

2007

Outsourcing and the Globalizing Legal Profession

Jayanth K. Krishnan

Indiana University Maurer School of Law, jkrishna@indiana.edu

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OUTSOURCING AND THE GLOBALIZING LEGAL PROFESSION

JAYANTH K. KRISHNAN*

ABSTRACT

The issue of outsourcing jobs abroad stirs great emotion among Americans. Economic free-traders fiercely defend outsourcing as a positive for the U.S. economy, while critics contend that corporate desire for low wages, alone, drives this practice. In this study Professor Krishnan focuses on a specific type of outsourcing, one which has received scant scholarly attention to date—legal outsourcing. Indeed, because the work is often paralegal in nature, many see the outsourcing of legal jobs overseas as no different from other types of outsourcing. But by using case studies of both the United States and India, the latter of which is receiving an ever-increasing amount of outsourced American legal work, Professor Krishnan describes how there are many forms to the legal outsourcing model and how this practice can entail a range of legal services.

This Article, however, moves beyond providing a descriptive account of legal outsourcing. Legal outsourcing to India occurs against the backdrop of an Indian legal system in crisis. For those who are fortunate to benefit from legal outsourcing, the payoffs are indeed rewarding. But most Indians, of course, are not participants in—or beneficiaries of—this practice. In fact, in everyday Indian parlance, the word “legal” is associated with a process that is delay-

* Professor of Law, William Mitchell College of Law, St. Paul, MN; Ph.D., University of Wisconsin-Madison; J.D., Ohio State University. For their insights the author thanks John Fieno, Bert Kritzer, Niketa Kulkarni, Steve Lundberg, Sabu Mathai, Peter Oh, Russ Pannier, and Leon Steinberg. The author is particularly indebted and grateful to Rick Abel, Marc Galanter, Shaun Mathew, Sudhir Rajan, and Liz Wright for their willingness to review drafts and to provide detailed comments and suggestions. For his research assistance, the author thanks Bill Jack.

ridden, backlogged, and unduly expensive. It might seem that legal outsourcing is unconnected to the problems that have long plagued India's legal system. Yet as this Article will argue, in addition to having an ethical obligation to provide assistance to the legal environment on which they draw, those engaging in legal outsourcing also have an economic incentive to ensure that India has a better-operating legal system. As a means of raising much needed revenue to fund its legal reform efforts, India, as Professor Krishnan proposes, might levy a minimal fee on U.S. legal outsourcers, and because strengthening the rule of law is ultimately in their financial interest, these American investors may well accept shouldering such a cost.

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INTRODUCTION

Over the past several years, there has been a vigorous debate in the United States over the benefits of outsourcing. Even amidst the ongoing threat of terrorism and the war in Iraq, the subject of outsourcing, perhaps not surprisingly, made its way into the last presidential campaign. One notable exchange highlighting the volatile nature of this issue occurred when then-White House economic advisor Gregory Mankiw remarked in February 2004 that outsourcing American jobs to foreign workers abroad was just “a new way of doing international trade”¹ and “a plus for the [U.S.] economy in the long run.”² Both Republicans and Democrats soon pounced on Mankiw. Republican Speaker of the House Dennis Hastert noted that Mankiw’s “theory fails a basic test of real economics,”³ and even President Bush responded coolly to Mankiw’s assertion.⁴ Not to be outdone, the Democratic presidential nominee, Senator John Kerry, condemned the White House economic team and labeled business executives who engaged in outsourcing as “Benedict Arnold C.E.O.’s.”⁵

Clearly, in conventional discourse outsourcing has come to signify the transfer of services to markets where costs are lower to employers. There is no shortage of stories that discuss how American companies have been increasingly turning to cheaper workers in places like India, China, and Brazil to perform lower-skilled, labor-intensive jobs, such as staffing those now famous call centers.⁶ Paralleling this trend, during the past decade high-technology firms, such as Microsoft and Dell, have been hiring sophisticated software

1. See Douglas Kiker, *Bush Econ Advisor: Outsourcing OK*, CBS NEWS, Feb. 13, 2004, <http://www.cbsnews.com/stories/2004/02/13/opinion/main600351.shtml>.

2. *Id.* The episode of Mankiw’s comments and the response to them were documented by Jagdish Bhagwati et al., *The Muddles over Outsourcing*, 18 J. ECON. PERSP. 93, 93-94 (2004).

3. Kiker, *supra* note 1.

4. *Id.*

5. Jagdish Bhagwati, Op-Ed., *Why Your Job Isn’t Moving to Bangalore*, N.Y. TIMES, Feb. 15, 2004, § 4, at 11.

6. It is important to keep in mind that overseas outsourcing is not the only type that exists. Outsourcing within a country is quite common too. I shall be discussing this point later in the Article. For a discussion see generally Bhagwati et al., *supra* note 2; Bhagwati, *supra* note 5.

engineers in developing countries.⁷ As *New York Times* columnist Thomas Friedman recently wrote, because of the worldwide reduction in economic and trade barriers, previously noncompetitive countries are now able to compete against advanced industrialized states.⁸ In fact, according to Friedman, progress in technology, telecommunications, the Internet, and outsourcing have all helped the world become more “flat.”⁹

Many have embraced this globalizing economic trend. Supporters argue that relying on relatively inexpensive and talented laborers in places like Bangalore, Beijing, or Brasilia frees up capital in the United States which then can be used to hire Americans to develop more cutting-edge, innovative technologies.¹⁰ On the other hand, critics note that when real, living Americans see jobs they once did now being performed by workers overseas, it is hard not to infer that the practice of outsourcing hurts the U.S. labor market.¹¹

To the extent that call centers and information technology (IT), in particular, along with wages, jobs, free trade, and principles of macroeconomics, more generally, remain at the center of the outsourcing debate, it is unlikely that either side will retreat from its position anytime soon. But what happens when the types of services outsourced move beyond the industrial, manufacturing, and technology sectors? Since 1995 a growing number of American legal services have been outsourced to different countries around the world.¹² Tasks from the preparation of simple documents, to patent applications and appellate briefs (one of which reached the U.S. Supreme Court in 2005), are increasingly being handled by foreign

7. See, e.g., JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 213-16 (2004).

8. THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 6-7 (2005).

9. *Id.*

10. Many supporters also take the position that outsourcing provides laborers with benefits that they would otherwise not receive. A full-scale presentation of this viewpoint will take place in the next Part.

11. There is also a website devoted to arguing against the trend of outsourcing: <http://lostamericanjobs.com>. This site includes several articles addressing the subject of outsourcing, including one by Ben Worthen, *No Americans Need Apply*, CIO MAG., Sept. 1, 2003, available at http://cio.com/archive/090103/people_sidebar_1.html, which relates the employment struggles of one American programmer.

12. In 1995 the Dallas firm Bickel & Brewer began off-shoring legal work to Hyderabad, India. Bickel's practices are discussed *infra* text accompanying notes 42-43.

workers.¹³ In 2004 alone, 12,000 legal jobs were outsourced abroad, and by 2015 one research firm estimates that the total number will near 80,000.¹⁴

Interestingly, few academic studies have been published that examine the specific issue of legal outsourcing.¹⁵ Perhaps both supporters and critics of outsourcing see the performance of certain types of legal tasks as not substantively different from other outsourced work, such as reading X-rays, developing computer chips, and preparing tax returns for American companies. Why not then expect low-cost foreign workers to perform certain types of legal services? This Article shall argue that there are many forms to the legal outsourcing model and a range of legal services that can be provided.

Part I seeks to ground this discussion in the larger outsourcing and globalization framework. Part II will then specifically examine the practice of legal outsourcing. This Part introduces India as a country that receives an increasing amount of American legal outsourcing. As the first half of Part II explains, the legal outsourcing to India has generally been in one of three forms: U.S. corporations hiring in-house Indian lawyers and/or paralegals within their Indian subsidiaries; U.S. corporations and U.S. law firms hiring Indian lawyers and/or Indian paralegals on a contract basis to perform certain tasks; and U.S. third-party vendors that serve as intermediaries and facilitators between U.S. corporations

13. Lexadigm is the legal outsourcing firm that submitted the brief to the U.S. Supreme Court. See *infra* notes 61-62 and accompanying text. Lexadigm's President, Puneet Mohey, gave an interview to National Public Radio in which he discussed the matter. See *Weekend All Things Considered* (NPR radio broadcast May 1, 2005) (transcript available at <http://www.npr.org>); see also <http://www.lexadigm.com>.

14. The research firm is a Boston-based institute called Forrester Research. See <http://www.forrester.com>. The company's report is cited and discussed in *Executive Briefing India*, ECONOMIST INTELLIGENCE UNIT, Sept. 14, 2005.

15. One forthcoming piece is a comment by Darya V. Pollak, "I'm Calling My Lawyer ... in India!": *Ethical Issues in International Legal Outsourcing*, 11 *UCLA J. INT'L L. & FOREIGN AFF.* (forthcoming 2006) (manuscript on file with author). Pollak's piece provides a nice overview of what legal outsourcing abroad involves and then addresses related ethical issues. *Id.*; see also Mary Catharine Daly & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-related Services* (St. John's Legal Studies Research Paper No. 06-0044, 2006), available at <http://ssrn.com/abstract=907343>.

and law firms and Indians who are willing to provide their services.¹⁶

The second half of Part II will explain why American legal outsourcers have set their sights on India. These reasons include generous tax breaks for legal outsourcing entrepreneurs, subsidies on commercial property, and other financial incentives from the Indian government. In addition, these entrepreneurs are able to hire easily trainable, often very bright employees at a fraction of what it costs to hire American workers. India offers investors other advantages—linguistic, political, and historical, to name a few—which only further facilitate doing business in that country.

Part III will then focus in detail on third-party vendors that engage in legal outsourcing. Third-party vendors are thought to be the fastest-growing aspect of legal outsourcing. In January 2006 I received permission from one of the most well-known and profitable third-party vendors in the world to interview the company's chief executive officer and to observe how the business operates. This vendor serves as a model that competitors seek to emulate. Part III will discuss the findings from this case study.

