps, Clifford Chance,
Allen & Overy, and others continue to maintain offices in various foreign
countries.\footnote{For two directories that track this data see: Legal 500, www.legal500.com and Asia Law
and Practice, www.alphk.com.} With American and British investors in Continental Europe, Latin
America, and Asia, it might be expected that these law firms would be present
and readily available in these foreign settings to advise their globalizing clients.
Furthermore, American and British law firms have also found it worthwhile to
have offices abroad in order to serve the needs of newly acquired foreign clients.\footnote{Id.}
Even during this recession, there remains profit-making and client opportunities
for those law firms from the United States and Britain that are able to afford
branching-out beyond their domestic borders.
Two countries that have particularly caught the attention of these law firms during the last several years are China and India. Together, China and India account for over one-third of the globe’s population. Economic growth in each is exceedingly high; in addition, China and India are, respectively, the first and second “most attractive venue[s] for foreign direct investment.” And each country is expected to have the world’s first and second largest gross domestic product numbers, again respectively, by the middle of this century.

In China, there are now American and British law firms in Hong Kong, Shanghai, and Beijing. Law firms from other countries too are locating in these cities and elsewhere in China. But curiously, in India, where multinational corporations, international accounting agencies, and thousands of other businesses from abroad are actively operating, American, British, and for that matter all foreign law firms and foreign lawyers are barred from practicing within the country.

The goal of this study is to examine why this is the case in India. One standard view is that a politically powerful set of Indian lawyers and elite Indian

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4 Id at both cites.

5 See Olivia Lowe, Passage to India, LAW SOCIETY GAZETTE, April 17, 2008, http://www.lawgazette.co.uk/features/passage-india-0. It should be noted that India’s economy, in recent months, has seen a rise in inflation and has been affected by a rise in oil prices. This has prompted some observers to wonder whether India’s economy may be entering a cooling period, with foreign investment declining. Even these commentators, however, concede that annual growth will be at least 7%, (optimists say it will be around 9.5%), and that most foreign investment will not evaporate “just because of a bit of cyclical gloom.” For a discussion of this point, see Foreign Investors Second-Guess India, THE ECONOMIST, Aug. 4, 2008.


7 See Legal Resources in China, LEGAL.CN, www.legal.cn, specifically, http://www.legal.cn/viewtopic.php?f=28&t=103&sid=8313a696740ba247f9e2ded0dd86fa1. For a nice overview of the legal profession in China, see ETHAN MICHAELSON, UNHOOKING FROM THE STATE: CHINESE LAWYERS IN TRANSITION (2003). It is important to note that there are limitations as to what foreign law firms in China are allowed to do. For a discussion of the parameters, and for complaints by a Chinese bar association that foreign law firms are running afoul of these limitations, see Anthony Lin, Shanghai Bar Association Goes After Foreign Firms, NEW YORK LAW JOURNAL, May 16, 2006, http://www.law.com/jspl/llf/PubArticleLLF.jsp?id=1147856732635.

8 There are a few points to keep in mind here. First, even if a foreign firm sought to enter India and hire only Indian lawyers, under India’s current system, this would still be prohibited. Second, as we will discuss, there are special circumstances where foreign lawyers have been allowed to come in and litigate a case on behalf of a client (who usually is from that lawyer’s country), but this requires obtaining special permission from the Indian judiciary, and it is not a frequent occurrence. Third, India does host international arbitration forums where foreign lawyers will be present representing their clients. However, because the law being adjudicated is considered foreign – not Indian – law, this activity is not considered ‘practicing law’ in India. (Where Indian law enters into the dispute, then Indian counsel would be required.) Moreover, as I was told by several Indian lawyers, in these situations, foreign lawyers will typically hire Indian counsel to assist in these types of arbitration matters.
law firms have sought to preserve their existing financial dominance and thus have successfully lobbied to block market liberalization of this sector. A competing view is that foreign law firms, driven by their greed, have made such onerous demands on the Indian government that the latter has rightly refused to cave to this outside pressure and has justifiably kept its legal services market closed. As I shall contend, however, these standard perspectives are both too blunt and inadequate. Based on fieldwork and compiled interview data of lawyers, judges, government officials, activists, and clients from India, Britain, and the United States – the latter two being the foreign countries most involved in this issue – I show that the controversy over whether law firms from abroad should be able to operate in the rapidly expanding market of India has several layered, substantive, symbolic, and even occasionally inconsistent aspects. It is important, therefore, to move beyond the existing dialogue and towards a more subtle, comprehensive analysis in order to appreciate the complexity of this matter.

For example, it is true that foreign law firms, not surprisingly, are interested in the Indian market for the purposes of increasing their profit margins and client base. But as I discovered and will explain, these firms offer other substantive policy justifications for why they believe liberalizing India’s legal services sector is an important and positive development. Similarly, the opponents, who comprise more than just those working in Indian law firms and include a seemingly unlikely group – Indian courtroom litigators who rarely work on transactional legal matters – make serious policy arguments as well, beyond pecuniary-based ones, for why India should be cautious about granting admission to foreign law firms.

In addition, what makes this story so fascinating is how both opponents and supporters strategically couple their substantive policy arguments with carefully selected symbolic rhetoric, or to use the late scholar Murray Edelman’s phrase, “symbolic politics,” to champion their point of view. As part of

10 We will be exploring this point in Sections II and III of this paper.
11 Id.
12 This point will be discussed at length in Section III. Moreover, I emphasize here that I recognize there is a difference between identifying the various justifications or arguments given by foreign lawyers and trying to decipher their actual motivations. As I shall contend, the contribution of this study is the uncovering of the former, with the stipulation that verifying the latter is much more difficult to do. The hope is that future researchers (particularly political and legal psychologists) will build upon this study to determine the precise psychological motivations of these foreign lawyers.
13 Id. The same point in footnote 12 regarding justifications/arguments and motivations applies to the opponents as well.
14 Professor Edelman published numerous works on this topic and his research is groundbreaking. For some of his most prominent scholarship, see MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS (1967); MURRAY EDELMAN, POLITICS AS SYMBOLIC ACTION: MASS AROUSAL AND QUIESCENCE (1971); MURRAY EDELMAN, POLITICAL LANGUAGE: WORDS THAT SUCCEED AND POLICIES THAT FAIL (1977). Traditionally, Edelman’s concept is seen as referring to the notion that those with material interests in an issue employ symbolic politics in order to mobilize a larger group that does not share that interest. My use of Edelman’s work, as will be seen, builds upon and then expands on the manner in which this argument flows. I am grateful to Professor Herbert M. Kritzer for suggesting that I consider the work of the late Professor Edelman and for helping me think about this point. This point will be discussed further in Subsection D of Section III of this article.
making their case, opponents often articulate the potent charge that liberalizing the legal services sector would inevitably lead to India’s legal system being controlled by modern-day Western colonialists – something a country that suffered from centuries of imperial rule can never permit. The opponents point to what they say is repeated patronizing, condescending language from foreign law firms regarding the inadequacies of Indian lawyers as evidence to support this accusation. The opponents’ playing of the ‘neo-colonialist card’ ratchets-up the discourse and prompts supporters of liberalization to employ further rhetoric of their own, which then sparks an even more intense response from opponents.

The result is that the Indian government finds itself in the middle of a political minefield. Notwithstanding some of its recent moves that will be discussed below, the government has procrastinated on this issue for over a decade. It has concluded that taking no formal stance, and instead placating both sides just enough, is politically less costly than making a formal decision and having to face either an angry domestic constituency or a set of wealthy but disappointed foreign legal investors. Indeed my thesis is that this is the main reason why foreign law firms remain prohibited from working in India. But lost in this emotional furor and government gamesmanship, as my findings suggest, is the fact that space does exist to reconcile the policy disagreements between the two sides. Yet unless the temperature of the current rhetoric is reduced, it is difficult to envision how a resolution that satisfies the concerned parties can be brokered.

To explore these points in greater detail, this study will proceed as follows. Section One will briefly describe the present state of the Indian legal profession, with a focus on the rise of a group of elite Indian law firms that have gained financial prominence since India liberalized its economy in the early 1990s. Section Two will then show how beginning in the mid-1990s two high-powered law firms from the United States and one from Britain received permission from India to establish offices in the country. Shortly thereafter, though, a lawsuit was filed by an Indian public interest group in the Bombay High Court claiming that the presence of these foreign law firms in India was a violation of domestic law. As I will explain, despite it being over a dozen years since the case was brought, no judgment has been rendered by the Bombay court; and even when a judgment comes, it is all-but-certain to be appealed to the Supreme Court of India, which might mean at least another two years (from 2009) before a final ruling is reached. Nevertheless, as I will discuss in Section Three, a series of important events has occurred during this prolonged litigation, which has moved this conflict from the courts into other venues. Following this discussion, Section Four will conclude by proposing a preliminary compromise that would allow foreign law firms gradually to enter India but also would incorporate the concerns held by the opponents and, provided that the rhetoric

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15 This point will be discussed infra Section III.

16 Note Mumbai is the word now used to describe the city of Bombay. (Proponents make the point that Mumbai was the original name of the city before colonial rule.) The change to (or return of) this word has been accepted quite generally in English discourse except for when describing certain institutions, like the city’s High Court, which still retains the name, Bombay High Court – thus my retention of this latter phrase throughout the article.
from both sides cools, could serve as the foundation for reaching a comprehensive resolution.

I. Briefly Contextualizing the State of the Indian Legal Profession

Ascertaining the specific number of lawyers in India has long been a challenge for those interested in empirical data collection. Upon my request, the Bar Council of India – a statutorily-created organization overseeing the licensing of lawyers in the country – compiled a state-by-state tabulation of the number of members that are currently enrolled within it throughout the country. Appendix A lists these figures and breaks them down by gender for most states as well. The data reveal that there are over one million lawyers in India. But this statistic requires scrutiny. The main reason is that while there may be one million law degree holders registered with the Bar Council, there is no information kept as to how many of these individuals actually practice law. Regardless of the number, what is certain is that of those who do practice empirical research over the years suggests that most are solo practitioners who work as courtroom litigators. Marc Galanter’s observation from years back still remains generally true: “Among the prominent features of Indian lawyers are their orientation to courts to the exclusion of other legal settings; the orientation to litigation . . . ; their conceptualism and orientation to rules; [and] their individualism.”

In India there is no bar exam, and upon receiving their degrees law graduates theoretically can begin practicing in any one of the country’s stratified layers of courts: the lower level district courts, the state supreme courts (or what are called state High Courts), or even the Supreme Court. Usually what occurs is that after graduation from law school, a lawyer, or advocate as she is commonly known, takes a position as a ‘junior’ with an experienced lawyer who, while often sliding back and forth among the different levels of courts depending on the clientele and the case, mainly remains anchored at one, or at most two, of the three tiers. Where that law graduate does this ‘junior-ship’ will depend on

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17 See Appendix A.
20 See Krishnan, Transgressive Cause Lawyering supra note 18. Note, in India for those wishing to practice in the Supreme Court, they are required to pass what is called an “advocates on
several factors, including law school performance, geographic location, personal ambition, connections, and the like. Upon completion of the junior-ship the advocate typically will stay on in the current practice (likely at a higher remuneration) or branch out and start her own office.

The overall reputation of these courtroom advocates in India is mixed. A common belief is that lawyers who practice at the district court level are poorly reputed. India’s judiciary suffers from the world’s worst backlog of cases (both in number and in the time it takes to resolve these matters), which many believe is the result of deliberate procedural abuse by district court advocates. But recent work has shown there to be variation in how this group is perceived among clients and the communities with whom they interact. Advocates who work in the High Courts and Supreme Court are thought to capture relatively more public respect and financial prosperity than those practicing in the district courts. Yet here too there has been variation documented.

Aside from these courtroom litigators, the Indian legal profession has seen a recent rise in the number of lawyers working in law firms. While this segment of the bar overall remains small, law firm lawyers have gained increased prestige, political clout, and financial success over the past two decades. There is a subset of these lawyers that works within one of about four dozen of what are considered ‘elite law firms’ that typically have their headquarters in either New Delhi or Mumbai. In 2000, these elite firms organized to form a political interest group known as the Society of Indian Law Firms (SILF). The president of SILF, Lalit Bhasin, provided me with a list of the law firms that are members, which can be found in Appendix B. Although these firm lawyers are also considered advocates and have the ability to appear in the Indian courts, they are referred to frequently as ‘company lawyers,’ or what in the West are called corporate lawyers, who engage in a great deal of transactional legal work. The elite law firms that house these lawyers have a reputational hierarchy among

record” examination. Passing this test allows the “advocate on record” to file any matter or document before the Court as well as to appear or act on behalf of a party in front of the Court.

The duration of a junior-ship depends on the agreement between the junior and the senior lawyer. For a discussion of this point, see id. Also see cites in supra note 19.

If the advocate stays on in the practice, it is common that she will continue more as an employee rather than becoming a partner with her senior colleague. There are also other possibilities that the advocate can pursue, including moving to a law firm (the subject of which will be discussed shortly in this section), going abroad to study, joining a corporation, working for a non-governmental organization, or taking a position with the government. Pursuing these other options has become more common, although there still is a perception that they remain less-selected paths than the two mentioned in the above text.


This point will be discussed in detail, infra Section III. Also see id, both cites.

See Krishnan, Transgressive Cause Lawyering, supra note 18.

Id.

This information on law firms and their rise in prominence was gathered during my fieldwork in India during the summer of 2008. See appendix B. For why the term Mumbai is used here instead of Bombay, see supra note 16.

Author interview with SILF President, Lalit Bhasin, June 19, 2008

Id. Also see Appendix B.

Author interview with SILF President, Lalit Bhasin, June 19, 2008.
themselves, but overall they are classified as such because of the volume of revenue they generate, the reputation of the partners who are in charge, the prestigious clientele whom they serve, and the bright legal staff that they employ. The history of this group of elite law firms has followed one of three trajectories. A few that exist today trace their roots back several decades before independence from Britain in 1947.\textsuperscript{31} In the major colonial cities (or what were called presidency towns) of Bombay, Madras, and Calcutta, most of these firms were established by British lawyers to meet the various business law demands of British companies that were operating within the colony.\textsuperscript{32} These British firms would sometimes hire Indian lawyers. After independence, with glass ceilings no longer a barrier and most of the British lawyers departing the country, the Indians took over as the partners of these firms and thereafter filled their associate-openings with other Indians.\textsuperscript{33} Another set of today’s elite firms emerged after independence but prior to India entering the global economy in the early 1990s, mainly starting off as family or small partnerships and then steadily expanding.\textsuperscript{34} The third set has formed recently, since the 1990s, as lawyers from the longer-standing firms have broken away, or as successful individual lawyers have partnered-up to establish these newer, highly-profitable practices.\textsuperscript{35}

In terms of clientele, multi-national corporations account for an important portion of these elite firms’ business. But as Indian companies have grown they too have turned to these firms for legal assistance.\textsuperscript{36} Also, over the

\textsuperscript{31} Information from author (phone) interview with Suresh Talwar, a former partner at one of India’s oldest firms (which originally started as a British firm in 1830), June 3, 2008; follow-up (phone) interview, June 21, 2008. Also, for background on Talwar’s former firm, Crawford Bayley, see http://www.alphk.com/directories/Worldlaw08/India/Crawford.html. For further discussion of this point, see Marc Galanter and V. S. Rehki, The Impending Transformation of the Indian Legal Profession, 1996 (unpublished paper on file with author.)