This Article, however, moves beyond providing a descriptive account of legal outsourcing to India. Legal outsourcing occurs against the backdrop of an Indian legal system in crisis. For those who are fortunate to benefit from legal outsourcing, the payoffs are indeed rewarding. But most Indians, of course, are not participants in—or beneficiaries of—this practice. In fact, as explained in Part

16. In her study, Pollak argues that there are four methods of legal outsourcing abroad: "variations of the middleman control model, the in-house model, the firm-to-firm model, and the international contract lawyer model." Pollak, *supra* note 15 (manuscript at 7). Her fourth model, which is not very prevalent in the Indian context, involves, as she puts it, U.S. (or U.K.) licensed lawyers who live abroad and serve as outsourced legal contractors. *Id.* (manuscript at 9). In fact, when discussing this model, Pollak cites Israel rather than India as a country where the international contract lawyer model is found. *Id.* (manuscript at 9-10). The reason, which she does not discuss, is mainly that the Indian government and bar do not permit lawyers licensed only in the United States to practice in India. The argument that both the government and the bar have made is that, because Indian-licensed lawyers are not permitted to practice in the United States, India has no obligation to extend the courtesy to U.S.-only licensed lawyers. V. VenKatesan, *Lawyers Against an Act*, FRONTLINE, Mar. 17, 2000, available at <http://www.hinduonnet.com/fline/fl1705/17050310.htm>; see also Bar Council of India, Resolutions Passed on Aug. 2, 1997 (on file with author) (establishing rules for admission and reciprocity).

IV, in India the word “legal” is associated with a process or system that is delay-ridden, backlogged, and unduly expensive.

It might seem that legal outsourcing is unconnected to the problems that have long plagued India’s legal system. Yet, because of the numerous benefits they receive from operating within India, these investors, as argued in Part V, have an ethical obligation to pay what might be called a “good-governance” fee to the state.¹⁷ Drawing on the rich corporate social responsibility literature, the Article contends that these foreign businesses ought to act, as Professor Lawrence Mitchell has put it, both “responsibly and morally,”¹⁸ which would include paying a levy to go toward raising much-needed revenue to fund efforts aimed at reforming India’s legal system.

Of course, there may be initial reluctance to accept such a fee; after all, many legal outsourcers will contend that, because of their investment, the Indian economy is reaping millions of dollars it otherwise would not see, and that individual Indians working in this sector are increasing their personal wealth as well. The question is how much of this revenue is dedicated to improving the country’s legal system—likely very little. Moreover, legal outsourcing investors—and, for that matter, foreign investors generally—also have an economic incentive to ensure that India has a better-operating, efficient legal system. Without one, consider the range of

17. In her piece, Pollak also raises a set of ethical issues that arise in the context of legal outsourcing. For Pollak, however, her main concerns and discussion focus on issues relating to conflict of interest, attorney-client privilege, disclosure, supervision of the outsourced legal laborers, discipline, malpractice, and tort liability. See Pollak, *supra* note 15 (manuscript at 21). As we will see, the ethical obligations discussed here are very different and go to the question of what the American legal outsourcers’ responsibility is to the Indian legal environment and system upon which they draw. See *id.* (manuscript at 21-52); see also Daniel Brook, *Made in India: Are Your Lawyers in New York or New Delhi?*, LEGAL AFF., May-June 2005, at 10 (quoting Professor Thomas Morgan, another well-known professional responsibility scholar, as saying: “To the extent that what you have [the Indian workers] do is legal research for U.S. firms, it’s not much different than having law students do it”); Jennifer Fried, *Outsourcing Reaches Corporate Counsel*, CORP. COUNS., Aug. 25, 2004 (quoting prominent legal ethicist Professor Geoffrey Hazard, who argues that as long as outsourced legal laborers in India are “acting under the supervision of U.S. lawyers, [he] wouldn’t think it would make much difference where they are”), available at <http://www.law.com/jsp/cc/pubarticleCC.jsp?id=1090180413835>. For further discussion on the ethics of this matter, see Daly & Silver, *supra* note 15.

18. LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA’S NEWEST EXPORT 3 (2001).

difficulties a foreign company may have, from enforcing basic contracts, to challenging a government regulation, to defending itself in court. As the Article concludes, even if they feel little or no moral obligation to pay a dedicated legal reform fee to the government, these foreign investors may well accept shouldering such a cost if they understand that strengthening the rule of law is in their financial interest.

I. A BRIEF BACKGROUND ON OUTSOURCING

Outsourcing is the result of those with capital seeking lower-cost services within more affordable markets. Three economists who are experts on this subject, Professors Jagdish Bhagwati, Arvind Panagariya, and T.N. Srinivasan, have argued that outsourcing involves trade in services, conducted at “arm’s-length.”¹⁹ Technological advancements have enabled many previously nontradable services to become tradable in this manner. Inherent in these scholars’ definition is that the supplier of services and the purchaser remain in their own locations.

For Bhagwati, Panagariya, and Srinivasan, outsourcing is simply a by-product of globalization,²⁰ or as another scholar has put it, the “evolution of closer economic integration by way of increased trade, foreign investment, and immigration.”²¹ Globalization dates back to the late nineteenth century, when there was expansive international exchange of trade, capital, and immigration.²² But the globalization of that era was different from what has occurred over

19. See Bhagwati et al., *supra* note 2, at 94 (noting also that “the resulting public debate over outsourcing has been marred by ... serious muddles”). For example, what if a large percentage of American tourists opted to travel to South America or Africa where their dollars would go farther than if they spent their holiday in New York or San Francisco? Or what if an American medical student upon graduation moved to a foreign country in need of doctors, and in return she received free health care and had her student loans paid off by the host government? Would that constitute an outsourced service? For these scholars, outsourcing does not include such activity as tourism, or as they put it, “moving the service recipient to the location of the service provider.” *Id.* at 95. Nor does it include the migrating medical student who Bhagwati, Panagariya, and Srinivasan would call a “service seller mov[ing] to the location of the service buyer.” *Id.*

20. *Id.* at 94-97.

21. See Michael M. Weinstein, *Introduction to GLOBALIZATION: WHAT’S NEW?* 2 (Michael M. Weinstein ed., 2005).

22. *Id.*

the last twenty-five years.²³ Then, poorer developing countries were not competitive players in the international marketplace.²⁴ Today, by contrast, developing nations are major exporters of manufactured goods and key providers of services.²⁵ Because many developing nations today encourage foreign investment through different government policies,²⁶ and because the costs of transportation and communication (mainly via the Internet) have decreased, several Western firms have found it economically beneficial to train workers in cheaper labor markets to engage in specialization—whether it be in the production of automobile parts or in the answering of telephones in call centers.

The normative implications of outsourcing and globalization garner different responses. One perspective held by free-traders like Bhagwati, Panagariya, and Srinivasan is that the spread of globalization and more sophisticated communicative technology results in greater trade.²⁷ Increased trade, in turn, leads to “specialization, lower production costs and, therefore, higher living standards” and economic growth for countries that import and export.²⁸

Statistics appear to be on the side of those who defend outsourcing and globalization. Between 1999 and 2002, a period many perceived as the height of the outsourcing boom, the U.S. Bureau of Labor Statistics counted a growth in the number of jobs created in the American IT sector; in fact, in 2002 seventeen million IT jobs were created.²⁹ On average the outsourcing of jobs abroad is responsible for less than two percent of all jobs lost every year in the

23. *Id.* at 2-3.

24. *Id.*

25. *Id.* at 3.

26. These policies might include providing tax holidays and subsidies on buildings for foreign investors. See *infra* notes 90-93 and accompanying text for a discussion of various incentives provided to investors.

27. See Bhagwati et al., *supra* note 2, at 100-13; see also Daniel W. Drezner, *The Outsourcing Bogeyman*, FOREIGN AFF., May-June 2004, at 22; Weinstein, *supra* note 21, at 3-4.

28. See Weinstein, *supra* note 21, at 4.

29. In 2004, two prominent economists and scholars on different sides of the outsourcing issue debated the value of this trade practice in the *Wall Street Journal*. Supporting outsourcing was Jagdish Bhagwati, and criticizing the practice was Paul Craig Roberts. See Timothy Aeppl, *Offshore Face-Off*, WALL ST. J., May 10, 2004, at R6.

United States.³⁰ The reason outsourcing does not hurt the American economy, this argument goes, is because the United States is a technologically advanced country. There is an ongoing demand for skilled workers, and the relatively few who have lost jobs to outsourcing can be retrained by firms that now have more money at their disposal because of the availability of cheaper labor abroad.³¹

Yet skeptics see no reason to believe that firms that save money through outsourcing will necessarily reinvest within their own domestic markets. Given that countries like India and China have an oversupply of employable populations, why would the trend of looking for cheaper, trainable laborers change for a U.S. firm that now has more available money?³² It is true that the United States is an industrialized country in need of high-tech products, but recent data indicate that the United States runs a huge trade deficit with China in the production of such goods.³³ Outsourcing, therefore, will logically continue only to the point at which a country—like the United States—experiences declining wages and increased unemployment.³⁴

There are other worries about outsourcing and globalization. To some, while Western firms may pay foreign laborers higher wages than they would otherwise receive, the salaries are still not livable.³⁵ Such laborers often lead impoverished lives.³⁶ Others claim that outsourcing and globalization have significantly altered the culture

30. *Id.* For an even lower estimate, see Drezner, *supra* note 27, at 26.

31. Aeppel, *supra* note 29.

32. *See id.*

33. *See* Robert E. Scott, Econ. Pol'y Inst., *Trade Picture: Rapid Growth in Oil Prices, Chinese Imports Pump Up Trade Deficit to New Record*, Feb. 10, 2006, http://www.epinet.org/content.cfm/webfeatures_econindicators_tradepict20060210 ("The growth of the trade deficit with China, which reached \$202 billion in 2005, was responsible for the entire increase in the United States' non-oil trade deficit."). The Economic Policy Institute is a think tank focusing on domestic and international economic and trade policy. *See* Economic Policy Institute, <http://www.epinet.org> (last visited Mar. 10, 2007).

34. *See* Aeppel, *supra* note 29.

35. *See, e.g.,* Vandana Shiva, *The Polarised World of Globalization: A Response to Friedman's Flat Earth Hypothesis*, ZNET, May 27, 2005, <http://www.zmag.org/sustainers/content/2005-05/27shiva.cfm>; *Now with Bill Moyers* (PBS television broadcast Sept. 5, 2003) (transcript available at http://www.pbs.org/now/transcript/transcript233_full.html) (interviewing Dr. Vandana Shiva regarding the negative impact globalization is having on the world's women).

36. Shiva, *supra* note 35.

and networks that exist among various communities within developing nations.³⁷

The noted sociologist Saskia Sassen has argued that globalization is in large part a local phenomenon.³⁸ When a city in a developing nation is suddenly infused with foreign capital and foreign demand for labor, the norms people have relied on within their political, economic, and social circles are forced to be renegotiated.³⁹ Once strongly held ideas regarding concepts such as citizenship, class, and rights, are now more fluid and shifting. As such, the social welfare demands made on the host state intensify. Western firms that cause such disruption, however, while obliged to offer assistance, often fail to do so.⁴⁰

A further description of the many commentaries on outsourcing and globalization could continue. The above discussion, however, places into context the connection between outsourcing and globalization and highlights the normative debate accompanying the two. The next Part focuses on a particular aspect of outsourcing and globalization—legal outsourcing. Although scholars have discussed more generally the intersection of globalization and the rule of law,⁴¹ to date there has been little academic work on legal outsourcing. The next Part thus seeks to fill this gap in the literature.

37. See, e.g., Dani Rodrik, *Feasible Globalizations*, in GLOBALIZATION: WHAT'S NEW?, *supra* note 21, at 196-213; Joseph E. Stiglitz, *The Overselling of Globalization*, in GLOBALIZATION: WHAT'S NEW?, *supra* note 21, at 228, 228-62.

38. See generally SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* (2d ed. 2001) [hereinafter SASSEN, *GLOBAL CITY*]; SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS* (1998) [hereinafter SASSEN, *GLOBALIZATION*].

39. See generally SASSEN, *GLOBAL CITY*, *supra* note 38; SASSEN, *GLOBALIZATION*, *supra* note 38.

40. See generally SASSEN, *GLOBAL CITY*, *supra* note 38; SASSEN, *GLOBALIZATION*, *supra* note 38. See also Leslie Evans, *Is Citizenship Being Diluted by Globalization?*, UCLA INT'L INST., Apr. 2, 2004, <http://www.international.ucla.edu/article.asp?parentid=9735> (reviewing a talk given by Saskia Sassen on March 25, 2004 at the UCLA International Institute).

41. See, e.g., Evans, *supra* note 40 (discussing the effect of globalization on citizenship); Jeffery Sachs, *Globalization and the Rule of Law* (Yale Law School Occasional Papers, Paper No. 2, 1998), available at <http://lsr.nellco.org/yale/ylosop/papers/2/> (discussing the struggles of law in adopting to capitalism). The World Bank has published works that touch on these two points. See, e.g., 1 THE WORLD BANK LEGAL REVIEW: LAW AND JUSTICE FOR DEVELOPMENT (2003) (discussing a variety of legal topics for the developing world).

II. THE GROWTH IN LEGAL OUTSOURCING

A. Recent Trends

It is difficult to say precisely when American law firms first began outsourcing legal work abroad. News accounts report that over a decade ago the Dallas litigation firm of Bickel & Brewer established a subsidiary in Hyderabad, India, named Imaging and Abstract International, "to scan, abstract and index documents."⁴² Throughout the next several years other American firms, as well as some British law firms, turned to cheaper labor markets to handle legal services.⁴³

While legal outsourcing by a few American firms early on was ad hoc and involved rather unsophisticated legal tasks,⁴⁴ over the last five years the process has become much more structured and specialized.⁴⁵ India has received a large amount of attention by those engaged in American legal outsourcing.⁴⁶ Beyond just serving as a cheaper labor market, India, as will soon be discussed, offers a number of political, legal, and historical advantages. For now it is important to explain the three primary business models of U.S. legal outsourcing to India.

The first model involves American corporations outsourcing their legal work to their subsidiaries, a practice which began in earnest in 2001.⁴⁷ Among the first of the U.S. companies to start this trend was General Electric.⁴⁸ By establishing an in-house legal office in India, staffed by Indian lawyers to handle issues relating to its plastics and consumer finance divisions, GE reportedly has saved

42. See *Executive Briefing India*, *supra* note 14.

43. *Id.*

44. See Brook, *supra* note 17, at 10-11.

45. See Eric Bellman & Nathan Koppel, *More U.S. Legal Work Moves to India's Low-cost Lawyers*, WALL ST. J., Sept. 28, 2005, at B1; Brook, *supra* note 17, at 11.

46. Krysten Crawford, *Outsourcing the Lawyers: Add Attorney to the Growing List of White-collar Jobs Being Shipped Overseas. How Far Will it Go?*, CNN MONEY.COM, Oct. 15, 2004, http://money.cnn.com/2004/10/14/news/economy/lawyer_outsourcing/.

47. See Bellman & Koppel, *supra* note 45; Brook, *supra* note 17, at 11; *Executive Briefing India*, *supra* note 14.

48. See *Executive Briefing India*, *supra* note 14; Pollak, *supra* note 15 (manuscript at 3, 8).

over two million dollars.⁴⁹ Similarly, DuPont Corporation's India office now hires in-house Indian lawyers to draft patent applications and conduct novelty searches to ensure that proposed innovations have not already been protected.⁵⁰ In 2004, the megalegal publishing corporation, West, opened an office in Mumbai (Bombay) where Indian lawyers were hired to prepare synopses of unpublished American court rulings.⁵¹

A second way that legal outsourcing has developed involves American businesses directly hiring Indian law firms. Nishith Desai Associates (NDA) is one of India's best known tax planning and business law firms.⁵² With offices in Mumbai, Bangalore, and now California and Singapore, NDA boasts a client list of over two dozen large, American-based corporations.⁵³ Rather than relying on lawyers from the United States, these corporations outsource both litigation-related and transactional matters to this Indian firm.⁵⁴ Numerous Silicon Valley law firms have also been directly hiring Indians to write patent applications in order to satisfy the demands of cost-conscious clients.⁵⁵ As one well-known San Francisco intellectual property lawyer stated, "I had reservations [about hiring foreign workers], and still do, about holding ourselves out to

49. *Executive Briefing India*, *supra* note 14.

50. Bellman & Koppel, *supra* note 45. DuPont, though outsourcing work for more than twenty years, has been sending that work to domestic U.S. companies. Such "outsourcing" resulted in a savings of "an estimated \$8.8 million in legal fees in 2002 alone." Zachary J. Bossenbroek & Puneet Mohey, *Should Your Legal Department Join the India Outsourcing Craze?*, 22 ACC DOCKET 46, 50 (2004). As the authors point out, other companies like Cisco Systems and Sun Microsystems have similarly "reduced their legal fees by millions of dollars" engaging in a similar type of practice. *Id.*

51. See Rich Smith, *A Passage to India*, MOTLEY FOOL, Jan. 26, 2004, <http://www.fool.com/news/commentary/2004/commentary040126rs.htm> (noting that West is a subsidiary of the "publishing behemoth, The Thomson Corporation").

52. For information and background on this firm, see Welcome to Nishith Desai Associates, <http://www.nishithdesai.com/nishithdesai.htm> (last visited Mar. 10, 2007).

53. *Id.*; see also *Executive Briefing India*, *supra* note 14. The firm also has Indian and British business clients.

54. See Welcome to Nishith Desai Associates, *supra* note 52. Pollak also notes that "a U.S. firm will form a direct relationship with an already-established overseas firm." Pollak, *supra* note 15 (manuscript at 9). She then goes on to say that "[t]his model is primarily employed in the area of patent proofreading." *Id.* However, as we see with the Nishith Desai firm, the work can involve other matters as well.

55. See Brenda Sandburg, *India Inked: San Francisco Bay Area Law Firms and Their Clients Are Saving Money by Using Shops to Write Patents*, RECORDER, Jan. 18, 2005, available at http://www.law.com/jsp/newswire_article.jsp?id=1105364113219.

be the Wal-Mart of patent prosecution ... [but] [t]he client is happy, and the patents are good, and we're profitable, so it's working out."⁵⁶

Aside from corporations establishing subsidiaries or directly hiring Indian law firms, "[t]hird party 'niche' vendors"⁵⁷ are becoming the most significant players in the legal outsourcing field. Sometimes referred to as legal processing outsourcing (LPO) companies, these third-party vendors serve as intermediaries between the American corporation or American law firm looking to outsource and Indians eager to do the work. Today there are several third-party vendors, with some even billing themselves as capable of having their foreign employees perform more than just basic office tasks.⁵⁸

For example, the Dallas-based Atlas Legal Research company highlights to its corporate and law firm clients that it has lawyers in Bangalore, India, who are experienced in writing "legal briefs for all kinds of cases—from dog bites and divorces to medical malpractice, trademark, and federal securities."⁵⁹ Pangea 3, another American third-party vendor started by two University of Pennsylvania Law School graduates, boasts that it is "the world's premier provider of legal outsourcing services."⁶⁰ And Michigan-based Lexadigm advertises that its foreign lawyers "provide large-law-firm-quality work at literally one-third the price."⁶¹ In fact in 2005, lawyers Lexadigm hired in India prepared a brief that was submitted to the U.S. Supreme Court in a case that involved whether an

56. *Id.*

57. See VALUENOTES, OFFSHORING LEGAL SERVICES TO INDIA (Dec. 2005), <http://www.valuenotes.biz/bpo/legaloutsourcing.asp>.

58. *Id.*; Sandburg, *supra* note 55. Some LPOs have emerged as spin-offs of larger, more general business process outsourcing (BPO) companies. See VALUENOTES, *supra* note 57. BPOs facilitate the hiring of foreign laborers for diverse types of jobs—software engineers, medical technicians, call center representatives, and the like. For example, OfficeTiger's LPO itself is a well-developed part of its larger BPO company. For information on the various services provided, see OfficeTiger Home Page, <http://www.officetiger.com> (last visited Mar. 10, 2007).

59. See Rashmi Agarwal, *India Courts Western Law Firms*, OUTSOURCINGASIA.COM, May 2005, <http://www.outsourcing-asia.com/india2.html>. As its website notes, Atlas caters to all different types of law firms, from solo practitioners to midsize firms and larger. See Atlas Legal Research LP Home Page, <http://www.atlaslegal.com> (last visited Mar. 10, 2007).