\textsuperscript{32} \textit{Id} all cites. For further information on the history of solicitor-practices that date back to the 1670s more generally, see infra notes 47-48, and see Schmitthener, supra note 19.

\textsuperscript{33} After independence and until the Advocates Act of 1961, which will be discussed shortly, those few British lawyers who remained in these firms continued to practice as before. (This was provided that they had registered with their respective High Court per a colonial 1926 law called the Indian Bar Councils Act. See Schmitthener, supra note 19 at 360.) Once the Advocates Act came into force, these British lawyers were grandfathered in by section 3 of the law (and thus permitted to continue practicing). For further discussion, see infra 44-51. Also see SANJIV ROW, COMMENTARY ON THE ADVOCATES ACT, 1961. And see generally, JOHN J. PAUL, THE LEGAL PROFESSION OF COLONIAL SOUTH INDIA (1991). Note, some of these firms, which as stated, continue to exist today, retain their British names partly because of tradition, partly because there is some perceived prestige attached to having these Western names, and partly because that is how the public knows these firms. See e.g., Crawford Bayley and Company (Mumbai), Orr Dignum (Calcutta), King and Partridge (Madras/Chennai), Little & Company (Calcutta), which is now Fox Mandal Little (for a brief, unique history of Fox Mandal Little, see Dipankar De Sarkar, \textit{India’s Oldest British Law Firm Returns to India after 152 Years}, THAI INDIAN NEWS, Feb. 20\textsuperscript{th} 2008, http://www.thaindian.com/newsportal/world-news/indias-oldest-british-law-firm-returns-to-london-after-152-years-10019464.html) (interestingly describing how before it was Fox Mandal Little, there was Little and Company and a separate firm known as Fox Mandal, which formed in 1896 after John Fox hired an Indian, Gokul Chandra Mandal, as a partner. Fox Mandal and Little and Company merged in 2006.)

\textsuperscript{34} Information gathered from fieldwork conducted in India, Summer 2008. Also see Asia Law and Practice, Worldwide Practice: India, Fact File, http://www.alphk.com/directories/Worldlaw08/India/factfile.html.

\textsuperscript{35} \textit{Id} at both cites.

\textsuperscript{36} \textit{Id}.
last twenty years these firms have seen an increase in lucrative business from the
Indian government (at the central and state levels), as well as from foreign
governments (investing in India) on projects ranging from infrastructure
improvement to other transactional matters. The liberalization of the Indian economy has been an economic boon for
this group of elite law firms. It is important to remember the context in which
these firms have thrived. As stated above, most Indian lawyers have individual
practices, are courtroom litigators, and have varying degrees of economic and
reputational success. While there are those small to medium-size firms that do
exist and make a profit, others struggle to break even, and none have been able to
compete financially with the elite corps. Therefore, in a country of over one
billion people, where one million hold law degrees, less than fifty elite firms – or
about 2,500 lawyers in all – are receiving a relatively enormous amount of wealth
as a result of providing transactional legal services to a diverse, prosperous client
base. Thus, when there are calls for India to open its market to allow foreign
law firms to compete for business, it is only natural to assume that the main
opposition would be from those working in these elite Indian firms. As will be
seen in the next section, however, the story is more complicated than it appears.

II. The Court Case Against the Foreign Law Firms

The reasons for India’s decision to liberalize its economy in the early
1990s have been discussed at length elsewhere, but the immediate, recognizable

37 Id.

38 This figure of 2,500 lawyers is arguably generous. If we estimate that within each of the
SILF firms (of which there are forty-four), there are fifty lawyers per firm, and we add, say, another
half dozen to this SILF list (assuming that there are a handful of elite firms that do not belong to
SILF), in order to arrive at an even fifty law firms (with fifty lawyers per firm), then indeed we
come out with about 2,500 lawyers. This sum, of which several SILF members agreed is about as
accurate as we can get, is far less than some accounts that claim there are tens of thousands of elite
corporate lawyers lobbying for the government to deny entry to the foreign firms. See e.g., Dan
Slater, Passage to India: Are Foreign Law Firms in the Country’s Future, LAW BLOG, Wall
law-firms-in-the-countrys-future/ (noting, without any support, that “India’s 15,000 corporate
lawyers reportedly worry that they’re not ready for international competition . . . .”)

39 See e.g., ROB JENKINS, DEMOCRATIC POLITICS AND ECONOMIC REFORM IN
INDIA (2000); VIJAY JOSHI AND I.M.D. LITTLE, INDIA’S ECONOMIC REFORMS 1991-
2001 (2000); PARTHASASANTHI BANERJEE AND FRANK-JURGEN RICHTER,
ECONOMIC INSTITUTIONS IN INDIA: SUSTAINABILITY UNDER LIBERALIZATION
AND GLOBALIZATION (2003). See Patriarch of Reforms Narasimha Rao Dead,
THE HINDU
BUSINESS LINE (internet edition), Dec. 24, 2004 (noting that: “A set of big-bang reforms were
unveiled by Dr. [Manmohan] Singh under the watchful eyes of his Prime Minister within days of
the Government taking office. A pre-Budget move to devalue the rupee by 20 per cent to encourage
repatriation of export earnings was followed by Budget proposals (July 1991) that included
abolition of licensing requirements in most industries, hiking fertiliser prices to reduce subsidies,
and a clear signal for public sector reforms to improve efficiency. The Budget also proposed
relaxation of controls on foreign investments. The second Budget of Mr Rao’s Government carried
the reforms further and set a tone that virtually made the process of change irreversible leaving
successive Governments with no option but to carry the task forward. While more import items
were transferred to the Open General Licence list, further liberalisation was proposed for attracting
investment flows. The period also saw major stock market reforms, including abolition of the office
consequence was that foreign investment as well as multi-national corporations soon entered the country hoping to capitalize on this untapped market.\(^{40}\) During this same period foreign law firms started to explore the possibility of expanding into India. Initiating this move, Chadbourne and Park and White and Case, both American firms, and the British firm of Ashurst Morris Crisp, formally sought to establish a presence in the country.\(^{41}\)

The three firms approached the Reserve Bank of India (RBI) which, under the Indian Foreign Exchange Regulation Act, was in charge of reviewing applications of foreign businesses wishing to open offices in India.\(^{42}\) The RBI granted Chadbourne, White and Case, and Ashurst ‘liaison licenses,’ allowing them to set-up branches in India for the restrictive purposes of learning about the business environment, collecting investment information, serving as official representatives of the foreign firms to the Indian government and to Indian businesses, and promoting relationships and collaborations with those interested in such cooperative initiatives.\(^{43}\) As several people who followed the RBI’s approval practices during the 1990s mentioned, these liaison offices were meant simply to be the ‘eyes and ears’ of the foreign law firms.

The reason why the RBI only provided a limited license to the three firms related to the existence of the Indian Advocates Act of 1961. Prior to this statute, ‘legal practitioners,’ as they were often called during the colonial period, were a compilation of several groups and were governed by various British-enacted laws dating back to the late 1700s.\(^{44}\) \textit{Vakils}, for instance, were practitioners who initially could only work in certain rural courts but eventually were granted the right to appear in “any High Court” in India by the 1860s.\(^{45}\)

\(^{40}\) Id at all cites.

\(^{41}\) Author interview with Ashok Mubayi, Liaison Head, Ashurst Morris Crisp, June 17, 2008; Author interview with David Roberts, Partner, Olswang, May 29, 2008. Also see Richard Lloyd, \textit{Indian Court Ponders Opening Legal Market to Foreign Firms}, THE AM LAW DAILY, May 2, 2008, \url{http://amlawdaily.typepad.com/amlawdaily/2008/05/a-mumbai-court.html}.  

\(^{42}\) Author interview with Ashok Mubayi, Liaison Head, Ashurst Morris Crisp, June 17, 2008. In 2000 the Foreign Exchange Regulation Act was replaced by the Foreign Exchange Management Act.

\(^{43}\) Author interview with Ashok Mubayi, Liaison Head, Ashurst Morris Crisp, June 17, 2008; also see Lloyd, \textit{supra} note 41.

\(^{44}\) \textit{See} Schmittenher, \textit{supra} note 19 at 351 (noting, e.g., that in 1793 the British passed the Bengal Regulation VII, which set up guidelines as to the professional conduct of \textit{vakils}, a group which will be described in the ensuing text and footnote. There was also Regulation XXVIII of 1814, which expanded upon the 1793 Regulation. Id at 352.) Then as the current Advocates Act of 1961 states in its introduction: “The Indian High Courts Act, 1861 (commonly known as the Charter Act) passed by the British Parliament enabled the Crown to establish High Courts in India by Letters Patent and these Letters Patent authorised and empowered the High Courts to make rules for advocates and attorneys (commonly known as Solicitors). The law relating to Legal Practitioners can be found in the Legal Practitioners Act, 1879 (18 of 1879), the Bombay Pleaders Act, 1920 (17 of 1920) and the Indian Bar Councils Act, 1926 (38 of 1926).”

\(^{45}\) \textit{See} Legal Practitioners Act of 1879, Interpretations Clause, section 3. Also see Schmittener, \textit{supra} note 19 at 350 (giving a nice history of the \textit{vakil}. As Schmittener discusses, \textit{vakils} emerged in the \textit{mofussil}, or rural, areas of the country during the 1700s. [The term, \textit{vakil}, incidentally, dates itself back to the “Muslim law books in connection with marriage settlement.” \textit{Id} at note 87. It came to mean agent or representative and after the Bengal Regulation of 1793(see
There were also private pleaders who served as litigators in the lower courts.\textsuperscript{46} Then there were mukhtars, or non-licensed legal workers (or what are thought of as modern-day paralegals) who provided assistance to licensed members of the bar.\textsuperscript{47} There were “revenue-agents as well who worked in revenue offices and courts and who were given status as legal practitioners . . .”\textsuperscript{48} And there were solicitors and barristers who, while originally were almost exclusively British,\textsuperscript{49} towards the latter half of the 19th century began having an increasing number of Indians join their ranks.\textsuperscript{50}

\textit{supra} note 44. \textit{Id.}] While solicitors and barristers in the main presidency towns of Calcutta, Bombay, and Madras were virtually all English in the 17th and 18th centuries, vakils in the rural areas were all Indian. \textit{Id} at 350. Prior to the Bengal Regulation of 1793, Schmitthener argues that many vakils were unchecked extortionists, charging clients high fees while not necessarily having the requisite skills needed to defend them in the rural courts that were under the control of the British East India Company. As time went on, however, vakils became more professionalized; with the British crown taking over the area that the British East India Company had been ruling (i.e., the rural areas) in 1858, unifying the colony’s court system shortly thereafter, and then passing a law that created the High Courts in India. Vakils soon were defined as those “who had studied law in a university and had passed the High Court vakils’ examination. Later it came to mean the graduate of a university with an LL.B. degree who as a full-fledged advocate . . . [could] handle work without the help of counsel on either the Appellate or the Original Side.” \textit{Id} at note 87.) Also for an important discussion of the diversity of legal practitioners in India during the colonial era, see Ministry of Law, All-India Bar Committee Report (1953) [hereinafter 1953 Bar Committee Report.] Also see generally PAUL, \textit{supra} note 33.

\textit{Id} at 352-354. Note vakils were initially considered pleaders after the 1793 Bengal Regulation. However, after the passage of the law that created the High Courts in the early 1860s, vakils were specifically denoted as High Court pleaders and the term pleader, on its own, came to signify those who practiced in the lower courts. These lower court pleaders could move up to become High Court pleaders provided they completed three years of practice and successfully passed an examination. It should also be noted that the Regulation of 1793 provided posts for those who wished to be government pleaders, or legal representatives of the Raj. \textit{Id}. Also see, 1953 Bar Committee Report, \textit{supra} note 45. Also see generally PAUL, \textit{supra} note 33.

\textit{Id} at all cites.

\textsuperscript{46} Schmitthener, \textit{supra} note 19 at 355.

\textsuperscript{47} See \textit{id} at 343-349 (describing how solicitors from the 1670s-1770s were poorly reputed, unprofessional, and often incompetent. This changed though as solicitors became more professionalized with the establishment of a more formal set of courts, first in Calcutta (1774), then in Madras (1801), and finally in Bombay (1824). As professional barristers from England began coming to India in the 1770s, solicitors stopped engaging in both litigation and transactional work, focusing on just the latter, which contributed to them become more specialized. For a full explanation of this evolution, see \textit{id}.)