60. See Pangea 3 Home Page, <http://www.pangea3.com> (last visited Mar. 10, 2007).

61. See Brook, *supra* note 17, at 10 (noting that "Lexadigm's rates range from \$65 to \$95 an hour for work that large U.S. firms might bill at \$250 an hour or more").

Internal Revenue Service provision was in violation of the Fifth Amendment's Due Process Clause.⁶²

The three methods of outsourcing legal work described here are not the only ways that American corporations or law firms can engage in this practice. Using economists Bhagwati, Panagariya, and Srinivasan's definition, legal outsourcing does not need to involve shipping services overseas.⁶³ A recent *New York Times* article discussed how American corporations have begun outsourcing work to American law school professors.⁶⁴ The *Times* piece coincidentally mentions that these businesses are using third-party vendors to locate which professors to hire.⁶⁵ And the general practice of companies and law firms seeking outside contract services from paralegals or other lawyers within the United States is not uncommon.

Nevertheless, legal outsourcing to India remains one of the most formalized, structured, and increasingly efficient ways that more American law firms and corporations are seeking to save in legal costs. One report projects an exponential growth in "[t]he market for outsourced legal work" and that "India is positioned to seize the largest share."⁶⁶ The next Section explores why India has become such an attractive site.

B. Why India?

In 2004 a U.S. third-party vendor, OfficeTiger, conducted a study showing how the top two hundred American law firms (in terms of gross revenue) spent approximately \$20 billion dollars per year on word processing, office operations, and other secretarial and paralegal services.⁶⁷ Table 1 divides the specific tasks into eleven different categories.

62. *Id.* at 11.

63. Bhagwati et al., *supra* note 2, at 96-97.

64. See Jonathan D. Glater, *Even Law Firms Join the Trend to Outsourcing*, N.Y. TIMES, Jan. 13, 2006, at C7.

65. *Id.*

66. Brook, *supra* note 17, at 10; see also Pollak, *supra* note 15 (manuscript at 4).

67. See Agarwal, *supra* note 59.

Table 1

Services Done in Top 200 (by Gross Revenue) U.S. Law Firms	Approximate Total Spending by the Top 200 (by Gross Revenue) U.S. Law Firms per Year
1. Office Operations	\$6.2 billion
2. Word Processing & Secretarial	\$2.9 billion
3. Information Systems	\$2.5 billion
4. Marketing	\$850 million
5. Finance & Accounting	\$500 million
6. Library	\$500 million
7. Legal Recruiting	\$350 million
8. Human Resources	\$200 million
9. Legal Research	\$620 million
10. Litigation Support	\$4.9 billion
11. Patent & Trademark Prosecution	\$400 million
Total	\$19.92 billion

*Source: Hildebrandt International, OfficeTiger, 2004⁶⁸

OfficeTiger, and other LPO firms like it, have a simple business plan to reduce the costs described in Table 1. Given that these tasks can be performed by willing, qualified workers in India where wages are much lower, LPOs have been approaching American law firms and their clients in an effort to persuade them to outsource many of these services using a company like OfficeTiger as a conduit.⁶⁹ One LPO executive, who asked that he and his company remain anonymous, reported that the salaries for his personnel in India range from \$2500 per year to only as high as \$35,000-\$40,000 per year.⁷⁰ Intellevate, another third-party vendor, which will be discussed below, also cites lower costs as a reason for sending work to India: "The prevailing wage in India is significantly less than in the US," its website states.⁷¹

68. *Id.* (citing Hildebrandt International, OfficeTiger, 2004).

69. For a discussion of this business model, see OfficeTiger's website, particularly, its link that discusses this point in detail. OfficeTiger Home Page, http://www.officetiger.com/whatwedo/legal_mar.htm (last visited Mar. 10, 2007).

70. Interview with LPO executive who requested anonymity (May 15, 2006).

71. Intellevate Benefits, http://www.cpaglobal.com/patents/intellevate/default_name (last visited Mar. 10, 2007); see Pollak, *supra* note 15 (manuscript at 4).

Various American corporations and American law firms have caught on to this trend as well. While filing complicated, high-tech patent applications can range from \$8000 to \$10,000 in the Midwest,⁷² and up to \$12,000 in Silicon Valley,⁷³ outsourcing this job to India costs between \$5000 and \$6000.⁷⁴ A well-informed intellectual property lawyer in Minneapolis who closely follows this pricing differential projected that 200 to 300 patent applications are being outsourced to India per year, with the number certain to rise over the next several years.⁷⁵ Approximating that the savings by using Indian workers is \$4500 per patent application, and that there are on average 250 applications written per year, outsourcing for this service saves over \$1,000,000.⁷⁶ Moreover, for other types of services, there are reports indicating that Indian lawyers who work as outsourced employees, at the high end, charge only twenty dollars an hour.⁷⁷

Figuring out the number of lawyers who work as outsourced legal laborers for American firms, however, is problematic. One conservative report states that “around 1,800”⁷⁸ Indians work in this sector with this number “to grow to 24,000 by 2010.”⁷⁹ In contrast, another report finds that “less than 12,000”⁸⁰ Indians serve as outsourced legal laborers, and that by 2015 the figure will reach 79,000.⁸¹

72. Interview with Steve Lundberg, Partner, Schwegman, Lundberg, Woessner & Kluth, P.A., in Minneapolis, Minn. (Jan. 18, 2006). Schwegman is the law firm that started Intellevate.

73. See Sandburg, *supra* note 55.

74. Interview with Steve Lundberg, *supra* note 72.

75. *Id.*

76. These estimates use the Midwest figures rather than the West Coast numbers as a baseline. Thus, for example, the \$4500 savings figure comes from the difference between \$9000 (the average of \$8000 and \$10,000) and \$5500 (the average of \$5000 and \$6000).

77. See *Executive Briefing India*, *supra* note 14 (citing specifically Philips and Company, which does work for both American companies and American law firms).

78. See VALUE NOTES, *supra* note 57.

79. *Id.*

80. *79,000 Legal Outsourcing Jobs for India by 2015*, EXPRESS INDIA, Nov. 12, 2005, <http://www.expressindia.com/fullstory.php?newsid=58207>.

81. *Id.* But see Crawford, *supra* note 46 (drawing on the same data from Forrester Research, but not specifically saying that India will be the recipient of all these 79,000 jobs). In fact, the Forrester Research study (May 2004), which cites this 79,000 figure, notes that the number of U.S. lawyers who will lose their jobs will be 40,400, ostensibly meaning that the remaining “legal” jobs outsourced will be paralegal and more secretarial in nature. See, e.g., JAMES H. JOHNSON, JR., UNIV. OF N.C. AT CHAPEL HILL, PEOPLE AND JOBS ON THE MOVE:

Because these figures are so varied and do not indicate whether those employed are lawyers, it is difficult to know the extent to which American legal outsourcers have penetrated the Indian bar.⁸²

There is some evidence to suggest that Indians who work as outsourced legal employees come from varied backgrounds. At Intellevate's New Delhi office, for example, there are about 120 employees. Thirty or so are technical scientists with Ph.D.s who work on intellectual property matters, such as conducting patent novelty searches.⁸³ At the other end, there are several dozen low-skill administrative employees who perform general legal secretarial duties. And there are about twenty lawyers who, according to chief executive Leon Steinberg, were practitioners in well-reputed law firms before beginning their current jobs as relatively high-paid paralegals.⁸⁴

While perhaps not as large, Intellevate's competitors seem to have a mix of workers as well. Interestingly, when it comes to their lawyers in particular, these other third-party vendors also make an affirmative effort to publicize the lawyers' credentials. For example, Lexadigm, the Michigan-headquartered vendor with its office near New Delhi, boasts that each of its lawyers

IMPLICATIONS FOR ECONOMIC DEVELOPMENT PLANNING AND CITY COMPETITIVENESS 14 (2007) (listing the loss of jobs by 2015 per the Forrester Research study).

82. The issue of how many lawyers are in India has been one of constant debate among observers for years. Because the Bar Council of India does not keep accurate records, estimates are that the number is around one million. See Pradip K. Ghosh, *India*, JURIST, <http://jurist.law.pitt.edu/world/india.htm> (last visited Mar. 10, 2007) (noting that "[o]f the law students who graduate from [law schools] every year, only about one third join the legal profession (considered to be overcrowded with approximately 1,000,000 members), with others going to industry and other economic sectors"); Biman Mukherji, *India Rides Outsourcing Boom To Capture Legal Work from Abroad*, ECON. TIMES, Oct 16, 2005, <http://economictimes.indiatimes.com/articleshow/1264061.cms> (quoting Sanjay Kamlani, cofounder of Pangea 3, as saying that "there are one million lawyers in India and 70,000 graduating from law schools every year"). *But see* Bellman & Koppel, *supra* note 45 (stating that actually "200,000 Indians graduate from law school there every year—five time[s] as many as in the U.S.—creating an enormous pool of talent to tap"). The open question is how many of these law degree holders practice. Practitioners have provided me with estimates around 250,000.

83. Interview with Leon Steinberg, Chief Executive, Intellevate, in Minneapolis, Minn. (Jan. 6, 2006).

84. *Id.* As one recent law graduate from New Delhi University conceded, even though she is working "below her educational level as a paralegal at Intellevate's office," she is able to hire "three part-time servants, one of whom washes her two cars daily." Brook, *supra* note 17, at 12.

has graduated from one of the top five law schools in India, practiced law for at least three years, received extensive legal training from U.S. attorneys, and passed Lexadigm's rigorous legal research and writing exam. In addition, a large percentage of [Lexadigm's] India-based attorneys have legal degrees from reputable U.S. law schools.⁸⁵

Many of these American vendors seek highly credentialed lawyers for two reasons. First, such employees can provide clients with reassurance and legitimacy for what might otherwise seem like an unusual way to conduct legal business.⁸⁶ Second, by hiring well-reputed lawyers the American vendors safeguard their own interests. The risk—or at least the perceived risk—of employing a lawyer from a known background is lower, and administratively it is easier for the Americans to recruit from the best known and most respected law firms and law schools in India.⁸⁷

An alternative business model is at play for others who participate in legal outsourcing to India. This model argues that though it is important to have good people on staff, the fact that the legal work is not complex, extensive training of Indian employees is required anyway, and the market is filled with competent individuals who can perform these rather simple tasks, means that hiring decisions should be based on whether the person has common sense and is collegial rather than on whether she is a lawyer. One American entrepreneur whose company outsources legal work to India noted that the amount of time was the same to train an elite-credentialed lawyer and a competent individual from a more modest background who may not even be a lawyer.⁸⁸ The American rejoiced in this finding, in fact, because he saw it as allowing a larger portion of the Indian market to share in the profits coming in from U.S. legal outsourcing.⁸⁹

85. About Lexadigm Solutions, <http://www.lexadigm.com/about.html> (last visited Mar. 8, 2007).

86. Interview with Leon Steinberg, *supra* note 83.

87. *Id.* Although note that Intellevate does most of its hiring directly from law firms rather than law schools.

88. Interview with lawyer who asked that his name and firm be kept confidential (Feb. 1, 2006).

89. *Id.*

In addition to this low-cost, highly skilled labor market, however, there are other economic incentives for legal outsourcing firms interested in India. As it does with many other types of American outsourcing companies,⁹⁰ the Indian government has provided multiple-year tax holidays as well as exemptions from import and export duties to U.S. legal outsourcers.⁹¹ These legal outsourcers have also been assured that bureaucratic regulations, notorious in India, would not be an obstacle for how the company operates its business.⁹² Despite the culture of bribery in Indian society, the government has also promised that this harassment would not occur.⁹³

It is important to note that the catalyst for this international economic interest in India was the macroeconomic policy shift that the Indian government made during the early 1990s. Much has been written about this move.⁹⁴ Beginning in 1991, then Prime Minister Narasimha Rao's government launched a series of economic reforms that sought to liberalize India's economy. Facing "a severe balance of payments crisis with foreign exchange reserves touching precariously low levels to meet import payments,"⁹⁵ Rao moved India toward a more free-market economy, imposed government spending cuts, and promoted foreign investment.⁹⁶ Although an examination

90. See *Virtual Champions: India's IT Stars Are Still Rising Fast*, ECONOMIST, June 3, 2006, at 4 (middle insert) (noting upcoming changes in tax breaks for IT firms).

91. Julie Forster, *Law Firm Cut Rates by Outsourcing to India*, PIONEER PRESS (St. Paul, Minn.), Mar. 3, 2004, at C1; Interview with Leon Steinberg, *supra* note 83.

92. Interview with Leon Steinberg, *supra* note 83.

93. *Id.*

94. See, e.g., PARTHASARATHI BANERJEE & FRANK-JÜRGEN RICHTER, ECONOMIC INSTITUTIONS IN INDIA: SUSTAINABILITY UNDER LIBERALIZATION AND GLOBALIZATION (2003); ROB JENKINS, DEMOCRATIC POLITICS AND ECONOMIC REFORM IN INDIA (1999); VIJAY JOSHI & I.M.D. LITTLE, INDIA'S ECONOMIC REFORMS 1991-2001 (1996).

95. *Patriarch of Reforms Narasimha Rao Dead*, HINDU BUS. LINE, Dec. 24, 2004, <http://www.blonnet.com/2004/12/24/stories/2004122402990100.htm>.

96.

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

of Rao's initiatives is beyond the scope of this study, it is important to note that in the years after these policy decisions were enacted, a host of Western businesses began flocking to India, including those interested in legal outsourcing.

India is an enticing environment for other reasons as well. With its population of over one billion,⁹⁷ and with millions of students graduating from college every year, India offers a giant "pool" of employees for American investors.⁹⁸ Furthermore, many of these graduates are fluent in English. English is one of the country's national languages and most high-level business dealings and government proceedings are conducted in English.⁹⁹ Tremendous advancements in the technology sector also make India one of the most internet-accessible countries in the world.¹⁰⁰ Given that Microsoft, Intel, Dell, and many other computer companies have facilities in India, it is no wonder why the country is often referred to as the "Silicon Valley" of Asia.¹⁰¹

Furthermore except for a period between 1975 and 1977, India has functioned politically as a representative democracy since gaining independence from Britain in 1947.¹⁰² Legally, the rule of

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 of Controller of Capital Issues that paved the way for a statutory regulator—the Securities and Exchange Board of India.

Id.

97. The estimated population of India as of 2006 is currently around 1.1 billion people. See *Can India Fly?*, *ECONOMIST*, June 3, 2006, at 13.

98. See *Intellectual Benefits*, *supra* note 71. However, a recent study by McKinsey & Co. noted that a large percentage of these graduates lack the skills necessary to compete in an ever-globalizing economy. For a discussion of this study see Satish Jacob, *India's Outsourcing Boom Runs into Trouble*, *ABC NEWS*, Dec. 24, 2005, <http://abcnews.go.com/International/story?id=1428299>.

99. INDIA CONST. art. 348. See generally Jayanth K. Krishnan, *Social Policy Advocacy and the Role of the Courts in India*, 21 *AM. ASIAN REV.* 91 (2003). But see Pollak, *supra* note 15 (manuscript at 53) (raising questions as to whether the English spoken in India, which Pollak notes is a "variant of British English that may employ certain vocabulary words whose meanings or nuances differ from their use in American English," might "constrain the types of legal tasks outsourced lawyers can perform, such as statutory interpretation").

100. See FRIEDMAN, *supra* note 8, at 110-11.

101. See Keith Naughton, *Silicon Valley East*, *NEWSWEEK*, Mar. 6, 2006, at 42.

102. See Krishnan, *supra* note 99, at 92. Between 1975 and 1977 Prime Minister Indira Gandhi declared Emergency Rule and suspended the country's democratic constitution. See

law in India draws not just on the British common law but on American constitutional principles.¹⁰³ It is not uncommon for Indian judges, when writing their opinions, to cite American case law.¹⁰⁴ As early as the 1950s and for the following three decades the Ford Foundation, an American philanthropic organization, devoted millions of dollars to the Indian legal education sector.¹⁰⁵ At the time, officials at Ford were pursuing a policy also championed by many American foreign policy experts: that to prevent the rise of future totalitarian regimes like Hitler's Germany and Mussolini's Italy, Western institutions needed to promote the rule of law within countries newly freed from colonialism.¹⁰⁶ India was such a country, and India's law schools were selected as the sites to emphasize these principles because of the belief that law students were likely to become the next generation of government leaders.¹⁰⁷ Although Ford substantially scaled back money for this project in the late 1970s, the relationships that developed between the Americans and Indians during this time affected how many Indian law schools function today, as well as the caliber of law graduates entering the market who are attractive to companies like those involved in legal outsourcing.¹⁰⁸

The low cost of labor, the surge in information technology, favorable macroeconomic policies, the high quality of workers with advanced educations, the democratic system of government, and the historical ties to the United States, are thus all significant factors for why India is fertile ground for American legal outsourcers. The

id. at 96-98.

103. See CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 77-78 (1998); Jayanth K. Krishnan & Kevin R. den Dulk, *So Help Me God: A Comparative Study of Religious Interest Group Litigation*, 30 GA. J. INT'L & COMP. L. 233, 236 (2002); Jayanth K. Krishnan, *New Politics, Public Interest Groups, and Legal Strategies in the United States and Beyond* (2001) (unpublished Ph.D. dissertation, University of Wisconsin-Madison) (on file with author).

104. See, e.g., Jayanth K. Krishnan, *The Rights of the New Untouchables: A Constitutional Analysis of HIV Jurisprudence in India*, 25 HUM. RTS. Q. 791, 804 (2003).

105. See generally Jayanth K. Krishnan, *Professor Kingsfield Goes to Delhi: American Academics, the Ford Foundation, and the Development of Legal Education in India*, 46 AM. J. LEGAL HIS. 447, 447-48 (2005).

106. See *id.* at 449.

107. See *id.* at 448.

108. See *id.* at 498 (noting that Ford scaled back its efforts after realizing that most of the improvement in Indian legal education had to come from Indians themselves).

next Part underscores this point by providing information gathered from a case study of a third-party legal outsourcing vendor and the law firm that helped to create it. As the findings confirm, India is coveted as a unique environment in which to operate. But being valued by those involved in legal outsourcing provides India¹⁰⁹ with an opportunity to leverage its position to improve a long-troubled legal system—an outcome that ultimately is in the interests of American investors as well.

III. THE BUSINESS MODEL FOR LEGAL OUTSOURCING: AN EMPIRICAL CASE STUDY

Intellevate is a third-party legal outsourcing vendor with headquarters in Minneapolis, Minnesota. It has an India office in New Delhi, and after just three years of operation is considered a leader in its field. Both Intellevate-Minneapolis and Intellevate-India are the brainchild of a Minneapolis intellectual property law firm, Schwegman, Lundberg, Woessner, and Kluth. There is a rich history as to how the Schwegman firm formed Intellevate,¹¹⁰

109. See *infra* Part V.

110. In 1999, the fifty-lawyer, Minneapolis intellectual property law firm, Schwegman, Lundberg, Woessner & Kluth, concluded that its software system needed to be both updated and accessible through the Internet. In addition, the firm realized that much of its time and money was dedicated to dealing with various labor-intensive, document-preparation tasks. In order to address both these issues, the firm hired the noted Indian businessman and management consultant Pradeep Sinha. Sinha earned a strong reputation for helping American businesses develop web-enabled software systems. He also, however, was an expert on advising American companies on how to save money on lower-end labor-related services. On the advice of Sinha, the Schwegman firm formed two companies between 2000 and 2001: Foundation Intellectual Property (FIP) and Portfolio Intellectual Property (PIP). FIP was the company charged with creating a web-enabled software package for the firm that would facilitate its patent prosecutions. The hope was that in time other law firms and corporations would buy into FIP's software and become subscribing customers. PIP, on the other hand, was the company that would manage the Schwegman firm's paralegal and other labor-related service needs. Sinha played a major role in operations of both the FIP and PIP companies. For one thing, Sinha was named president of FIP. See FoundationIP, Case Study, Schwegman, Lundberg, Woessner and Kluth, P.A., http://www.foundationip.com/ct_files/case_slwk.pdf (last visited Mar. 10, 2007). Moreover, in India, Sinha owned two companies of his own. One was a high-tech firm named Infotech that had several employees whom he assigned to work on FIP's software programming system. The other firm, Cantata, offered low-cost office services to American businesses. Until 2000, no U.S. law firm had used Sinha's office services company, which changed when the Schwegman-backed PIP company decided to hire Cantata to do a series of proofreading and other document preparation tasks. Over the next few years the partnership between Sinha and the Schwegman firm thrived. By 2002 the law firm had

but two main reasons explain its decision. First, as early as 1999 Schwegman realized that much of its time and money was dedicated to dealing with various labor-intensive document preparation tasks.¹¹¹ It experimented by sending some of this work to India; the firm was happy with the quality of the work received and even happier with the savings in cost.¹¹² By 2003 the firm concluded that it would be most efficient to have a separate office (Intellevate-Minneapolis) serve as the third-party vendor that would handle the firm's work being outsourced to India. The firm subsequently formed a subsidiary for its Intellevate-Minneapolis office, Intellevate-India, which would house the Indian employees being hired.¹¹³