\textsuperscript{48} There are several points to emphasize here. First, solicitors in India during this time were often referred to as “attorneys,” while barristers were denoted as “advocates.” Second, solicitors and barristers were mainly located in the urban, presidency, British government-controlled (as opposed to British East India Company controlled) areas like Calcutta, Bombay, and Madras. Third, after the court system was unified, the allowance of vakils to practice in the High Courts “ended the monopoly that the [English] barristers had enjoyed” (\textit{Id} at 356). (Vakils were considered one level lower than barristers in the pecking order; after unification they could now aspire to become barristers/advocates.) Fourth, English solicitors during the late 1800s began hiring some Indians into their firms. Several of these solicitor firms, after the passage of the High Court law, became very wealthy, because the High Courts were given, not surprisingly, appellate jurisdiction but also original jurisdiction for significant commercial matters. (They also had original jurisdiction for major criminal cases.) Solicitors who brought such commercial cases could prepare the transactional work and then would hire a barrister/advocate to argue these issues. \textit{See} \textit{id} at 358-59; 367-68. Also see generally PAUL, \textit{supra} note 33. For what happened to solicitors and barristers practicing in India, who were British, after Independence, see \textit{supra} note 33.
The 1961 Advocates Act, which remains in force to this day, consolidated many of these distinctions and stated that the above groups would all be recognized as “advocates”\(^{51}\) who would be the only professionals “entitled to practice the profession of law”\(^{52}\) in India. Moreover, although there are exceptions, in general a practicing advocate has to be a “citizen of India”\(^{53}\) under the law. And there is the requirement that an advocate’s law degree must come from an institution recognized as legitimate by the above-mentioned Bar Council of India – again, itself an elected body established by the Act that along with licensing practitioners, evaluates and accredits Indian law schools, and disciplines members who breach their fiduciary or ethical duties as advocates.\(^{54}\)

Soon after the liaison licenses to Chadbourne, White and Case, and Ashurst were issued, a lawsuit against them was brought in 1995 by a public interest organization based in the western state of Maharashtra. This group, known as the Lawyers Collective, argued that the three firms exceeded the terms of the licenses issued by the RBI.\(^{55}\) There were accusations, for example, that lawyers from White and Case and Chadbourne were working on transactional deals and that the latter was even openly housing its contingent of twenty-plus lawyers in a five-star hotel. (Interestingly, there was no specific accusation made against Ashurst, perhaps because its liaison office had just opened a few weeks before the suit was filed and had only one English lawyer and one legal secretary employed at the time.\(^{56}\) Nevertheless, it still was named as a defendant by the Lawyers Collective.) The complaint detailed how the liaison offices were being used as fronts by these foreign firms in order to circumvent the strict rules governing the practice of law enumerated in the 1961 Advocates Act.\(^{57}\) The law firms sought to have the complaint dismissed, but the Bombay High Court held

\(^{51}\) See Advocates Act, 1961. Also see Navoneed Dayanand, Overview of the Legal System in the Asia Pacific Region: India, Cornell Law School LL.M Paper Series (2004), http://lsr.nellco.org/cgi/viewcontent.cgi?article=1001&context=cornell/lps. Dayanand also provides some background on the three foreign firms seeking to petition to enter India in the 1990s. Interestingly, in some Indian cities like Mumbai and Calcutta, there are still some lawyers who refer to themselves as solicitors and are officially recognized within these local jurisdictions as such. Indeed, in these cities there is still a solicitors’ exam that is administered where lawyers can receive their ‘solicitors’ licenses. As stated above in the text, the Indian bar is unified today and so there is no requirement that lawyers take such tests or need to become solicitors. It appears that the motivation for why some do so, though, is that there is a perception that having such a listing next to their name provides these lawyers with an additional form of prestige. Information on this point gathered from author interview with Ashok Mubayi, Liaison Head, Ashurst Morris Crisp, June 17, 2008.

\(^{52}\) Advocates Act, 1961, section 29.

\(^{53}\) Id at Section 24(1)(a). We will be discussing the exceptions shortly, but they include receiving special permission from the judiciary to practice law in the country or where the Bar Council of India, under its discretionary powers, grants a foreign lawyer the right to practice. (Typically the latter will occur where Indians are given the right to practice in that lawyer’s home country.) See id at Sections 4-15 (also discussing how answering to the national Bar Council of India are state chapters. These sections outline the powers and functions of both the national and state Bar Councils.)

\(^{54}\) See Lawyers Collective v. Bar Council of India and Others, Writ Petition No. 526 (Bombay High Court) 1995 [hereinafter Lawyers Collective case].

\(^{55}\) Author interview with Ashok Mubayi, Liaison Head, Ashurst Morris Crisp, June 17, 2008.

\(^{56}\) See Lawyers Collective case, supra note 55.
that even the “rendering [of] legal assistance and/or . . . executing [of] documents, negotiations and settlements of documents would certainly amount to [the] practice of law.” The court then ordered the RBI to perform an investigation to determine the extent to which the firms were contravening the statute.

The law firms appealed this decision to the Indian Supreme Court, but the case was sent back to the Bombay High Court in 1996 for further deliberation. Since that time the matter has remained pending, although there are reports that the Bombay court is set to hear closing arguments sometime in 2009 and will subsequently issue a final judgment. Of the three Western law firms that were sued by the Lawyers Collective, only one remains in India today. Chadbourne departed soon after the Bombay High Court’s initial judgment and White and Case closed its operations in the spring of 2008; Ashurst has kept its doors open but emphatically maintains that no legal work is done within its office. All three firms await a final ruling from the courts.

Regardless of the outcome, the side that loses will likely appeal. Understanding that complicated litigation in India routinely takes decades to resolve, the litigants and their supporters during this prolonged period have opted to pursue other routes to advocate their positions. In the next section I describe: what has transpired over the last many years; who is now involved in the debate; and how this struggle has become indeed more than just a litigation dispute.

III. Expanding the Fight Beyond the Courts

A. The Initial Conflicts

From 1996 until autumn 1999, India experienced a series of fractured parliamentary coalitions at the central governmental level. In spite of this political instability foreign investment into India continued and foreign lawyers representing these investors began devising ways to advise their clients without being accused of unlawfully practicing within the country. For example, several foreign law firms established offices in nearby Singapore – a country that was welcoming to them – in an effort to keep a close eye on the Indian legal scene.

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58 See id. Note the case was originally heard in the Bombay High Court, which although is the appellate court of the state of Maharashtra (and the state of Goa and the union territories of Daman and Diu and the Dadra and Nagar Haveli) also serves as a court of original jurisdiction in matters where a petitioner is claiming that there is a violation of the Constitution’s fundamental rights, or as in this case, a violation of a statute. (The Supreme Court of India has similar original jurisdiction in terms of a petitioner bringing a claim on the basis of the former.)

59 Id. Also see Knocking on India’s Door, BUSINESSWORLD, December 5, 2007.

60 See Lloyd, supra note 41.

61 Id. Author interview with Ashok Mubayi, Liaison Head, Ashurst Morris Crisp, June 17, 2008.


In addition, a number of British firms and a few American ones set-up “India desks” within their headquartered offices (or in one of their other foreign offices) that were charged with monitoring and working on legal issues involving India. And many foreign law firms formed relationships with their Indian counterparts, referring their clients to the latter whenever necessary and in turn taking-on clients when so referred.

By October of 1999 electoral politics stabilized. The right-of-center Bharatiya Janata Party (BJP) and its coalition partners captured a majority of seats in the Indian Parliament. While foreign law firms wondered whether the self-proclaimed Hindu-nationalist BJP might be hostile to their particular agenda, the government’s eventual appointment of the eminent lawyer Ram Jethmalani to the position of Minister of Law and Justice allayed many of these observers’ concerns. Although free-speaking and an oft-provocateur, Jethmalani, who now is in his 80s, was then and still is viewed as one of India’s best civil rights and criminal law experts. He was seen as a strong selection by those interested in opening India’s legal services market because of his vast experiences abroad and his exposure and acclaim in different international legal circles.

Upon becoming Law Minister, Jethmalani did not disappoint. Among one of his first initiatives included proposing changes to India’s Code of Civil Procedure. As stated above, the Indian judiciary has been in crisis for years; currently there are roughly 40,000 cases pending before the Supreme Court, a total of about 3 million cases languishing in all of the state High Courts, and 25

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65 Id.

66 For reference to this point, see the above cites at supra note 62.

67 For an interesting background on part of Jethmalani’s career, see Sumit Mitra, The Wrath of Ram, INDIA TODAY, August 7, 2000, http://www.indiatoday.com/itoday/20000807/cover.html [hereinafter, Mitra, Wrath of Ram.] Also India’s CNN-IBN news service conducted a very provocative interview with Jethmalani and his decision to defend a controversial defendant accused of murder, Manu Sharma, in a case that was decided in 2006. (Sharma was found guilty.) To observe a snapshot of Jethmalani’s reaction which he states is a window into his personality, and his views of this case and of the criminal justice system more generally, see http://www.youtube.com/watch?v=3Os-yqbitHk (Part I of the interview); http://www.youtube.com/watch?v=ADJjbKAzKM8&feature=related (Part II of the interview); http://www.youtube.com/watch?v=P7pNUNLbtkc&feature=related (Part III of the interview).

68 This latest data come from India Daily (March 7, 2007.) The site can be found online: http://www.indiadaily.org/entry/40243-cases-pending-in-supreme-court-3991251-cases-pending-in-21-high-courts-law-minister/

69 Id.
million cases lying dormant in the district courts.\textsuperscript{70} The explanation for this backlog has been discussed elsewhere,\textsuperscript{71} but in short there has been a long-held belief that because both the criminal and civil procedure codes allow for multiple interlocutory appeals, parties have the ability to drag cases on for decades. To reduce the backlog and provide more timely legal remedies to both Indians and foreign investors seeking to use the courts, Jethmalani advanced the idea of curtailing the number of adjournments and appeals allowed for by the civil procedure code.\textsuperscript{72} (He did not broach the criminal procedure code at this juncture.)

The second of Jethmalani’s proposals, which even further pleased the ever-watchful foreign bar, suggested exploring the possibility of opening India’s legal services market.\textsuperscript{73} For the Law Minister, “the opposition to foreign lawyers entry into India . . . [was] misguided and against national interest.”\textsuperscript{74}

Furthermore, he argued that the frequently cited provisions in the Advocates Act prohibiting foreign lawyers from practicing in India were not absolute.\textsuperscript{75} There were exceptions, for example, where if another country allowed Indian lawyers to practice in its jurisdiction, then lawyers from that country would be granted reciprocal privilege in India.\textsuperscript{76} Plus, upon special permission of the Indian judiciary, foreign lawyers could, and have in the past, appeared in Indian courts.\textsuperscript{77}

\textsuperscript{70} As of June 30, 2006, the website India Stat (www.indiastat.com), which is the most comprehensive database that tracks pending suits in court, states that the figure is 25,393,251. This data is on file with author.

\textsuperscript{71} Most observers agree that the main issue in India is not how many cases enter the courts, but how few come out. India’s legal system, in both its civil and criminal procedure codes, allows for many different types of interlocutory appeals. This practice is a carry-over from the colonial period. The British believed that in order to protect themselves from adverse judgments in lawsuits, they (the British) needed to preserve the right to appeal both substantive and procedural rulings from lower courts, which were generally staffed by Indians. (In fact the British system allowed substantive and procedural decisions to be appealed all the way to the Privy Council, Britain’s highest court at the time, in London. The tradition of prolonged appeals continues today in independent India. A sub-category of “delay lawyers” has even emerged who are specialists in perpetuating the length of litigation. These civil lawyers are in part motivated to keep litigation pending because of the way the Indian Bar organizes its fee-structure – which is that lawyers typically receive payment per court appearance. In 2002, the Indian Civil Procedure Code was overhauled, with the intent to reduce the number of these types of appeals. It is uncertain whether such a change will make a substantive difference in how the system operates. Footnote extracted from Krishnan, Outsourcing, supra note 23 at 2226-2227.


\textsuperscript{73} Minister Lambasts Strike against Foreign Lawyers and CPC Amendments, PRESS TRUST OF INDIA, Feb. 23, 2000, http://www.expressindia.com/news/ie/daily/20000223/ina23042.html. (Note, Jethmalani argued that he was only following-up on an idea raised by the government’s Law Commission’s report. He stated that there was not a “legislative proposal before the Government.” It was only an idea-in-progress.)

\textsuperscript{74} See Mitra, supra note 72 at http://www.india-today.com/chat/200003/jethmalani.html.


\textsuperscript{76} Id.

\textsuperscript{77} See Advocates Act, 1961, section 32.
Nevertheless, both of Jethmalani’s propositions received a harsh response from the largest segment of the Indian bar, the district court lawyers. They argued that his amendments to the code unfairly reduced the amount of time they could prepare for cases and virtually eliminated the ability of everyday litigants to appeal most civil trial judgments.78 On the second proposal, they accused Jethmalani of succumbing to the seductive pressure from foreign law firms and for not consulting with them on this idea.79

The district court lawyers contemplated how to react. Those involved in the main strategic decision-making sessions were members of the Delhi (district court) Bar Association (DBA), the most mobilized and politically effective group of its kind in the country.80 One thought was to sue the government, but that was rejected because of how long it would take to receive a final judgment. Another option discussed was whether to launch a grassroots political response. As one lawyer stated, “we wanted to make our position as political as could be. That’s the only way to get anything in this country done.”81 The DBA eventually decided to call a one-day strike to be held on December 21, 1999 in the nation’s capital. The protest drew 5,000 lawyers from three of the city’s district courts as well as from the Delhi High Court.82 A follow-up strike was then called for on February 24, 2000. At this rally, approximately 40,000 lawyers gathered in Delhi, and nation-wide an estimated 500,000 lawyers struck, shutting down the courts throughout the country.83

The February strike made international news. The main reason was because of how the government responded, namely, in Delhi, by using force to break-up the demonstration. According to the government the police were compelled to use violence because the protesting lawyers were on the brink of instigating a riot. The lawyers, however, tell a much different story. Rajiv Khosla, the current president of the DBA and at that time an organizer of the strike, recalls that the beatings of the lawyers by the police were unprovoked.84 Not only did they use batons but the police also launched propelled water canisters to disperse the crowd – one of which hit Khosla in the face, causing him to lose his right eye.85 The result of this episode was that the Delhi Bar extended

78 On a detailed critique of Jethmalani’s amendments’ proposal, see Mitra, supra note 72 at http://www.india-today.com/itoday/20000313/law.html.
79 Author interview with a key district bar official, Rajiv Khosla, who will be discussed below. Interview, June 18, 2008.
80 It is important to note that in each state there is a bar association that serves those who practice in the district courts; there are more practitioners who work primarily in the district courts than in any other venue in the country. There are also parallel state-bar associations that represent lawyers who primarily work in each state’s High Court; and there is a Supreme Court bar association for those who work primarily in the Supreme Court. The Bar Association of India is the comprehensive group that represents all of these lawyers, although again, the main constituents are those lawyers who mainly practice in the district courts. These district court lawyers, as we will see, thus have a great deal of lobbying and political power.
81 Author interview with lawyer who asked to remain anonymous, June 19, 2008.
82 Author interview with Rajiv Khosla, current president of the Delhi Bar Association (Tis Hazari branch), June 18, 2008.
83 Id.
84 Id.
85 Id.
the strike for several more weeks,\textsuperscript{86} bringing to a halt all work in the city’s
district courts and the Delhi High Court.\textsuperscript{87}

It is hard to tell whether the proposed change to the civil procedure code
or the possibility of foreign lawyers entering India was the driving force behind
the lawyers’ agitation. There are those who believe that the former was the main
contributor; because district court lawyers are often paid per court appearance,
the amendments, which reduced the opportunities for adjournments and appeals,
would have cut into the fees of Indian litigators.\textsuperscript{88} On the other hand, DBA
President Khosla insists that it was the issue of foreign lawyers that infuriated
him and his constituents the most.\textsuperscript{89} For Khosla, that the Law Minister had not
consulted with the district court lawyers but instead engaged in conversations and
correspondences with a handful of domestic allies sympathetic to liberalizing the
legal services sector, which the Minister then touted as an endorsement from the
legal establishment, provoked the strike.\textsuperscript{90}

Ultimately a compromise was reached on the amendments to the civil
procedure code, which Khosla cites as support for his claim that this issue was
not as problematic for the district court lawyers as some have suggested.\textsuperscript{91} On
the issue relating to foreign lawyers, however, the district court bar refused to
budge; the government eventually shelved its plans, and Khosla and his
colleagues claimed victory. But the fact is that neither the district court lawyers
nor the government had a detailed set of policy arguments explaining their
respective positions.\textsuperscript{92} Add to this that India’s elite law firms were not even
major players in this conflict and had a minimally articulated position-platform
of their own at this time.\textsuperscript{93} For those in favor of liberalizing India’s legal market,
what occurred in December 1999 and February 2000 served as an important
lesson and forced them to craft a more sophisticated strategy that they then
employed in the years that followed. The district court lawyers and their
ideological allies similarly did the same. These developments will be explored
next.