Second, the firm realized that the practice of patent prosecution was changing and that it needed to be at the forefront of this shift. As explained by Intellevate's chief executive officer Leon Steinberg,

converted its software system to the FIP web-enabled patent program. FIP released a statement that said the following:

FoundationIP provides a simple, integrated and customizable environment for corporations and law firms to collaboratively manage the prosecution of IP matters. Designed as a web-enabled service, FoundationIP provides users with immediate and concurrent access to all their matter information in one place in a secure online environment. FoundationIP can store and help manage all aspects of a users' [sic] IP matters including scanned documents, docket dates and notifications, assigned tasks, sent and received communications and notes and discussions.

Some of FoundationIP's unique benefits include a collaborative online environment enabling all information to be stored online and shared by inventors, corporate counsel, outside attorneys, and paralegals; a built-in contact management module for users to sort and manage email correspondence by matter; and a customizable workflow allowing users to customize templates to define and manage the process for different U.S. Patent and Trade mark [sic] Office-related events.

Id. By the end of 2003 FIP had twenty-four customers. One year later that number jumped to eighty and by the end of 2005 FIP had 160 subscribers to its software program. FIP's customers have been a combination of law firms and business corporations. During this same period the Schwegman firm also increased the volume of office work it was sending to India. Delighted with the quality of services it received, the firm in 2003 purchased Cantata from Sinha and renamed the company Intellevate-India. The law firm then established Intellevate's headquarters in Minneapolis, one block from its own downtown office. Interview with Steve Lundberg, *supra* note 72.

111. Interview with Steve Lundberg, *supra* note 72; see Molly McDonough, *IP Goes Indian: Patent Proofreading Is Latest Hot Area in Offshore Outsourcing*, A.B.A. J. E-REPORT, Apr. 23, 2004.

112. See McDonough, *supra* note 111.

113. Interview with Steve Lundberg, *supra* note 72.

himself a lawyer, in the traditional paradigm of corporate patent practice, a corporate employee with an invention would typically be routed to an in-house "invention submission panel."¹¹⁴ The panel would be charged to determine whether or not the invention deserved patent protection.¹¹⁵ Before making its decision, the panel would seek expert counsel from outside intellectual property lawyers, like Schwegman, who would conduct a string of labor-intensive due diligence tasks that cost the corporation large sums of money.¹¹⁶ If the law firm found the invention to be patent-worthy, an application would then be filed on behalf of the corporation with the United States Patent and Trademark Office; if not, no application would be filed.¹¹⁷

As Steinberg remarked, however, corporations increasingly expressed great dissatisfaction that the patent protection process resulted in huge legal fees.¹¹⁸ To corporate executives, so much of the lawyers' work seemed pedestrian; yet legal costs continued to rise.¹¹⁹ Worried that their corporate clients might soon pull their business, law firms like Schwegman were faced with a dilemma: continue to operate without changing their fee practices in hopes that their corporate clients would remain, or find ways to make the patent process more cost-efficient, thereby giving their clients more incentive to stay with their current lawyers. For the Schwegman firm the choice was simple. The firm approached these disgruntled corporate executives and proposed cutting legal fees by outsourcing low-level services to those who would perform these jobs for one-quarter of the costs.¹²⁰ Intellevate-Minneapolis would be the company established to manage the outsourcing, serving as the intermediary between the corporation and its American law firm on the one hand, and the outsourced laborers at Intellevate-India on the other.

Thus far Schwegman's approach to legal outsourcing has yielded great returns. Intellevate today is an international company with

114. Interview with Leon Steinberg, *supra* note 83.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Interview with Steve Lundberg, *supra* note 72; *see also* McDonough, *supra* note 111 (noting that savings need to be fifty percent or more to be worth the effort for Lundberg).

four separate subsidiaries, three in Minneapolis and one in India.¹²¹ Intellevate's client list includes twenty law firms, and thirty corporations among Fortune Magazine's top five hundred companies.¹²²

Intellevate's Minneapolis and New Delhi offices operate, according to Steinberg, in a seamless around-the-clock fashion.¹²³ Because of the eleven-and-one-half-hour time difference between the two sites, requested work by one office to the other often can be completed within a twenty-four-hour period.¹²⁴ In terms of allocating specific work between Minneapolis and New Delhi, decisions are made on a cost-benefit basis. A law firm might request Intellevate to perform a certain set of paralegal services. Steinberg and his executives will then assess whether it is most cost-effective to have the work done in Minneapolis or in New Delhi.¹²⁵ There are several categories of work that are presumed to be "outsourcable." Table 2 highlights these tasks.

121. For background information on Intellevate, see Intellevate, <http://www.cpaglobal.com/patents/intellevate> (last visited Mar 10, 2007); CPA History, http://www.cpaglobal.com/about_cpa/history (last visited Mar. 10, 2007).

122. Interview with Leon Steinberg, *supra* note 83.

123. *Id.*

124. *Id.* However, Pollak raises a question as to whether the time difference might hamper communication regarding more complex legal tasks. Pollak, *supra* note 15 (manuscript at 53-54).

125. Interview with Leon Steinberg, *supra* note 83.

Table 2¹²⁶
Types of Work Outsourced to Indian Facility

Patent Paralegal	Trademark Paralegal	Docketing	Patent Engin. Research	Patent Illustration	Proof-read- ing	Computer Research	Book-keep- ing & Account- ing
Preparing, filing new & foreign patent applications	Clearance searching	Main- taining IP firms' docket & annuities	Prior art searches & litigation searches	Preparing drawings w/state of the art sys- tems	Proof- reading patent documents	Performing nonlegal research	Managing accts payable and accts receivable
Preparing and filing prosecution templates	Filing & prosecution		Patent product clearance searches			Performing marketing research	Performing general ledger work
Maintaining file histories	Maintain existing trademarks		Preparation of draft agreements				Performing invoicing work
Handling PTO corres- pondences	Monitoring infringe- ment research		Drafting technical specifi- cations				
Client re- porting/ Foreign fil- ing requests			Claim chart preparation				
Foreign as- sociate corres- pondences			Sequencing listing prep- aration				

Given that the Schwegman firm started Intellevate and that both focus on delivering services to clients in the intellectual property

126. This information comes from Intellevate, *supra* note 121, as well as Interview with Leon Steinberg, *supra* note 83.

field, it is not surprising that the tasks listed in Table 2 involve work such as patent engineering, patent prosecution, trademark monitoring, and the like. Intellevate, moreover, advertises to potential clients that the outsourcing of these tasks to its Indian subsidiary will provide: “an instant boost to the size of your IP team, enabling you to increase the number of cases you manage. This is achieved without the usual overhead associated with a larger department. Our practices allow this to happen in a cost effective manner.”¹²⁷ But how?

As learned in my interview sessions with both Steinberg and Steve Lundberg, a named partner at the Schwegman firm, the Intellevate office in India operates in a specialized and generalized manner. A law firm or corporation will come to Intellevate-Minneapolis and request one, some, or all of the legal services in Table 2. Provided that it makes sense cost-wise, Intellevate-Minneapolis then will assign workers in its New Delhi office to perform the requested tasks for the American client.¹²⁸ These Indian Intellevate employees are, as Lundberg described it, “exclusively dedicated” to the American law firm or corporation.¹²⁹ Consider the Schwegman firm, which currently has twenty such Intellevate employees.¹³⁰ Fifteen of these workers are paralegals while five are technical patent engineers.¹³¹ As Lundberg and Steinberg both explained, the “dedicated employee model” is central to how Intellevate operates.¹³² This has to be the case because Intellevate serves clients that see its work as innovative and confidential.¹³³

The dedicated employee model highlights the specialized aspect of how Intellevate-India operates.¹³⁴ But there is also a “shared

127. See Intellevate Benefits, *supra* note 71.

128. Interview with Leon Steinberg, *supra* note 83.

129. Interview with Steve Lundberg, *supra* note 72.

130. *Id.*

131. *Id.*

132. Interview with Leon Steinberg, *supra* note 83; Interview with Steve Lundberg, *supra* note 72.

133. Interview with Leon Steinberg, *supra* note 83; see also Pollak, *supra* note 15 (manuscript at 24) (noting that Intellevate promises “restricted access to the entire facility, separate work areas with restricted access control, [and] security guards on [the] premises” (quoting Intellevate India, *About Us*, <http://www.intellevate.com/india/aboutus.htm> (last visited Oct. 17, 2004))).

134. Interview with Leon Steinberg, *supra* note 83; Interview with Steve Lundberg, *supra* note 72.

services” component to the facility.¹³⁵ When Intellevate-Minneapolis receives a service request from a client, Steinberg and his colleagues may assign the task to a group of employees who work in a separate part of the New Delhi office.¹³⁶ Clients whose work is delegated to this shared services department tend to have simpler and general administrative needs.