\textsuperscript{86} Id. Also see, India, Attacks on Justice, Eleventh Edition, INTERNATIONAL
COMMISSION OF JURISTS, 181-182, \url{http://www.icj.org/IMG/pdf/india.pdf}.

\textsuperscript{87} Author interview with Rajiv Khosla, current president of the Delhi Bar Association (Tis
Hazari branch), June 18, 2008. Also see, \textit{Delhi HC Lawyers to Resume Work Tomorrow},
INDLAW.COM, April 5, 2000, \url{http://quirk.in/guest/DisplayNews.aspx?AE7F0A78-5B28-4B22-
9E57-4AA502C30955} (noting also how there was apparently a disagreement between the High
Court lawyers who wanted to end the strike and district court lawyers, including Rajiv Khosla.
Also see, \textit{HC Lawyers’ Prevented from Resuming Court}, INDLAW.COM, April 7, 2000,
Back on Work Despite Differing Statements}, INDLAW.COM, April 24, 2000,
\url{http://quirk.in/guest/DisplayNews.aspx?5DE13E01-E4FF-4157-AB4F-11CC95A9E1C1}.)

\textsuperscript{88} Author interview with a Delhi advocate who practices in both the district courts and High
Court and who followed these series of episodes, June 17, 2008. (Attorney asked for anonymity.)
Although other district court lawyers with whom I met vigorously rejected this argument, saying
that in fact many who practice at this level actually receive lump-sum payments, not fees per court
appearance.

\textsuperscript{89} Id.

\textsuperscript{90} Id.

\textsuperscript{91} Id.

\textsuperscript{92} Indeed Khosla and his DBA colleagues admit this point today, noting that they were
most bothered by what they perceived as the Law Minister’s heavy-handed and non-inclusive
political brazenness.

\textsuperscript{93} At least, that is, to the extent that we see today.

Ram Jethmalani’s tenure as Law Minister ended on July 22, 2000. Although the two strikes by the Indian lawyers occurred during his time in office and may have played a role in the BJP government’s decision to ask for his resignation, there were other high profile incidents, unrelated to our study, which contributed to his departure. Jethmalani’s successor was a well-respected Supreme Court advocate, Arun Jaitley. Jaitley had two terms as Law Minister. First, he served from November of 2000 until July 2002 and then from the end of January 2003 until the spring of 2004, when the BJP-led coalition fell in that year’s national elections. (Jaitley left the Law Ministry briefly during the fall of 2002 and the first part of January 2003 to serve as the BJP’s General Secretary.)

Jaitley’s position on the issue of foreign lawyers entering India was twofold. He believed that given its politically volatile nature, there simply could be “no proposal to allow foreign lawyers to practice” in India during his time in power. At the same time, Jaitley insisted that the Indian bar needed to acknowledge that globalization was changing the way lawyers were doing business. “There is an increasing element of competition and trend towards commercialization of [the] legal profession,” he stated. “This has come to stay and it is a hard reality. The territorial restriction on law practice . . . [is] cracking down.”

Jaitley’s stance offered hope to American and British law firms who still sought to be part of the expanding Indian economy. Recall that although Chadbourne and Park had left India, the U.S. firm of White and Case and the U.K. firm of Ashurst remained in the country. In addition, elite English firms such as Clifford Chance, Freshfields, Olswang, Herbert Smith, and Linklaters continued to show interest in India, as did American firms like Jones Day, Baker & McKenzie, and those that focused on the field of intellectual property.

But with the Law Minister and the government ultimately unwilling to push for the opening of the legal services sector, foreign law firms were left to work outside of the country as they had been doing since the mid-1990s.

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95 Id.
96 During this time the law minister was Jana Krishnamurthi. For information on this point, see Arun Jaitley Takes Over as Union Law Minister, January 30, 2003, http://pib.nic.in/archive/releng/lyr2003/lyr2003/30012003/3001200331.html.
98 Id.
The national elections of 2004 ushered in a new coalition government led by the historically dominant Indian Congress Party. As of this writing this coalition continues to remain in power. This government is viewed by many observers in and outside of India as having the economic ‘dream-team’ at the helm. The Prime Minister, Dr. Manmohan Singh, is a Cambridge and Oxford-trained economist who worked at the International Monetary Fund (IMF) and helped India begin the process of liberalizing its economy in the early 1990s. His deputy chairman of the government’s planning commission, Montek Singh Aluwalia, similarly is a former IMF official who has served in several key economic posts in the Indian government. And the national Home Affairs Minister, Palaniappan Chidambaram, a lawyer as well as a graduate of the Harvard Business School, has long been involved on the international stage dealing with multinational corporations and foreign nations as a government official and before that working in his private law practice.

In addition to these internationalists, the government appointed as Law Minister, H.R. Bhardwaj, an intellectually agile and savvy official with a keen pulse on the country’s political landscape. For the law firms based in Britain, in particular, the Bhardwaj selection and the overall formation of the new government were the best opportunities they had seen in ten years for opening India’s legal market. In short order, the Law Society of England and Wales, which is the organization that has represented the political and legal interests of solicitors since 1842, began “actively lobbying the Indian government and legal profession for an easing of its regime on foreign legal practitioners.”

In January of 2005, a high-ranking official from the Law Society became part of the Joint Economic and Trade Committee (JETCO), a large delegation established by the governments of Britain and India for the purposes of promoting bilateral

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100 For information on this point and for the Congress Party in general, see http://www.congress.org.in/.

101 In July of 2008, the Congress-led coalition faced a no-confidence vote, which it survived, despite an important coalition member, the Communist Party of India, pulling out of the alliance. See id for further discussion of this subject. Also see, Tejas Mehta, Cash-for-Vote Scam Lead to Rise in News Channels TRP’s, NDTV.COM, July 24, 2008, http://www.ndtv.com/convergence/ndtv/story.aspx?id=NEWEN20080058419&ch=7/24/2008%208:54:00%20AM (noting that the Congress Party was accused of buying votes with cash and other perks in order to maintain its control of Parliament. Members of the Congress Party vehemently deny the allegation. The matter, as of this writing, is currently under investigation.)


104 See Congress Party website, http://164.100.24.209/news/Biography.aspx?mpsno=3000. It should be noted that Chidambaram only became Home Affairs Minister in late 2008, following the November 2008 terrorist attacks in Mumbai. Prior to this post, he held the finance portfolio, where he was a central player in developing India’s economic policies.

105 For background on Minister Bhardwaj, see the Indian Legal Information Institute, http://www.indlii.org/LinkDetail.aspx?id=47.


cooperation in various fields. Legal services were designated as one such field and along with this Law Society member, the English negotiating team on this issue included four private sector solicitors and three government officials. The Indian team consisted of two lawyers, each from two different well-reputed private law firms, and two courtroom litigators, one from the Delhi Bar Association and the other from the Mumbai Bar Association.

The goal of JETCO’s legal services “working group” was to arrive at a mutual understanding on the steps that would be taken to liberalize India’s legal market. To this end, the English side prepared a report detailing its suggestions and proposals. It is hard to say to what extent the English have influenced Law Minister Bhardwaj or vice versa. Or for that matter if they both independently have shared the same views all along. Regardless, he, the British contingent, and other supporters (including some American law firms) have built a methodical, some say provocative, case as to why foreign lawyers should be allowed to practice in India. Let us consider each of the arguments in turn.

1. Teaching Them What We Know To Make Them Better

There is a direct and oft-repeated sentiment among those advocating for liberalization: “letting in foreign lawyers will help India to become globally competitive in legal services in its own right.” For these proponents Indian lawyers, as a whole, currently lack the experience and skill-set needed to compete in the global marketplace. By introducing foreign lawyers who are fluent in international legal services into the Indian space, competition within the domestic market would ensue and force underperforming Indian lawyers to improve their practice, merge with their new competitors, or fold.

This position is not just held by foreign lawyers; several Indian transactional lawyers feel the same way. Som Mandal, the managing partner of one of India’s oldest law firms, Fox Mandal Little & Company, has stated that he believes the presence of foreign law firms in India would only strengthen the Indian legal profession. According to Mandal, “[c]ontrary to popular belief...
that domestic firms will be wiped out by the entry of international firms, . . .

foreign players will enhance the quality of service, facilitate the adoption of
international best practices, and promote the overall development of individual
[Indian] lawyers.”115 Similarly, Suresh Talwar, one of India’s most respected
corporate lawyers who was an equity partner with another long-standing Indian
firm before leaving and forming his own boutique practice, argues that
competition from foreign law firms will ratchet-up the professionalism of the
Indian bar where “those who are good will survive, and those who aren’t
won’t.”116 Talwar, like Mandal, also believes that Indian law firms could benefit by
“imbibing the best practices”117 of foreign law firms. In fact his new firm,
Talwar Thakore and Associates, has announced a formal “tie-up,” or “best-
friends cooperative,” with the elite British firm Linklaters.118 In addition to
establishing a joint referral network and sharing legal and technical know-how, a
key purpose of this cooperative includes Talwar’s new firm incorporating the
professional norms and practices of Linklaters in the hopes that the former will
be able to thrive to the extent that the British firm has done so.

Irrespective of whether it is domestic or Western lawyers articulating this
position, the message of this argument is clear: the entry of foreign law firms
into India would allow Indian lawyers to realize their full potential. With Indian
lawyers so insulated from the rest of the world for so many decades, it is only to
be expected that they would not have the expertise to deal with the complicated
transactional work demanded by high-profit yielding, multi-national clients. As a
partner from the London-based Ashurst firm has said, foreign lawyers would
bring “higher standards and new techniques to the Indian market.”119 Or to take
it one step further, as another British practitioner has remarked, the Indian
transactional bar “need[s] the breadth of experience that the U.S. and U.K. law
firms can bring. It is not to knock the Indian firms, but they are much smaller and
do not have such a full range of expertise.”120

115  Id (noting that while he is supportive, he also believes that foreign lawyers “be allowed to
practice only the law of their jurisdiction and later be allowed to enter into joint ventures with local
firms. Furthermore, litigation can be preserved for domestic lawyers.”)
116  Author (phone) interview with Suresh Talwar, June 3, 2008.
117  Id.
118  Id. Another Indian firm, Trilegal, has recently done the same with the British firm Allen
and Overy. For a discussion of this point, see Trilegal Makes Innovative Deal with Top UK Firm,
2009, “Clifford Chance, the world’s largest law firm, announced an alliance with leading Indian
counterpart AZB . . . as global legal practices try to gain access to the country’s burgeoning cross-
border market.” See Joe Leahy and Michael Peel, Clifford Chance Finds AZB India Ally,
FINANCIAL TIMES, Jan. 15, 2009, http://www.ft.com/cms/s/0/19ffa578-e266-11dd-b1dd-
0000779f62ae_i_email=y.html.
119  See Murali Neelakatan, Foreign Firms Raise Standards, in Ben Frumin, Lowering the
Bar, INDIA BUSINESS JOURNAL, Nov. 2007, 15,
120  See comment by London’s Clifford Chance’s finance partner Chris Wyman in Chris
Crowe, Middle East and India: Standard Guard, LEGALWEEK.COM, March 29, 2007
http://www.legalweek.com/Articles/1018790/Middle+%20East+and+India+Standing+guard.html. See
ALB Special Report: India, ALB LEGAL NEWS, March 1, 2007,
http://asia.legalbusinessonline.com/reports/23706/details.aspx (article noting “that internationals
name as among the handful [of Indian firms] able to stand the competition include Amarchand
Mangaldas & Suresh A Shroff & Co, Fox Mandal Little, Khaitan & Co, AZB & Partners, Crawford
2. Better for Clients and Law Students

Indian lawyers would not be the sole beneficiaries from the presence of foreign law firms, according to liberalization supporters; Indian clients and Indian law students would gain as well. Earlier it was discussed how there is a relatively small number of elite law firms in India that work on transactional matters. With the booming growth of Indian businesses over the past decade, the Indian law firms servicing these clients have financially capitalized. Open-marketers, however, claim that because the legal services sector is closed to international competition, Indian clients are forced to pay whatever fees are demanded of them.\textsuperscript{121} If foreign law firms were granted access, then not only would clients have a wider selection from which to choose, but because these firms would be seeking to attract business of their own, they would likely enter India charging less than their Indian counterparts, which would be savings directly felt by clients.\textsuperscript{122} (And for wealthier Indian clients who already travel abroad to use foreign law firms, having their lawyers in the “same time zone”\textsuperscript{123} would reduce the costs currently spent working across international borders.\textsuperscript{124})

Indian law students are another group that could see their situation improved with the admission of foreign law firms. Over the past twenty years, India has witnessed a transformation in legal education. Previous work has detailed this development,\textsuperscript{125} but briefly, since the late 1980s a set of prestigious five-year, post-high school law programs have emerged that have attracted some of the country’s best students.\textsuperscript{126} Many of these graduates, together with a number of top students who have matriculated from the handful of historically-reputed, three-year, post-baccalaureate law programs have been accepting positions overseas (mainly in the U.K.) with several of the same firms that are seeking entry into India.\textsuperscript{127}

Bailey & Co, Luthra and Luthra, Trilegal, J Sagar & Associates, Rajani & Associates, and Mulla & Mulla.) As we have seen from above, and from Appendix B, however, there are others that could be included in this list as well.


\textsuperscript{122} Id.


\textsuperscript{124} Id.

\textsuperscript{125} See generally Jayanth K. Krishnan, Professor Kingsfield Goes to Delhi: American Academics, the Ford Foundation, and the Development of Legal Education in India, 46 AMERICAN JOURNAL OF LEGAL HISTORY 447 (2004) [hereinafter Krishnan, Professor Kingsfield].

\textsuperscript{126} Id.

This legal ‘brain-drain,’ as the argument goes, is occurring because these graduates are attracted to the salaries, vertical opportunities, and prestige that foreign law firms offer; liberalization supporters contend nothing comparable is present in even the most elite Indian firms. First-year associates, or “freshers” as they are often called, at the top Indian firms earn, at a maximum, $2,000-$2,500 a month.\footnote{This information was gathered after speaking with several partners who work in the most elite Indian law firms.} Furthermore, the probability of a fresher becoming an equity partner within one of these top firms historically has been remote.\footnote{One reason is that until late 2008 law firms in India were not allowed to have more than twenty equity partners. This point relates to the 1956 Indian Company Act, section 11.2 (stating: “No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Indian law.”) However, at the end of 2008, Parliament passed the Limited Liability Partnership Bill, which gives the go-ahead for partnerships to have more than twenty partners. See Kian Ganz, Indian Liberalisation Comes Closer with LLP Act, THE LAWYER.COM, January 17, 2009, http://www.thelawyer.com/cgi-bin/item.cgi?id=136195&d=415&h=417&f=416. We will be exploring this point later in the text, but it should be noted that technically section 11.2 of the Companies Act needs to be dealt with before the LLP bill can become effective. A new version of the Companies law is pending before Parliament and has a provision (section 422) that indeed increases the cap to one-hundred.} Finally, no Indian firm has the cache of a Clifford Chance, Jones Day, or Allen & Overy. Yet if foreign law firms were permitted into the Indian market, it would be a win-win situation, according to this argument.\footnote{For a student paper echoing this point, see Anand Shankar Jha, Indian Legal Profession and Trade in Legal Services, INDLAW.COM (n.d.), http://news.indlaw.com/publicdata/articles/article170.pdf.} Many of these stellar Indian students who would prefer to stay in their home country could do so; they also could reap the benefits that accompany working for an elite Western firm; and the country’s ongoing legal brain drain could be curtailed.

3. It’s a Matter of Fairness

For supporters who believe India should open its legal services sector, those opposing this move are acting in a terribly unfair manner. As liberalization-advocates claim, Britain and the United States have long welcomed Indians interested in studying law into their universities. Upon graduation, a number of these Indians have offers to practice in some of the most lucrative law firms in the world. As one Western lawyer remarked, “you don’t see Brits or Americans banging down the doors of Indian universities; no, it’s always the other way around, but we don’t complain about it. Most of us think it’s good for our schools and for our [legal] system.”\footnote{Author interview with respondent (anonymity requested), July 20, 2008.} Indian law firms also recently have been opening offices in the U.K and U.S. For example, the Indian firm of Fox Mandal established a London office in the spring of 2008.\footnote{See First Indian Law Firm’s UK Entry Creates a Splash, THE ECONOMIC TIMES, March 17, 2008,} The Mumbai-based firm of Nishith Desai Associates has...
an office in Palo Alto, California. Other Indian firms too are likely to follow this lead.

In addition, India is a member of the World Trade Organization (WTO) and a signatory to the 1995 General Agreement on Trade in Services (GATS). Much has been written on the WTO, the GATS, and the “Uruguay Round,” the site where this agreement was reached. For our purposes, this treaty contains a goal to form more open relationships among member states in various service sectors, including legal services. Although there is flexibility for states on how and when they decide to liberalize each sector, the argument pro-liberalization advocates make is that pure politics has affected the decision-making calculus of Indian government leaders. Consider, they claim, the accounting services sector, which opened-up years ago in India pursuant to the GATS. Unlike the political lobbying power of the Indian bar, Indian accountants had no such leverage; thus the government was free to move forward on liberalization. Yet the Indian bar, according to these observers, has unreasonably exerted disproportional influence on its government, thereby preventing the Indian parliament from further implementing the treaty. How can India, they ask, expect to be treated as a major player on the world’s economic stage when it is unwilling to comply fully with its obligations as a WTO member and instead succumbs to pressure from a bullying interest group?

The above discussion highlights how considerably the case for liberalization has evolved since the strikes and violence of 1999 and 2000. The arguments by foreign law firms and their supporters have become more detailed and hard-hitting and indeed to some smack of arrogance and paternalism. With a sympathetic government now willing to defend them, it might seem that the country is on its way to opening its legal services sector. But based on in-depth fieldwork conducted in India during 2008, I offer first-hand empirical evidence showing that contrary to the conventional wisdom liberalization-opponents have developed a sophisticated case of their own. The opponents’ arguments and the constituencies that support them, as I show, have forced the government to reconsider the pace at which foreign law firms should be admitted into the country. These findings are examined next.

http://economictimes.indiatimes.com/First_Indian_law_firms_UK_entry_creates_a_splash/articleshow/2872259.cms

133 See the website for the firm, at http://www.nishithdesai.com/nishithdesai.htm.

134 The WTO has devoted an entire site to the GATS negotiations and responsibilities and obligations of the partners. See http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm.


137 Id.

138 See Feroz Ali K, supra note 121. Author (phone) interview with English lawyer (anonymity requested) making this point, June 29, 2008.

139 See Feroz Ali K, supra note 121. Also, Author (phone) interview with American lawyer (anonymity requested), making this point, June 28, 2008.
C. The Opponents and Their Arguments: More than Simply Protectionism

There is a common perception among foreign lawyers and their supporters that those who oppose them are mainly equity partners from the elite Indian law firms who are earning an enormous amount of wealth under the current closed system. Our discussion above of the animosity district court lawyers have held towards liberalizing the legal market, dating back to 1999, undermines this conventional view. I will soon spend more time exploring how the district court bar has fine-tuned its case over the past nine years. There is also evidence that lawyers working in smaller firms, and even some lawyers based in both Britain and the United States, have expressed concern about allowing foreign practitioners to enter India. Still, it is not inaccurate to suggest that among the most vociferous skeptics of this liberalization initiative are indeed equity partners from some of the elite Indian law firms.

For this project I met with several of these lawyers. While they acknowledged that their financial prosperity might be affected by the presence of foreign law firms in the country, they insisted and articulated a point-by-point rebuttal to the arguments made by those on the other side. For example, the Indian partners bristled at the suggestion that the introduction of foreign lawyers would improve the quality of transactional legal practice within the country. “This just shows how little they [the foreign law firms] know about what we do,” stated one Mumbai-based practitioner. Another well-regarded lawyer, Lalit Bhasin, the above-mentioned president of the Society of Indian Law Firms (SILF), echoed these sentiments. Bhasin is the managing partner of the New Delhi-based Bhasin and Company and has long argued that Indian law firms are already “globally competitive and need no support from foreign lawyers.”

According to Bhasin and a number of his SILF colleagues, Indian transactional lawyers have not been working in a vacuum all these years. In fact, many in SILF have long had productive and ongoing working relationships with foreign law firms. Indian firms and foreign firms have referred clients to one another; they have hosted joint conferences where information and experiences are shared; and they have worked closely together when client-interests so demand. Thus this depiction that they are isolated entities, sequestered from the rest of the world, is seen with disbelief and leads these Indian law firms to conclude that their foreign counterparts are engaging in a

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140 Author interview with managing partner (anonymity requested) of one such smaller firm, June 7, 2008. Also see Frumin, supra note 113 at 19 (quoting Bob Nelson of Thelen Reid in San Francisco, who states: “I fear that excessive liberalization at too fast a pace could lead to a real overall quality dilution – where top Indian firms lose many of their good lawyers, while foreign firms that hire such lawyers and establish local presences cannot establish sufficient depth and critical mass – essentially creating a situation where quality is spread too thinly.” He goes on to say that “slow, organic change over time is best.”)

141 Author (phone) interview with Mumbai lawyer (anonymity requested), June 7, 2008.

142 Author interview with Lalit Bhasin, June 19, 2008.

143 Follow-up correspondence with Lalit Bhasin, July 5th, 2008.

144 Author interview with Lalit Bhasin, June 19, 2008

145 Id.
rhetorical stunt in order to caricature the Indian bar for “self-serving and malafide” purposes. After all, how can it be, Bhasin and his SILF colleagues ask, that yesterday Indian transactional lawyers were able and competent but today they are inferior? For these Indians, British and American lawyers are simply searching for new employment opportunities. In their press releases, editorials, and internal communications, the Indian lawyers repeatedly point to studies showing how saturated the legal markets are in Britain and the United States. While well-paying jobs are few and far between in their own home countries, foreign lawyers view India as a “fertile market.” For this reason, the Indians are skeptical that the foreigners have a sincere wish to improve the quality of lawyering in India.

Then there is the contention of how Indian clients would benefit. “This is such a straw-man argument,” remarked one Indian law firm partner. According to this lawyer, foreign firms purposely mischaracterize Indian transactional lawyers as a cartel, where prices are somehow fixed and there is no domestic competition. Nothing could be further from the truth, this lawyer and others say. The Indian legal market is bustling with competition and, moreover, the fees charged to Indian clients are at a rate that is affordable. As one of India’s top transactional lawyers whose clients are among some of the country’s wealthiest business-people stated, “I charge 16,000 rupees [$400] an hour, maximum, for my services. Would a London or New York partner’s rate be so low?”

If anything, there is a sense that the entry of foreign lawyers would lead to increased financial hardship for clients. As this argument goes, the elite London and Wall Street firms clamoring for liberalization employ thousands of lawyers. If these firms were granted admission into India, they may, yes, initially undercut the fees of Indian lawyers. (With enough resources at their disposal, the foreign firms could absorb the costs that accompany the lower rates.) But once the domestic competition was eliminated or brought under their control, foreign firms, as the Indians contend, would be in a position of complete power. 

146 Follow-up correspondence with Lalit Bhasin, July 5th, 2008.
148 Follow-up correspondence with Lalit Bhasin, July 5th, 2008.
149 Author interview with respondent (anonymity requested), June 18, 2008.
150 Id.
151 Author interview with respondent, June 16, 2008.
152 Even one foreign lawyer has expressed concern about this occurring too. See Frumin, supra note 113 at 17 (quoting Richard D. Rogovin of the Ohio firm, Fred Brown Todd, that indeed a large international firm can soon dominate an area of practice because it has the financial resources that most local firms do not enjoy.”)
Indian clients in need of transactional work would have no alternative but to use the services of these foreign firms and pay the fees demanded of them.\textsuperscript{153} That Indian law students would also benefit from the presence of foreign law firms is viewed as another red herring. Indian firms dismiss the allegation that they are having problems recruiting and staffing their offices with the country’s best and brightest law graduates. As for salaries, Indian law firms argue that in terms of purchasing power they are as competitive, if not more so, than their foreign rivals. As a partner of one firm commented, the “2,500 dollars a month in India that freshers [i.e., first year associates] get is nothing to sneeze at. Plus we sometimes give them a car with a driver, a mobile phone, and other great perks.”\textsuperscript{154} Compare these benefits to what associates earn in London, he asserted, which is of course one of the most expensive cities in the world, and it is not difficult to understand why he sees many Indian law students eschewing a move to the U.K.\textsuperscript{155} And although this lawyer conceded that the salaries in elite American firms could not be matched in India, he noted that the lifestyle for lawyers in Indian law firms is more manageable and enjoyable, and that in addition, his lawyers are able to work within one of the most dynamic economies in the world today.\textsuperscript{156}

As for the charge that there is little upward mobility for Indian associates, that too is an exaggeration, according to equity partners from several different law firms.\textsuperscript{157} It is true that becoming an equity partner within an elite Indian firm traditionally has been difficult.\textsuperscript{158} But there is a valid explanation, relating to how the country’s limited liability partnership law has been structured for decades. Until recently, India’s main partnership statute barred law firms from having any more than twenty equity partners. The rationale for this cap was that equity partners were open to unlimited liability if they were sued.\textsuperscript{159} The more equity partners the greater the possibility that one of them could act in a manner that placed the other partners and the firm in financial jeopardy. In order to contain this risk, the statute arrived at a reasonable number – twenty – that allowed firms the ability to grow at a steady rate but at the same time made it

\textsuperscript{153} Author interview with New Delhi lawyer (anonymity requested), June 15, 2008. Also see Frumin, supra note 113 at 16 (quoting a partner of the Indian firm, ALMT, who expects legal fees “to rise to international levels” with foreign law firms entering the country. Although it should be noted that this partner, Sakate Khaitan, seems to be suggesting from the Frumin piece that this development would be good, presumably because lawyers’ incomes would rise as well.)

\textsuperscript{154} Id. Rajiv Luthra, a partner at a major Indian firm, Luthra and Luthra, has also made this point separately. See Kian Ganz, Indian Salary War Escalates as Global Firms Circle Best Talent, THE LAWYER.COM, Apr. 14, 2008, http://www.thelawyer.com/cgi-bin/item.cgi?id=132226&d=415&h=417&f=416.

\textsuperscript{155} Id. As he noted, training contracts, which are what law graduates sign onto during their first two years with a London firm, typically pay about 40,000-50,000 pounds per year. Of course, salaries increase after this two year period quite dramatically, but he still argues that in terms of purchasing power, Indian associates do well.

\textsuperscript{156} Id. Also see Ganz, supra note 154.

\textsuperscript{157} Information gathered from four different partners from four different law firms during the week of June 15\textsuperscript{th}, 2008.

\textsuperscript{158} Id. Some may wonder whether law firm associates feel the same way. Of the law firm associates with whom I spoke, the responses given were varied. Several said that they did believe they could achieve equity status; some simply did not know the odds; a few were more skeptical, while a couple were reluctant to commit one way or the other on this point.