Intellevate’s business model has proved so successful that in August 2005 the international Computer Patent Annuities Ltd. Partnership (CPA) acquired a controlling stake of both Intellevate-Minneapolis and Intellevate-India.¹³⁷ Headquartered in the United Kingdom, CPA is one of the world’s leading intellectual property management firms.¹³⁸ Neither Steinberg nor Lundberg anticipated any major changes in the way Intellevate operates, and both welcomed the acquisition as an opportunity for greater economic growth.¹³⁹

It appears as though Intellevate will continue to rely on its Indian facility for intellectual property support in the years ahead. The success Intellevate and other legal outsourcing investors are enjoying in India, however, occurs within a legal environment that is at a breaking point. For the vast majority of Indians, legal outsourcing has no relevance in their everyday lives. In fact, while the idea of legal outsourcing for interested American investors sparks sentiments of enthusiasm and opportunity, for most Indians the word “legal” alone evokes disdain. As the next Part will detail, because the Indian legal system is, in the words of the country’s

135. Interview with Steve Lundberg, *supra* note 72; Interview with Leon Steinberg, *supra* note 83.

136. Interview with Leon Steinberg, *supra* note 83.

137. Press Release CPA, CPA Acquires FoundationIP and Takes Major Stake in Intellevate (Aug. 24, 2005), *available at* <http://www.foundationip.com/CPA.html>.

138. About CPA, http://www.cpaglobal.com/about_cpa (last visited Mar. 10, 2007) (“[CPA has] been in the business of IP for over 35 years. We now look after more than 40,000 clients worldwide, handling in excess of 2 million patent, design and trademark records. So ‘yes’ we’re a market leader but that hasn’t made us complacent.”).

139. Press Release, CPA, *supra* note 137 (“[W]e are excited to become part of the CPA Group. We have been growing over the last two years at a blistering pace, as US based outsourced IP services and India based offshore services have gained legitimacy. Although we have been profitable, financing our growth has been a challenge. CPA offers us the financial resources to add personnel and facilities. They also give us access to their significant industry experience.” (quoting Leon Steinberg)).

former Attorney General Soli Sorabjee, “on the verge of collapse,”¹⁴⁰ that so many Indians feel disaffected by law and the legal process is of little surprise. Given the numerous benefits that those profiting from legal outsourcing receive from working within India, these investors are not only obliged to help correct the dilapidated legal system, but they likely will find it in their interests to do so.

IV. THE LEGAL ENVIRONMENT FOR ORDINARY INDIANS

A. *The Problems at Home*

For Intellevate, the government of India has been generous in the benefits it has provided. Intellevate has received tax breaks, few bureaucratic obstacles in establishing its New Delhi office, and the assurance that it will not be troubled with requests for bribes.¹⁴¹ With the growing number of Western firms coming to India because of its cheap labor, the Indian government also has been disinclined to push for set wage laws that might be on par with the minimum wage in the United States.¹⁴² Intellevate is not the only firm that has received such a warm reception.

One study notes that over fifty legal outsourcing vendors have entered the Indian market since 2001,¹⁴³ presumably to take advantage of similar benefits. Perhaps it is unsurprising that Indian officials have so catered to these vendors. Reports indicate that India receives \$60 to \$80 million a year from outsourced legal business.¹⁴⁴ Future projections are that this revenue will grow

140. *Criminal Justice System on the Verge of Collapse*, HINDU, June 13, 2003, available at <http://www.hinduonnet.com/2003/06/13/stories/2003061305741100.htm>.

141. See *supra* notes 90-93 and accompanying text.

142. India does have the Minimum Wages Act of 1948, which sets employment rates for various types of jobs. The government's Ministry of Labour has a detailed outline of the wages per employment task, as well as a discussion of the statute itself on its website. See Minimum Wages Act of 1948, <http://www.labour.nic.in/wagecell/welcome.html> (last visited Mar. 10, 2007). But, according to Javed Razack, a practicing lawyer who is an expert on intellectual property matters and runs a website that answers common questions pertaining to this field, “[t]here are no wage standards fixed in India in so far as the Info Tech sector is concerned.” Jared Razack, Topic: Indian Law (June 24, 2002), <http://experts.about.com/q/Indian-Law-1798/India-Wages-Intellectual-Property.htm>.

143. See VALUENOTES, *supra* note 57.

144. *Id.*; Mukherji, *supra* note 82 (noting that outsourcing as a whole generates \$6.7 billion a year). But see Jill Schachner Chanan, *Moving to Mumbai*, A.B.A. J., Apr. 2004, at 28 (noting

tenfold by 2010 and by 2015 will exceed \$1 billion.¹⁴⁵ Thus, while the government may not be collecting revenue through taxing these foreign investors, as one observer has noted, it is pursuing a type of supply side policy.¹⁴⁶ Less government intervention and lower taxes are encouraging foreign businesses to continue investing in the Indian market, which is creating more job opportunities and raising the standard of living for a great number of Indians.¹⁴⁷

To date, most American legal outsourcing vendors have established their Indian offices in one of four cities: New Delhi, Mumbai, Hyderabad, or Bangalore.¹⁴⁸ There is persuasive rationale for why these cities have been targeted. New Delhi, with a population of fourteen million, is the country's capital and the political and legal center of India.¹⁴⁹ The national Parliament, the central bureaucracy, the Supreme Court, India's national legal research center, and the mammoth Delhi University are all located here.¹⁵⁰ Furthermore, it is an international city where foreign businesses and banks have offices and where many foreign workers and diplomats reside. New Delhi is therefore a natural fit to base a legal outsourcing company.

The other three cities are attractive sites as well. Mumbai has long been the country's commercial hub.¹⁵¹ It has a history dating back to British times of a rich legal culture where some of the most prominent lawyers practiced and judges sat.¹⁵² Hyderabad and

that no legal professionals have lost their jobs to outsourcing and no firms are ready to ship actual legal work abroad); Sandeep Dave, *Outsourcing Legal Services to India*, GLOBAL L. REV., May 4, 2004, <http://www.globallawreview.com/outsourcing.html> (noting that there is no specific data to show how much legal outsourcing work is being sent to India).

145. See VALUENOTES, *supra* note 57.

146. See Sumit K. Majumdar, *India Astride a Supply Side Revolution*, HINDU BUS. LINE, Aug. 23, 2005, <http://www.thehindubusinessline.com/2005/08/23/stories/2005082300271000.htm>.

147. *Id.*

148. Interview with Leon Steinberg, *supra* note 83; see also VALUENOTES, *supra* note 57.

149. *Provisional Population Totals: Delhi*, CENSUS OF INDIA, 2001, available at <http://www.censusindia.net/profiles/del.html> (last visited Mar. 10, 2007).

150. See generally Govt. of National Capital Territory of DELHI, <http://delhigovt.nic.in/index.asp> (last visited Mar. 10, 2007) (providing access to information about the governmental, legal, and social facets of Delhi).

151. The population of greater Mumbai is over sixteen million people. CENSUS OF INDIA, 2001, available at http://www.censusindia.net/results/million_plus.html (last visited Mar. 10, 2007).

152. See Jayanth K. Krishnan, *From the ALI to the ILLI: The Efforts To Export an American Legal Institution*, 38 VAND. J. TRANSNAT'L L. 1255, 1269 (2005).

Bangalore have been the two economic “boom” cities since the early 1990s.¹⁵³ Along with housing some of the world’s finest international technology firms, both cities lay claim to two of India’s top law schools.¹⁵⁴ And government leaders in both Hyderabad and Bangalore have been at the forefront in making their respective cities the two information technology centers of India.¹⁵⁵

The states in which these four cities are located comprise over a fifth of India’s population.¹⁵⁶ Three of the states—Maharashtra (with Mumbai as the capital), Karnataka (with Bangalore as the capital), and Andhra Pradesh (with Hyderabad as the capital)—were, respectively, the top three beneficiaries of foreign investment as of 2004.¹⁵⁷ And each of the four cities is among the most economically prosperous in India.¹⁵⁸

Despite the ways in which New Delhi, Mumbai, Bangalore, and Hyderabad have thrived, each city has experienced tremendous difficulty in administering how the rule of law is adjudicated. As Table 3 shows, the courts within each city’s respective state suffer from incredible backlogs of cases that in many instances have been pending for up to a decade or more.¹⁵⁹

153. See BHAGWATI, *supra* note 7, at 64-65; FRIEDMAN, *supra* note 8, at 21-29.

154. Bangalore is home to the National Law School, and Hyderabad has the NALSAR University of Law. For a general discussion of legal education in India, see Krishnan, *supra* note 105, at 480-98.

155. See FRIEDMAN, *supra* note 8, at 3-49. In Hyderabad, the former chief minister, Chandrababu Naidu, was a key figure in transforming the city into a technological hub. He is currently president of a political party known as Telugu Desam. His website reports his efforts to spearhead the changes that have occurred in Hyderabad over the past decade. See Welcome to Telugu Desam Party, <http://www.telugudesam.com/html/party.htm> (follow “Party” hyperlink; then select “Manifesto 2004”); see also N. CHANDRABABU NAIDU & SEVANTI NINAN, PLAIN SPEAKING 75-101 (2000) (discussing the technological advances implemented in governance).

156. According to the CIA World Factbook, the total population of India is about 1.1 billion. *India*, in CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2006), available at <http://www.cia.gov/cia/publications/factbook/geos/in.html> [hereinafter WORLD FACTBOOK]. For state population figures, the 2001 census data is available at IndiaMart, *Indian States Population*, http://finance.indiamart.com/india_business_information/indian_states_population.html (last visited Mar. 10, 2007).

157. See FED’N OF INDIAN CHAMBERS OF COMMERCE & INDUS., FDI SURVEY 2004: THE EXPERIENCE OF FOREIGN DIRECT INVESTORS IN INDIA 7 (2004), <http://www.ficci.com/surveys/fdi-survey.pdf>.

158. See *Mumbai Richest City; Delhi Largest Car Mart*, REDIFF.COM, Apr. 15, 2004, <http://www.rediff.com/money/2004/apr/15survey.htm>.