\textsuperscript{159} Id.
possible for the senior leadership to police one another without expending inordinate resources.\textsuperscript{160}

To prove that they are not conspiring to hoard profits and restrict the vertical mobility of those who work under them, equity partners point to how they were among the leading lobbying force behind the passage of a December 2008 Parliamentary bill that raised the number of equity partners allowed in law firms.\textsuperscript{161} I was also informed that even before this bill passed partnerships cleverly maneuvered around the twenty partner rule for the main purpose of rewarding and accommodating their ambitious associates.\textsuperscript{162} To understand how this arrangement worked, assume that law firm XYZ had twenty equity partners and thirty associates. Assume also that the partners believed that five associates deserved to be promoted to equity level. The partners would form a sub-partnership, between for example X and Y, which would then be allowed to have twenty equity partners of its own. If need-be, subsequent sub-partnerships would be formed between X and Z or Y and Z, and while the specifics of profit-sharing and firm management would have to be determined, it was through this technique that associates could indeed become partners.\textsuperscript{163}

Finally, that India is failing to reciprocate on the many advantages it receives from the West is an accusation without merit, according to these lawyers. On the issue of Indians studying law abroad, as one lawyer from New Delhi noted, “it’s not as though we aren’t helping them when we go there.”\textsuperscript{164} This individual, like others with whom I met, received an LL.M. from an Ivy League school, worked for a large American law firm, but returned to India a few years ago. (Even though she was already a licensed lawyer in India, before she could practice in the U.S. firm she had to take a state bar exam, which itself first required her to receive an LL.M from an accredited American law school.\textsuperscript{165}) While in the U.S. she received no financial aid and paid tens of thousands of dollars in tuition.\textsuperscript{166} At the law firm she billed over two thousand hours a year and helped to settle a case that brought her partners a large sum in legal fees.\textsuperscript{167} And of course in this post-9/11 era, there were strict immigration laws with

\textsuperscript{160} Information gathered from four different partners from four different law firms during the week of June 15\textsuperscript{th}, 2008.
\textsuperscript{161} Id. Also for a discussion of this bill and the related Indian Companies Act, see supra note 129. The bill also had a provision they are supporting that would introduce the concept of limited liability to these partnerships. Although the latter would certainly better insulate them financially, it also would help to recruit potential equity partner prospects who otherwise might be reluctant to enter a business where they may be open to suit both professionally and personally. For a nice synopsis of this bill’s provisions, see Shantanu Surpure, \textit{Limited Liability Partnership Bill 2006 in Line with International Practices}, VC CIRCLE: INDIA’S DEAL CHRONICLE, Jan. 22, 2007, \url{http://www.vccircle.com/2007/01/22/legal-guest-column-limited-liability-partnership-bill-2006-in-line-with-international-practices/}. For another set of comments on the new bill, including how it is likely to be affected by the government’s plans on taxing the new limited liability partnerships, see Umakant Varottil, LLP Bill Passed in Parliament, INDIAN CORPORATE LAW, December 15, 2008, \url{http://indiacorplaw.blogspot.com/2008/12/llp-bill-passed-in-parliament.html}.
\textsuperscript{162} Id at note 160.
\textsuperscript{163} Id.
\textsuperscript{164} Author interview with respondent (anonymity requested), June 7, 2008.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
which she had to comply.\textsuperscript{168} “I had to jump through a lot of hurdles before I could be a lawyer in the States,” she recalled.\textsuperscript{169} Similarly, Indians who wish to practice in the U.K. must first pass what is called the Qualified Lawyers Transfer Test (QLTT) if they want to work as licensed solicitors.\textsuperscript{170} For opponents of foreign law firms entering India, it is galling that while such requirements exist both in the U.S and U.K., American and British law firms have no qualms arguing that they should be able to come freely into India and establish their practices.\textsuperscript{171}

With respect to the issue of the WTO and the GATS, liberalization-opponents contend that here again there is great hypocrisy from the West. Under the GATS, India has latitude to determine when it should act on the provision regarding legal services.\textsuperscript{172} There is also a feeling among a contingent of domestic legal observers that India has provided Western law firms with access to the Indian market – particularly through what is called legal process outsourcing (LPOs). There has been recent research published on this topic,\textsuperscript{173} but essentially over the past fifteen years Western law firms have used intermediaries or have directly hired Indians to perform a range of administrative, secretarial, and paralegal tasks.\textsuperscript{174} With the line between paralegal and legal work often blurred these days, there is dismay that Western firms can claim that they are being denied access. As one frustrated Indian lawyer remarked, “What

\textsuperscript{168} Id.

\textsuperscript{169} Id. Moreover, she remembered how many of her classmates from India, after spending a great deal of money on tuition, graduating, and passing the bar never even received interviews for legal positions and had to return home.

\textsuperscript{170} The Law Society of England and Wales, mentioned above, has an independent body known as the Solicitors Regulation Authority (SRA) that “regulates more than 100,000 solicitors in England and Wales, as well as registered European and foreign lawyers.” See http://www.sra.org.uk/solicitors/solicitors.page. As part of its jurisdiction, the SRA oversees the QLTT, which now is being offered in foreign countries, including India, and which leads foreign lawyers to argue that they are making efforts to accommodate those wanting to take the test, so that they do not have to travel to the U.K. to do so.

\textsuperscript{171} Noting this disparity, the British Indian Lawyers Association, which is a group of Indians who have passed the QLTT and now work in the U.K., has issued public statements and sent formal letters to government officials in New Delhi and London calling on real reciprocity between the two countries – including abandoning licensing tests and easing immigration restrictions – before India opens its legal market to British firms. For further discussion of these points, see Indian Lawyers Oppose Move to Allow Foreign Law Firms in India, EXPRESS INDIA, July 29, 2008, http://www.expressindia.com/latest-news/Indian-lawyers-oppose-move-to-allow-foreign-law-firms-in-India/254885.

\textsuperscript{172} See WTO website that discusses rights and obligations of those states that belong to the GATS, http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm. Also for a new book that has been published on this subject, see MERIT E. JANOW ET. AL, THE WTO: GOVERNANCE, DISPUTE SETTLEMENT, AND DEVELOPING COUNTRIES (2008).

\textsuperscript{173} See e.g., Krishnan, Outsourcing, supra note 23; also see Darya V. Pollak, I’m Calling My Lawyer . . . in India: Ethical Issues in International Legal Outsourcing, 11 UCLA J. INT’L & FOR. AFFAIRS 99 (2006); Mary C. Daly and Carole Silver, Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law Related Services, 38 GEO. J. INT’L L. 401 (2007); Joshua A. Bachrach, Offshore Legal Outsourcing and Risk Management: Proposing Prospective Limitation of Liability Agreements under Model Rule 1.8 (H), 21 GEO. J. LEGAL ETHICS 631 (2008).

\textsuperscript{174} Id at all cites. Also see, Angela Balakrishnan, Clifford Chance Moves Admin Work to India, THE GUARDIAN, Oct. 28, 2006, http://www.guardian.co.uk/business/2006/oct/28/india.internationalnews.
are they crying about, really?”175 Besides, that India is being called upon to open its legal services market when for years the United States and European countries have failed fully to end the subsidies they provide to a precious constituency within their own economies – agribusiness – raises further ire.176 “What a bunch of hypocrites,” a Delhi-practitioner stated. “They’re okay with protecting their rich farmers, but they get angry when we want to protect our legal system.”177

Contrary to the conventional wisdom then, the empirical information solicited from the above field research reveals that elite Indian law firm partners indeed have a sophisticated set of responses to the charges being leveled against them. More than just lamenting about profit-loss, this group provides policy rebuttals on issues relating to lawyer quality, client costs, opportunities in Indian law firms, and reciprocity. The fieldwork also uncovers another finding. In the next section, I discuss how these partners, joined by another group of liberalization-opponents in India, district court lawyers, have moved beyond the point-by-point rejoinders of this policy debate and have employed intensely provocative, symbolic rhetoric as well. The opposition argues that this is a response to the paternalism exhibited by liberalization-advocates. In turn, foreign lawyers and their supporters have reacted with heated rhetoric of their own, which has triggered even further passions among the domestic constituency. The question is whether a compromise might be brokered to accommodate these seemingly irreconcilable positions. I tackle that issue in the conclusion.

D. Symbolic Politics

The last quote above from the Delhi practitioner reflects a sentiment that several Indian lawyers expressed during the course of my research. That Western law firms are moving to establish a presence in India evinces enormous symbolic rhetoric from those who are opposed to this initiative, and they

175 Author interview with respondent (anonymity requested), June 7, 2008. This lawyer also noted that the fact that Western firms are engaging in “tie-ups” with Indian firms, which were discussed above, is also another way that they (the Western firms) have access to the Indian market.

176 Of course, agriculture and other goods (rather than services) that are dealt with by the WTO fall under the General Agreement on Tariffs and Trade. To some, this will appear to be conflating issues, and while there is indeed a distinction between the GATT and the GATS, where the frustration lies is in the larger perceived inconsistency that the quotation in the next sentence brings to light. For a discussion of this treaty and the details behind it, see the WTO’s website, The GATT Years: From Havana to Marrakesh, at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm. During the last week of July 2008, the WTO’s major set of trade talks that had consequences for some 150 economies around the world broke-down, namely because of this issue regarding agriculture. India was accused (along with China) by the United States and the European Union of contributing to the inability of the parties to reach an agreement. For a summary of what occurred, see Stephen Castle and Mark Landler, After 7 Years, Talks Collapse on World Trade, NEW YORK TIMES, July 30, 2008, http://www.nytimes.com/2008/07/30/business/worldbusiness/30trade.html?_r=1&oref=slogin.

177 Author interview with respondent (anonymity requested), June 15, 2008. This particular interviewee stated he understood that there was a distinction in the West between the rich agribusinesses and everyday farmers – the latter which he noted actually has sympathized with the call by farmers in the developing world to end governmental subsidies to the former.
articulate their perspective in the following manner.\textsuperscript{178} It has only been a little over sixty years since India freed itself from British oppression.\textsuperscript{179} During the colonial period, the British used the law as a means of consolidating their hold over Indian society. The British attempted to shape every aspect of Indian life – economic, social, political, religious, and familial. The exploitation of Indians under this system was notorious, and it took a long, hard struggle to win independence from the Crown in 1947. Since that time India has made significant progress. It is a vibrant constitutional republic, with a thriving economy, a diverse and free press, and an energetic civil society.\textsuperscript{180} But now for a group of private British law firms, with the support of the British government, to claim as a substantive policy argument that their entering India will only ‘help’ their counterparts and improve the country overall is in reality a smokescreen for their ulterior motives (that include dominating the Indian legal system) and is eerily reminiscent of the rhetoric used by the British East India Company in the 17\textsuperscript{th} century.\textsuperscript{181} Add to this that law firms from the United States – a country that has clear expansionist ambitions – are aligned with the British on this issue, and Indians have no choice but to resist.

Not surprisingly, these emotions espoused by the opponents prompt immediate reaction from pro-liberalization corners. It is outrageous, they say, to compare an open services request to the rulings of an empire two generations ago. According to one London lawyer, such hyperbole is jingoistic if not outright racist.\textsuperscript{182} It is easy, this individual contends, “to whip people up into a frenzy once you start talking about white neo-colonialists.”\textsuperscript{183} Another lawyer who is based in New York and closely following this debate comments that the “Indians want it both ways.”\textsuperscript{184} On the one hand, they love having “all things Western,” or as he calls it the “three Cs”: “commodities” from the West, “client-referrals” from the West, and a reputation for being “cosmopolitan.”\textsuperscript{185} At the same time, these Indians are not hesitant to revert to provincialism the moment they feel their positions of privilege are being threatened.\textsuperscript{186}

\begin{itemize}
\item Note the following is the synopsis of the points raised by the various interviewees during the course of the fieldwork during the summer of 2008. The interviewees often made more than one of these points during the conversations, but this synopsis provides the comprehensive account of what the opponents stated.
\item India achieved independence from Britain on August 15, 1947.
\item See e.g., GARY J. JACOBSOHN, THE WHEEL OF LAW: INDIA’S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT (2003); KOHLI, supra note 62; FRIEDMAN, supra note 10.
\item Author (phone) interview with respondent (anonymity requested), July 29, 2008.
\item Id.
\item Author (phone) interview with respondent (anonymity requested), June 30, 2008
\item Id.
\item Id.
\end{itemize}
As an illustration, several pro-liberalization supporters point to the response of elite Indian law firm lawyers to a recent episode involving Law Minister Bhardwaj’s cabinet office. On September 21, 2007 government officials from this department filed an affidavit in the Bombay High Court case initiated by the Lawyers Collective in 1995. Because there was still no decision from the court, the Law Ministry intervened in order to place its position officially on the record. The sworn statement declared that foreign lawyers should be allowed to practice in India, so long as their work involved providing:

“assistance and advice on [the] international practice of foreign law to their clients, whether Indian or foreign, [and that] there may not be any restrictions of them . . . nor may there be any need for those foreign lawyers to enroll themselves as advocates under the Advocates Act [of 1961].”

The affidavit stunned many elite Indian law firm lawyers. A few days earlier Law Minister Bhardwaj had met with this group and while affirming his support for liberalizing the legal services sector did not close-off the possibility that his mind remained open to feedback. There is some disagreement about the extent to which Bhardwaj was willing to consider changing his position, but once the Ministry’s affidavit was issued, the rhetorical gloves came off. One foreign lawyer reported that he heard his Indian-opposites say that they believed the Minister had betrayed them and sold out to the West. Lalit Bhasin, the SILF president discussed above, arguably went further by stating:

“It makes us feel very bad. We have pointed out that this is not the correct way. It is like stabbing someone in the back. You are asking someone to enter into a dialogue - meanwhile you are presenting them with a fait accompli.”

On one level, deriding a government official for being duplicitous or a backstabber is nothing new in Indian politics or for that matter politics in general. Yet this episode is another important piece of evidence highlighting how what initially started as a battle in the courts between one public interest group and three foreign law firms is now a much larger conflict involving multiple constituencies. The specific characterization of the Law Minister by opponents as someone willing to ‘carry the water’ for the foreign law firms is symbolic rhetoric of the most provocative nature. Such messages evoke images of the

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188 Id. Opponents claim that the Law Ministry was either trying to pressure the court or ratchet-up the intensity of this issue (or both).

189 Id at 3-4.

190 See Frumin, supra note 113 at 14-15.

191 Id.

192 Author interview with respondent (anonymity requested), July 28, 2006.

193 See Frumin, supra note 113 at 15.
colonial era where Indians who worked with the British administration were not infrequently depicted as accomplices in the oppression of the indigenous population. It is difficult to verify whether the users of this type of language truly believe that the Law Minister and those Indians who share his viewpoint have “sold out” their country; or, whether they (the opponents) know how incendiary this rhetoric is and are purposely employing it in order to rally support. Likewise, it is uncertain what the thought process is of foreign law firms and their supporters when they speak of needing to help the Indian bar improve itself, or when they react to opponents of liberalization by referring to them as jingoistic or racist. Regardless, the fact is that both sides are coupling their policy arguments with this heated rhetoric, which only helps widen the chasm between the two sides.

This point perhaps is most apparent when examining how the Indian district court bar today is reacting to the possibility of foreign lawyers practicing in the country. Recall that in 1999 and 2000 district court litigators in the nation’s capital organized strikes as a response to the proposal by the then center-right government to consider allowing foreign law firms into India. For this study, I spent time at the place where these protests were conceived, the Tis Hazari district court complex that is located in a historic area of what is called Old Delhi. Arguably the most important political set of district court lawyers in the country practices at Tis Hazari. The Bar Association of India has an active branch at this complex, and it was at this site where I met with dozens of everyday practitioners as well as the branch’s elected representatives, including its president, Rajiv Khosla, the aforementioned lawyer who lost his eye in the February 2000 strike.

Many pro-liberalization supporters express shock that district court lawyers could be so opposed to granting the foreign firms official permission to practice in the country. These firms have stated that they are interested in

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194 This complex is the largest of its type in Asia, housing some 250 civil and criminal courts and serving as the site where an astonishing 500,000 people work or have business to which they attend on a daily basis. In addition, there are approximately 14,000 mostly solo practicing lawyers whose primary work is at the complex. Around the complex yard is a seemingly endless number of what are referred to as individual “chambers,” which serve as the each practitioner’s individual office. (Some practitioners do office-share.) Generally these chambers have no library, no staff, and no computers; usually there is just a wooden desk, an operational typewriter, and a few statutory books to which they can refer. Furthermore, these lawyers have to compete with unlicensed brokers, better known as touts, who stroll around the courtyard offering potential clients the ability to resolve their legal disputes for nearly half the costs. In Geertzian terminology, the picture is one of a massive bustling bazaar, although there is a curious order to the seemingly existing chaos. The court was officially out of session when I visited the premises during the June of 2008. I have been to this site on previous occasions for other research projects, and so the contrast in the settings was marked. Indeed I thought it might be difficult to accomplish anything during this most recent time I was there; however the exact opposite was true. As it turned out, many of the lawyers, particularly those involved in the politics of the Delhi Bar Association were present, catching-up on older case files during this recess. The DBA officials spent a great deal of time with me and during the course of my visit, and as stated in the text, I also met with many everyday practitioners who offered their insights on whether foreign lawyers should be able to practice in India.

195 For a review of how the bar associations in India work, see supra note 80.
transactional work and not litigation; moreover they contend Indian litigators would benefit by opening the legal services sector. After all, given their unfamiliarity with the local norms and practices of the lower courts, foreign lawyers would be dependent upon these Indian advocates whenever the need to litigate a matter would arise.

However, this is not how the district court lawyers see the situation. There is a palpable sentiment among this group that once foreign law firms acquire a toehold into the country, they will soon petition to make regular appearances in the Indian courts. Above I referenced how liberalization-supporters have lauded the development in India’s chartered accountancy sector, where foreigner accountants today are allowed to compete. The district court lawyers though point to this same example as evidence of how most of the thriving Indian accounting businesses that once existed are now gone, with foreign accounting firms currently reigning as the dominant force within this profession. For the district court lawyers, they believe this same pattern will repeat itself if the legal services sector is opened.

Furthermore, they worry about the potential of Indian clients being duped by the slick marketing tactics of foreign lawyers who may look appealing on a website or in an advertisement but who in reality know little about the issues of concern to that client. As a district court representative proudly explained, Indian lawyers are strictly prohibited from advertising their services, because of the belief that unsophisticated clients are susceptible to exploitative and deceptive marketing techniques. By itself this position is one that has been made in other countries, like in the United States and Britain, where there has been a debate about the benefits and drawbacks of allowing lawyers to advertise. But almost as quickly as he stated this policy objection, the Indian

196 The views of the district court lawyers presented above are a summary of my empirical findings during my field visit to Tis Hazari during June of 2008.
197 Id. I am grateful to Professor Mark Sidel (University of Iowa College of Law) for prodding me to consider this point in greater detail. As Sidel has noted, it would be worth inquiring about the extent to which domestic Indian law practice (e.g., tax law, trusts and estates work, and the like) is being done within these multinational accounting firms. Author conversation with Professor Mark Sidel, South Asian Studies Program Event, September 18, 2009.
198 Id.
199 Id.
200 I single out this point because one of the district court lawyers with whom I met was insistent that he has championed this issue and has been the leader in bringing around his colleagues to this point of view. Author interview with this lawyer (anonymity requested), June 18, 2008.
201 I am grateful to my colleague, Professor Douglas Heidenreich, an expert in legal ethics and professional responsibility of American lawyers, for summarizing the debate in the United States for me on this topic. Professor Heidenreich wrote to me the following: “There is a long and tortuous history involving lawyer advertising [in the U.S.] While early in the 20th century lawyers often advertised in newspapers and other places, around 1937 the old Canons of Ethics (they were about the only guidance that lawyers had in those days) were formally amended to disapprove of the practice. For the next forty years or so lawyers were generally barred from advertising. (Lawyers sometimes ran for public office in those days as a way of getting their names before the public.) An Arizona law firm, Bates and O’Steen (sic) . . . sued to challenge these rules, and the case went to the US Supreme Court in 1977. . . (Bates v. State Bar, 433 US 350, rehearing denied, 434 US 881) . . . . The challenge was based on a constitutional argument involving the first
lawyer ended his thought by noting how unfathomable it would be to have “Western lawyers” working within, as he put it, “our legal system.” Similarly, after raising a policy concern about the rates foreign lawyers might charge Indian clients for services, another district court lawyer remarked: “even if their fees are fair, they [the foreign lawyers] still can’t be allowed in. What’s next, having white judges?”

The above discussion illustrates how the main players in this debate have interwoven into their policy arguments provocative rhetorical language that has significantly affected the intensity of the discourse. Some years back the late University of Wisconsin scholar, Murray Edelman, conducted research on the significance of symbolic and rhetorical politics. Edelman argued that political actors behave with multiple objectives; they can act instrumentally, symbolically, rhetorically, and genuinely towards their cause. What can occur though, according to Edelman, is that these actors, unintentionally or even subconsciously, often ultimately rely on symbolism and rhetoric as the main vehicles to convey their political message to the media, those in government, and to the general public. This lesson seems to have relevance for our study. As discussed above, there are serious and substantive policy arguments made by supporters and opponents of liberalizing India’s legal market. But the characterization of the Indian bar in desperate need of assistance from foreign lawyers (and of being jingoistic for rejecting this offer) on the one hand, and the portrayal of foreign law firms entering India as symbolically equivalent to the British colonial regime on the other, are concise, powerful, and maybe even subconscious ways of packaging messages that otherwise are complicated to convey.

amendment, [and] commercial speech . . . . The Court overturned the regulation forbidding advertising, but did recognize that some regulation of such commercial speech would be . . . [acceptable] . . . . The rule (7.1) now allows advertising that is not false or misleading.” Professor Heidenreich went on to say that the rationale for prohibiting advertising was that “it was considered to be "not the thing," as it were. It was considered undignified and thought to reflect badly on the profession . . . . Even indirect advertising ‘and all other self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper.’ This is part of Canon 27.” He then notes that contributing to this ban was also in part due to “anti-Semitism (Jewish lawyers often were plaintiff's personal injury lawyers and collection lawyers . . . who tended to advertise; there were few if any Jewish lawyers in the white-shoe firms.) . . . [The thinking was that while] fancy lawyers could hobnob with potential clients at the country club and otherwise make themselves known to potential clients . . . upstart lawyers, often immigrants and night-school grads, shouldn't be able to get a piece of the pie, especially by [such] undignified means.” Author correspondence with Professor Douglas Heidenreich, July 16, 2008. For a discussion of this issue in England, see ANDREW BOON AND JENNIFER LEVIN, THE ETHICS AND CONDUCT OF LAWYERS IN ENGLAND AND WALES (1999).

See Author correspondence, supra note 201.

Id.

Author interview with another district court lawyer (anonymity requested) on that same day, June 18, 2008.

See EDELMAN, SYMBOLIC POLITICS, supra note 15.

Id.
Given the direction this debate has taken, what next? In the concluding section, I offer a set of modest proposals that I see as the first step in arriving at a compromise that could satisfy the various constituencies.

IV. Conclusion

This study has sought to provide first-hand insight on the issue of whether foreign law firms should be granted official licenses to practice in the burgeoning market of India. Unlike how it is depicted in the conventional wisdom, the debate, as this study reveals, is rife with complexity involving several distinct constituencies. As of 2009 there was still no decision from the Bombay High Court on the case that was filed by the Lawyers Collective in 1995; moreover any judgment rendered is expected to be appealed to the Indian Supreme Court, which itself could take another year or two (at the earliest) before making a final ruling.

As this study has also uncovered, though, much of this controversy has moved beyond the courts. At the time of this writing the status of India’s central government is in flux. In November 2008, the city of Mumbai witnessed a series of brazen terrorist attacks for which the government was harshly criticized in its handling of the situation. Prior to that, the government’s coalition, led by the Congress Party, saw a key ally in Parliament depart. Although the coalition survived a no-confidence vote, national elections are set for spring 2009, and there is a strong sense among public and private officials that a policy decision on the foreign lawyers issue will only be made after a new government comes to power.

Regardless of what the 2009 election yields it is difficult to envision the enactment of a sweeping policy one way or the other by the next government. As we have seen, because of the intense lobbying pressure exerted by supporters and opponents, the different governments to date have had to walk a political tightrope, doing just enough to cater to both sides while making sure not to alienate either. The calculation is that there are fewer costs in making no affirmative decision than in selecting a policy that could result in significant political fallout. At the same time, however, even government officials recognize that this current strategy cannot continue indefinitely. As they and the foreign law firm lawyers have said, at some point the latter will decide that it is not worth any further effort trying to gain admission and will turn their attention elsewhere.

\[207\] Political observers predict that following the elections, one of a set number of outcomes is likely to occur. The current government’s main coalition parties could be returned to the majority. Alternatively, a coalition comprised of anti-Congress parties could emerge with the central leadership taking one of two forms. In one scenario, this anti-Congress coalition might be led by a party whose constituency are voters mainly from lower castes; in another scenario the leadership could be led by Hindu-nationalists, namely from the above-mentioned BJP. For those interested in following ‘political pundits’ discuss election possibilities for next year, see www.ndtv.com, which has several political programs on it (along with its twenty-four hour news reports).

\[208\] This sentiment was reflected in several of the interviews I had with the foreign lawyers from the U.K. and U.S.
In my view, prohibiting skilled, transactional, foreign lawyers from competing with adroit Indian law firm lawyers in India would not be optimal, and it would cut against the state’s larger policy decision of seeking to play in the global arena. Based on the above research, it is extremely improbable (and functionally inconceivable) that allowing foreign lawyers to enter India would lead to a massive foreign overtaking of the entire Indian legal system. Foreign lawyers are interested in only a relatively small (albeit lucrative) area of high-end, transactional practice. Moreover, there is little doubt that their elite Indian counterparts are every bit as talented, knowledgeable, and capable of ‘holding their own’ against these foreign lawyers.

Therefore, I do believe that the current policy towards foreign lawyers practicing in India should be changed. I hasten, however, to acknowledge that those opposed to this move do have certain objections that deserve respect and consideration. Furthermore, there is a political reality that must be recognized. Unlike many Indian sectors that have been liberalized over the past decade, those who oppose opening the legal services market, as we have seen, constitute a significant political force that simply cannot be bulldozed. For this reason, it makes the most sense to engage in a gradual integrative process that would be sensitive to these opponents’ concerns and would involve bringing into the fold current dissenting voices. To accomplish this goal, I outline three possible proposals below.

A. Restricting Practice-Areas of Foreign Firms

The government could insist that the foreign law firms interested in working in India issue a categorical statement as well as sign an agreement with it saying that they will restrict their practices to areas of non-Indian law. Skeptics will immediately highlight two problems. First, they will say that although it may be possible to do so with litigation matters, in transactional dealings deciphering between what is an ‘Indian’ and ‘non-Indian’ issue is meaningless. Consider that Indian clients seeking to establish an initial public offering on a foreign stock exchange or wishing to have a contract prepared to apply to an overseas operation could easily have their work handled by an Indian law firm or a foreign law firm, particularly if the former has within it lawyers with international experience. Second, assuming that such a distinction could be made, there would be a policing problem; how could foreign lawyers be trusted to stay within their specific domain?

With respect to the latter, it is true that deterrence measures would need to be established in order to limit the practice-scope of foreign lawyers. This could come in the way of amendments to the 1961 Advocates Act or new

209 This proposal has already received some support to date. See e.g, Ferheen Mahomed, A Phased Opening, in Ben Frumin, Lowering the Bar, INDIA BUSINESS JOURNAL, Nov. 2007, 17, http://www.benfrumin.com/Lowering%20the%20Bar%20-%20November%202007.pdf; Mandal, supra note 114.

210 See e.g, Rajiv Luthra, Level the Playing Field, in Ben Frumin, Lowering the Bar, INDIA BUSINESS JOURNAL, Nov. 2007, 18, http://www.benfrumin.com/Lowering%20the%20Bar%20-%20November%202007.pdf. Other Indian lawyers mentioned this point as well.

211 Id.
provisions added to the bar’s code of professional responsibility. The foreign lawyers would also arguably have little financial incentive to expand beyond their areas of familiarity. But, yes, ultimately there would be no fool-proof way of assuring compliance; any transgressions would have to be addressed if and when they occurred. In terms of the skeptics’ first concern, the lines admittedly are blurred in certain transactions. Nevertheless, in these deals there is regularly a ‘choice of law’ provision that states what jurisdiction’s legal regime will govern, with the selection often being one that is foreign.212 It seems only a mild concession then to allow foreign lawyers to advise Indian clients within India, especially when such legal assistance would be: a.) acceptable to liberalization-opponents if the interaction occurred on foreign soil; and b.) cheaper for Indian clients who otherwise might have to travel overseas for this service.213

B. Crafting Joint Venture Arrangements

Another proposal would be to allow for the creation of ‘joint venture law firms’ between the foreign and domestic entities. As one recent report notes, generally “India’s foreign investment policy is fairly liberal, allowing up to 100% foreign investment in most sectors.”214 However, because of political, national security, or other domestic reasons, there are some sectors in which the government places a cap on the amount of investment from foreigners.215 One possibility then would be to consider legal services in India as one of these protected sectors, limiting foreign investment to, say, 26%, which is the capping figure that the government has used for some of these other areas.216 The result would be that a foreign firm, for example from New York, could enter into a joint venture with an Indian law firm.

This new U.S.-India partnership would be a legally distinct entity with the same rights, obligations, and privileges afforded to Indian law firms. Presumably there would be some irritation from foreign firms at having to be overseen by what they would perceive as unnecessary bureaucratic regulations.217 But such a creation would come with important advantages. Foreign firms would gain the foothold into the country they have long-wanted. Also, their willingness to work within this framework would help to dispel the notion that they possess

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212 For a recent paper published by a lawyer who works for a British ‘Magic Circle’ firm (Freshfields Bruckhaus Deringer), on this topic of choice of law (particularly as it relates to insolvency), see Look Chan Ho, Conflict of Laws in Insolvency Transaction Avoidance, 20 Singapore Academy of Law Journal 343 (2008).

213 Moreover, acquiescing to this condition could deflect the charge that the opponents are behaving in a protectionist-manner; it could also be interpreted as a good-faith gesture that might prove beneficial as these opponents make demands of their own during the negotiation process.


215 Id.

216 Id; also see e.g., Tarun Shukla and K. Raghu, India to Stick with 26% FDI in Defense, LIVE MINT.COM, WALL STREET JOURNAL, Feb. 19, 2008, http://www.livemint.com/2008/02/19011641/India-to-stick-with-26-FDI-in.html.

217 For example, based on my conversations with various foreign lawyers, these might include the cap on the number of equity partners in the new entity, the 26% foreign investment limitation, and the requirement of having to enter into a joint venture in the first place.
grand neo-colonial ambitions. Perhaps most importantly, the joint venture firm would be able to practice domestic law and have access to clients that the foreign law firms on their own would not.\footnote{218}

Opponents at first will likely be outraged at the concessions they see foreign firms receiving.\footnote{219} Upon closer scrutiny though, they would gain as well. Most Indian bar regulations would remain intact; foreign law firms would have only a minority interest in the joint venture; and the Indian side in the joint venture would be in a position of policing the activities of the foreign lawyers. Moreover, the joint venture could foster greater cooperation and increased sharing of best practices so that lawyers from both sides could benefit.\footnote{220}

Of course, there will remain several open questions that would accompany this joint venture proposal. For example, how, if at all, would profits be shared with the parent foreign law firm? How many equity partners would each side have; would this be determined proportionately by the percentage contributed to the joint venture? How would the salaries of lawyers in the joint venture be structured; would they be on par with what the lawyers in the foreign parent firm earn? If not, how much of a difference would there be? And how would the joint venture comport to the ban on advertising that applies to all lawyers in India?\footnote{221}
In the nearby country of Singapore, which has admitted foreign law firms and indeed seen joint ventures with domestic Singaporean firms emerge, many of these particular issues have arisen. In fact, while more research needs to be completed, the conventional wisdom is that law firm-joint ventures in Singapore have been of mixed success. For this reason, Singapore is in the process of implementing another method to deal with how foreign law firms should be treated, which could be useful for India to consider.

C. Decision by Expert Committee

India could establish a commission staffed by experts from the competing domestic constituencies that would be in charge of evaluating applications for admission into the country by foreign firms on a case-by-case basis. As part of its procedure, the commission could require foreign lawyers who wish to practice to meet certain fitness and character criteria. Singapore has recently enacted such a program, and the early reviews from foreign law firms, government officials, as well as the domestic bar are positive. In the Singaporean context there has been ‘buy-in’ from the different parties, which likely explains the favorable response thus far. Whether this could succeed in

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Diljeet Titus, managing partner of an Indian law firm, Titus & Company, saying, “advertising restrictions on Indian law firms should be removed”); Dinesh Sharma, Sharing Good Staff, in Ben Frumin, Lowering the Bar, INDIA BUSINESS JOURNAL, Nov. 2007, 18, http://www.benfrumin.com/Lowering%20the%20bar%20-%20November%202007.pdf. And in fact, some Indian law firms have actually established websites, varying in the degree to which they are ‘advertising’ their services. (Indian lawyers also have advertised in foreign legal directories for some time.) This issue on whether the ban is constitutional is currently pending before the Indian Supreme Court. But as we just learned, lawyers who practice in the district courts, like Tis Hazari, have remained opposed, claiming, as described above, that unsophisticated clients are too susceptible of being manipulated by the ads. (It should be noted that there are those (mainly from law firms who want to be able to advertise) who remain skeptical of the district court lawyers’ claim and instead believe that this segment of the bar holds an unjustified fear that they will somehow lose business to those who are engaging in advertising.) The intensity of the district court lawyers’ opposition is fueled in large part by their frustration that their sentiments have not been considered by government officials on a range of matters over a long period of time. As one such lawyer stated, for decades he and his colleagues have been clamoring for the government to devote more money for legal aid, courtroom infrastructure, more judges to fill open judicial vacancies, better prison facilities, and the like; yet none of these demands have been met to their satisfaction. Their perception, however, is that when rich foreign law firms lobby the government immediate attention is given and within a short time there are accompanying results. Perhaps one way to make advertising more acceptable to the district court lawyers would be for the government to include them in the discussions on the foreign lawyers’ petition, ensure them that their litigation practices will remain largely unfazed, and acknowledge and inquire into their list of grievances.

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I am currently in the process of researching joint ventures. From my early research, this has been the reaction I have received from Singaporean lawyers and academics who have been studying this issue.

Id. The same observers who have expressed skepticism regarding joint ventures have hope regarding this committee process. Also see the government’s website, which has outlined the details of the Singaporean committee process, http://notesapp.internet.gov.sg/...48256DF20015A167.nsf/LookupContentDocsByKey/GOVI-7M26G57?OpenDocument.

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23 Geo. J. Legal Ethics (forthcoming 2009)
India depends on the willingness of the different interests to work together on such an initiative.

To facilitate better cooperation, the Indian government might seek to enlist the assistance of those lawyers whose main practice is in the appellate courts, in both the state High Courts and in the Supreme Court of India. These advocates have not been of focus to this point, mainly because most have not publicly revealed their views on whether foreign lawyers should be granted admission into the country. This reticence is understandable. These upper court lawyers generally enjoy high levels of prestige and respect from within the bar and are relatively wealthy professionals, deriving a percentage of their business from referrals from lower court lawyers. There is, though, an incentive for them to push for liberalization, as they would likely receive a new set of revenue from foreign lawyers who would be in need of their services for any matter pending in the upper judiciary. By wisely appropriating the professional capital they possess, these High Court and Supreme Court lawyers could serve as important intermediaries between their lower court colleagues and those who support opening India’s legal services sector, helping to bridge what has become a clear gap in terms of perceptions and understandings of the other’s positions.

And ultimately, that has been the main goal of this study – to reveal how the different constituencies are making multiple, sophisticated arguments when articulating whether globetrotting law firms should be admitted into India. In many ways this research adds another layer to the years of work conducted by the esteemed scholar, Professor Richard Abel. In his famous series of volumes published during the 1980s, Abel theorized and empirically showed how up-until the second-half of the twentieth century an elite segment of the legal profession in Western nations monopolized the distribution of legal services. By requiring particular credentials and mandating that certain criteria be met in order for individuals to become members of the bar, lawyers in countries like the United States, England, and Wales successfully staved-off competition for generations. In a parallel vein, Indian lawyers too have resisted altering the status quo. Whereas in Abel’s case studies the control the lawyers wielded over their markets eventually diminished, the outcome in India is still to be determined. The hope is that the fieldwork and empirical evidence gathered for this study, and the proposals outlined above, will give policymakers, members from the sparring camps, and those theorizing about comparative legal norms more broadly the necessary insights to evaluate what really is at stake, so that if a resolution is brokered it will reflect and address the concerns of all of the interested parties.

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225 Id.
Appendix A

STATEMENT OF TOTAL NUMBER OF ADVOCATES ENROLLED WITH THE STATE BAR COUNCILS AS OF 31/3/2008

<table>
<thead>
<tr>
<th>STATES</th>
<th>MEN</th>
<th>WOMEN</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. ANDHARA PRADESH</td>
<td>58,147</td>
<td>9605</td>
<td>67,752</td>
</tr>
<tr>
<td>2. ASSAM, NAGALAND, etc</td>
<td>9,703</td>
<td>2022</td>
<td>11,725</td>
</tr>
<tr>
<td>3. BIHAR</td>
<td>N/A</td>
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<td>5. DELHI</td>
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<td>6. GUJARAT</td>
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<td>47,794</td>
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<td>8. JAMMU &amp; KASHMIR</td>
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<td>9. JHARKHAND</td>
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<td>13. MAHARASTRA &amp; GOA</td>
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<td>14. ORISSA</td>
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<td>15. PUNJAB &amp; HARYANA</td>
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<td>4,265</td>
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<td>16. RAJASTHAN</td>
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<td>48,636</td>
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<td>17. TAMIL NADU</td>
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<td>18. UTTARAKHAND</td>
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<td>19. UTTAR PRADESH</td>
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<td>20. WEST BENGAL</td>
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</tbody>
</table>
Appendix B

Society of Indian Law Firms, List of Forty-Four Firms

Mr. Hiroo Advani
Advani & Co.
10, Thakur Nivas
Level 2, 173 J. Tata Road
Mumbai – 400020

Mr. Lalit Bhasin
Bhasin & Co.
10, Hailey Road, 10th Floor
Near Connaught Place
New Delhi 110001

Mr. Nishith Desai
Nishith Desai Associates
93-B Mittal Court Nariman Point
Mumbai 400021

Mr. Dinkar Goswami
Goswami Associates
B-63, Soami Nagar North
New Delhi – 110 017

Mr. Anil Harish
D. M. Harish & Co.
305-309 Neelkanth,
98, Marine Drive,
Mumbai – 400002

Dr A.K. Kainth & Associates
G-01, Ground Floor
‘Oakview’
14, Haudin Road
Bangalore 560042

Mr. Gautam Khaitan
O. P. Khaitan & Co.
Khaitan House,
B-1 Defence Colony,
New Delhi 110024, India

Mr. Rohit Kochhar
Kochhar & Co.
S-454, G.K. II

Mr. Pravin Anand
Anand & Anand, Advocates
B-41, Nizamuddin East
New Delhi 110 013

Ms. Mona Bhide
Dave & Girish & Co.
55, Maharshi Karve Road,
Marine Lines, Mumbai

Mr. C. R. Dua
Dua Associates
202-206 Tolstoy House,
15 Tolstoy Marg,
New Delhi 110 001

Mr. Ameet Hariani
Hani & Co.
Alli Chambers, Ground Floor
Homi Mody 2nd Cross Lane
Fort, Mumbai - 400 023

Mr. Akil Hirani
Senior Partner
Majmudar & Co.
96, Free Press Journal House
Free Press Journal Road
Nariman Point
Mumbai 400 021

Mr. R. N. Karanjawala,
Karanjawala & Co., Advocates,
Hindustan Times House
10th Floor,
18-20 Kasturba Gandhi Marg
New Delhi – 110001

Mr. Suman J. Khaitan
Suman Khaitan & Co.
W – 13, West Wing
Greater Kailash, Part - 2
New Delhi – 110048

Mr. Rajendra Kumar
K & S Partners
84C, C-6 Lane (Off Central Avenue),
<table>
<thead>
<tr>
<th>Name</th>
<th>Address</th>
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<tbody>
<tr>
<td>Mr. Sudhir Kumar</td>
<td>India International Jurists</td>
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<tr>
<td></td>
<td>1201 B, Antriksh Bhawan</td>
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<tr>
<td></td>
<td>22 Kasturba Gandhi Marg</td>
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<td></td>
<td>New Delhi – 110 001</td>
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<tr>
<td>Mr. Rajiv K. Luthra</td>
<td>Luthra &amp; Luthra Law Offices</td>
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<tr>
<td></td>
<td>103 Ashoka Estate,</td>
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<td>24 Barakhamba Road,</td>
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<tr>
<td>Mr. Dara P. Mehta</td>
<td>Little &amp; Company</td>
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<td></td>
<td>Central Bank Building</td>
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<tr>
<td></td>
<td>Mahatma Gandhi Road</td>
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<tr>
<td></td>
<td>Mumbai – 40023</td>
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<tr>
<td>Mr. Badri Nath</td>
<td>International Investment &amp; Law Consultants</td>
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<tr>
<td></td>
<td>C-434, Defence Colony</td>
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<tr>
<td></td>
<td>New Delhi – 110 024</td>
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<tr>
<td>Mr. Anand S. Pathak</td>
<td>P&amp;A Law Offices</td>
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<tr>
<td></td>
<td>1st Floor, Gopal Das Bhawan</td>
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<td>28 Barakamba Road</td>
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<tr>
<td>Dr. Akshoy Rekhi</td>
<td>Abacus Legal Group</td>
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<td>B-226 First Floor,</td>
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<td>Greater Kailash Part-1,</td>
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<tr>
<td>Mr. Hemant Sahai</td>
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<td></td>
<td>B-58, Friends Colony (West)</td>
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<tr>
<td>Mr. Raman Sarma</td>
<td>AZB Partners</td>
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<td></td>
<td>F-40 N.D.S.E. Part I</td>
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<tr>
<td>Mr. V. Lakshmikumaran</td>
<td>Lakshmikumaran &amp; Sridharan</td>
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<td></td>
<td>B-6/10 Safdarjung Enclave,</td>
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<td>New Delhi 110 029, India</td>
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<tr>
<td>Mr. Som Mandal</td>
<td>Fox Mandal &amp; Co.</td>
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<td>A-9, Sector - 9</td>
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<td>Noida – 201 301 (U.P)</td>
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<tr>
<td>Mr. Devang Nanavati</td>
<td>Nanavati &amp; Nanavati Advocates</td>
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<tr>
<td></td>
<td>7th Floor, 'Corporate House', Judges Bung.</td>
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<td>Rd.,</td>
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<td></td>
<td>Sarkhej - Gandhinagar Highway,</td>
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<td>Ahmedabad - 380054</td>
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<td>Mr. Ravi Nath</td>
<td>Rajinder Narain &amp; Co.</td>
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<td>Maulseri House,</td>
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<td>7, Kapashera Estate,</td>
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<tr>
<td>Mr. D. M. Popat</td>
<td>Mulla &amp; Mulla &amp; Craigie Blunt &amp; Caroe</td>
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<td></td>
<td>Jehangir Wadia Building,</td>
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<td>51 Mahatma Gandhi Road</td>
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<td></td>
<td>Mumbai 400 001</td>
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<tr>
<td>Mr. Jyoti Sagar</td>
<td>J. Sagar Associates</td>
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<td></td>
<td>84E, C-6 Lane (Off Central Avenue),</td>
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<td></td>
<td>Sainik Farms</td>
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<tr>
<td></td>
<td>New Delhi 110 062</td>
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<tr>
<td>Mr. R. K. Sanghi</td>
<td>International Trade Law Consultants</td>
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<td></td>
<td>5, Babar Road,</td>
</tr>
<tr>
<td></td>
<td>Near Bengali Market Post Office,</td>
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<td>New Delhi - 110001</td>
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<tr>
<td>Mr. Shah</td>
<td>Shah &amp; Sanghavi</td>
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<td></td>
<td>114-A Wing 11th Floor,</td>
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<tr>
<td></td>
<td>Mittal Court,</td>
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<td>Nariman Point,</td>
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<td>Mumbai – 400021</td>
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</table>
Mr. R. A. Shah
Crawford Bayley & Co.
State Bank Buildings,
N.G.N. Vaidya Marg
Mumbai 400 001

Mr. Anand Sharma
Mathura Road
Trilegal Sphire
Plot F-2, Block B-1, Mohan Cooperative
Industrial Estate
New Delhi - 110044

Mrs. Krishna Sharma
Corporate Law Group
1106-1107, 11th Floor,
Kailash Building,
26, Kasturba Gandhi Marg,
New Delhi – 110001

Mr. Shardul Shroff
Amarchand & Mangaldass & Suresh
A. Shroff & Co.,
Amarchand Towers,
216, Okhla Industrial Estate, Phase –3,
New Delhi - 110020

Mr. Sandeep Singhi
Singhi & Co.
7, Premchand House Annexe,
Ashram Road,
Ahmedabad – 380009

Mr. Vinod Surana
Surana & Surana International Attorneys
National Insurance Building
#224, NSC Bose Road
Chennai 600 001, India

Ms. Ramni Taneja
Law Office of Ramni Taneja
A-34, Defence Colony
New Delhi – 110 024

Mr. Sameer Tapia
ALMT Legal
4th floor
Express Towers
Nariman Point
Mumbai 400021

Mr. Diljeet Titus
Titus & Co.
Titus House, R-77A
Greater Kailash, Part-1
New Delhi – 110048

Mr. Vinay Vaish
Vaish Associates
Flat 5 & 7, 10 Hailey Road,
New Delhi 110001

Mr. V.S. Yadav
Udwadia, Udeshi & Co.
2nd Floor, Express Building
9-10, Bahadurshah Zafar Marg
New Delhi – 110 002