159. See *Judge Me Not*, BUS. & ECON., Feb. 10-23, 2006, at 32 (noting that “[a]ccording to the Ministry of Law and Justice, 650,000 cases have been pending in the High Courts for more

Table 3¹⁶⁰

State	Cases Pending in Lower Court	Cases Pending in State High Court
Maharashtra (Bombay)	2,544,594	332,975
Karnataka	1,070,791	129,653
Andhra Pradesh	963,869	183,139
New Delhi	660,553	113,785

In Maharashtra there are over 2.5 million cases pending in the lower courts; over 2.1 million of these are criminal cases.¹⁶¹ In that state's supreme court, or High Court, over 330,000 cases remain pending, with about a third that have been pending for over five years.¹⁶² In Karnataka there are over one million cases awaiting adjudication in the lower courts, with about 45% classified as criminal matters,¹⁶³ while over 100,000 cases sit in the High Court. The numbers are just as staggering for both Andhra Pradesh and New Delhi.¹⁶⁴

The figures for the four states in Table 3 are symbolic of the backlog of cases affecting all of India's courts. In the Supreme Court alone there are about 20,000 cases pending.¹⁶⁵ The total number of cases pending in all of the state High Courts is roughly three million.¹⁶⁶ Nationwide there are twenty-four million cases pending

than 10 years, while 630,000 have been pending between 5 and 10 years").

160. The data for this table come from the comprehensive, well-known Indian statistical database, IndiaStat Home Page, <http://www.indiastat.com> (last visited Mar. 10, 2007). The data are from 2004 and are the most recent statistics compiled at the time of this writing.

161. *Id.* Specifically, in Maharashtra, 2,180,101 cases in the lower courts are criminal matters while 364,493 are civil matters.

162. *Id.* In fact, the specific figures are that 66,807 cases have been pending for over five years but less than ten years, and 61,035 have been pending for over ten years.

163. *Id.* The figure, specifically, is 458,996. There are 611,795 civil cases pending.

164. *Id.* In New Delhi's High Court, 18,909 cases have sat longer than five years but less than ten years, and 20,799 cases have sat for more than ten years. In New Delhi's lower courts, 521,199 cases are criminal matters while 139,354 are civil cases. In Andhra Pradesh's High Court, 35,215 cases have sat for more than five years but less than ten years, while 3796 cases have sat for more than ten years. In Andhra Pradesh's lower courts, 460,020 cases are criminal matters while 503,849 are civil cases.

165. See Jason Overdorf, *Unclogging the Courts*, NEWSWEEK (Atlantic Edition), July 18, 2005, at 36.

166. *Id.*

in the lower courts, two-thirds of which are criminal cases.¹⁶⁷ Relating to this last point, the government's own Law Commission in 2004 reported that 70% of those who are jailed (or about 275,000 people¹⁶⁸) languish as under-tried prisoners who have yet to face prosecution in court.¹⁶⁹

Two immediate questions come to mind. Why is there such a backlog? Is it because Indians are excessively litigious? The answers to these queries are complicated, because in part they are cross-cutting. In terms of litigiousness, clearly the Indian government is a litigant with respect to the two-thirds of cases in the lower courts that are criminal.¹⁷⁰ In civil cases, "[b]ranches of the government are often suing each other over contracts, land and other matters."¹⁷¹ One analyst estimates that the government is a litigating party in more than 60% of civil court cases.¹⁷² As this observer found, when the government is a litigant it tends to pursue cases simply for delay and engages in relentless appeals even where the chance of winning is remote.¹⁷³

Article 32 of the Indian Constitution also provides that

- (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
- (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certio-*

167. *Judge Me Not*, *supra* note 159; see LAW COMM'N OF INDIA, 189TH REPORT ON REVISION OF COURT FEES STRUCTURE 84 (2004), available at <http://lawcommissionofindia.nic.in/reports/189th%20Report%20on%20Revision%20of%20Court%20fee.pdf>.

168. Bibek Debroy, *Losing a World Record*, FAR E. ECON. REV., Feb. 14, 2002, at 23.

169. See LAW COMM'N OF INDIA, *supra* note 167; *Judge Me Not*, *supra* note 159 (noting that, as of 2006, the undertried population was 180,000).

170. There is no breakdown currently available as to what percentage of the criminal cases are central/federal law and what percentage are state law cases.

171. Overdorf, *supra* note 165.

172. *Id.* This point is supported by an interview with Richard Messick, Legal and Policy Analyst for the Public Sector Group, The World Bank (Jan. 14, 2002). Messick is an expert on the Indian government's role in litigation.

173. *Id.* For example, in the state of Uttar Pradesh, the government has lost virtually every case in which it participated, but it nevertheless appeals a large percentage to the state's High Court. This refusal to make reasonable settlement offers not only fills the courts with meritless claims and defenses, it forces the victims in each case to engage in an expensive, delay-plagued process that the state ultimately loses on most occasions. *Id.*

rari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.¹⁷⁴

The Supreme Court of India has broadly read Article 32 to permit litigants to file claims directly in its own Court where the central government is accused of violating a fundamental right of the constitution.¹⁷⁵ In order to have their claims heard, the litigants themselves can simply submit a letter that states a legal claim, or what is called an "epistle petition," which in theory is supposed to provide greater access to the legal process.¹⁷⁶ There are also lenient standing rules, under which neither "ripeness" of an issue nor lack of an actual controversy has been an obstacle to having a claim heard.¹⁷⁷ In addition, Article 226 of the constitution has been interpreted to allow claims to proceed in a state High Court where the state government is charged with violating a fundamental right or a right guaranteed by its own state law.¹⁷⁸

174. INDIA CONST. art. 32; *see also* EPP, *supra* note 103, at 81-82 ("[T]he Indian Supreme Court's jurisdiction is remarkably broad. It has original jurisdiction over disputes between the national government and the states and between different states; it has appellate jurisdiction over criminal and civil cases, ... and it has advisory jurisdiction to render its opinion on any question of law or fact referred to it by the president. The Court also has a special leave jurisdiction that grants it discretion to hear appeals involving 'any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India' except for matters relating to the Armed Forces. Thus the Supreme Court may decide nearly any issue that arises in Indian politics." (footnotes omitted)).

175. The fundamental rights guaranteed in the Constitution of India are found in Articles 12-35. They include such provisions as: the rights to equality; freedom of movement; freedom of speech and expression; freedom of religion, and the like. INDIA CONST. arts. 12-35. For case law on Article 32, *see* D.C. Wadhwa v. State of Bihar, A.I.R. 1987 S.C. 579 (re-promulgation of ordinances by governor without having them replaced by acts is unconstitutional); People's Union for Democratic Rights v. Union of India, A.I.R. 1982 S.C. 1473 (emphasizing strict enforcement of labor laws); S.P. Gupta v. President of India, A.I.R. 1982 S.C. 149 (power to appoint and transfer judges is strictly executive in nature); Fertilizer Corp. v. Union of India, A.I.R. 1981 S.C. 344 (jurisdiction under Article 32 to be exercised for enforcement of Part III fundamental rights only); Ratlam Municipal Council v. Vardhichand, A.I.R. 1980 S.C. 1622 (upholding authority of Court to require municipal officers to abate public health nuisance).

176. The norm, however, is that most litigants turn to lawyers for assistance in filing their claims. For a discussion of epistle petitions, *see* Carl Baar, *Social Action Litigation in India: The Operation and Limitations of the World's Most Active Judiciary*, 19 POLY STUD. J. 140, 140-42 (1990).

177. *Id.*; Krishnan & den Dulk, *supra* note 103, at 260.

178. *See, e.g.*, S.P. SATHE, JUDICIAL ACTIVISM IN INDIA 198-99 (2002).

Active involvement by the government and constitutional flexibility thus might explain the clogging of the Indian courts. On the other hand, about a decade ago Professor Christian Wollschläger compared the filing rates of civil cases in over thirty jurisdictions between 1987 and 1996.¹⁷⁹ Although there were certain measurement problems, Wollschläger's study found that the courts in India, in per capita terms, were not greatly used.¹⁸⁰ Moreover, there are statistics from other independent studies that lend support to the proposition that Indians are low users of civil litigation.¹⁸¹

179. See Christian Wollschläger, *Exploring Global Landscapes of Litigation Rates*, in *SOZIOLOGIE DES RECHTS* 582 (Jürgen Brand & Dieter Stempel eds., 1998).

180. *Id.*; see also Marc Galanter & Jayanth K. Krishnan, "Bread for the Poor": Access to Justice and the Rights of the Needy in India, 55 *HASTINGS L.J.* 789, 789 n.1 (2004) (evaluating Wollschläger's study). That article goes on to say that, according to Wollschläger,

[a]nnual rates of filing in courts of first instance per 1000 persons ranged from 123 in Germany and 111 in Sweden at the high end to 2.6 in Nepal and 1.7 in Ethiopia at the bottom. Since no national figures are available for India, Professor Wollschläger included in his comparison figures on Maharashtra, one of India's most industrialized states, whose capital (Mumbai or Bombay) is India's financial center. Maharashtra ranked thirty-second of the thirty-five jurisdictions with an annual per capita rate of 3.5 filings per 1000 persons. Of course, it is true that Wollschläger looked only at a single state and one ten-year period, and there is a question as to how representative his finding is for India overall. But there is no reason to think that Maharashtra has less litigation than India as a whole, since the data point to a general correlation of court use with economic development.

Id.

181. Professor Marc Galanter and lawyer Niketa Kulkarni have recently collected data tracking litigation rates in India from even before Independence in 1947. As Galanter wrote recently to the author:

India is renowned as a litigious society, but current figures suggest that the rate of court use is actually very low by international standards—lower than Japan or Korea which are famously non-litigious. Niketa Kulkarni and I have been collecting data about litigation rates in India and have had some success in finding figures from 1881 to 1968, but just a scatter of data since then. But here is the puzzle: the per capita rate of litigation in British India rose more or less steadily for fifty years, from about 7200 per million people in 1881 to 9900 per million in 1933. But then something happened: the rate started falling and by 1946 it was just 4300. The data we have separates Rent and Title suits from money damages cases. Title suits fall slightly, rent suits keep rising into the early 1940s and then drop precipitously. But the most dramatic change is in the money damages cases: the rate falls from 6900 per million in 1932 to 1500 in 1946. The latter part of this period is the war years, but the rate had fallen to 3600 by 1938. People on the ground would not have been concerned with rates, but might have noticed the fall in the absolute number of cases filed from 1.9 million in 1932 to 1 million in 1938 to 400 thousand in 1946. (Money damages cases were about two-thirds of all cases in 1932, but just over one-third in 1946).

Irrespective of whether India is litigious, there remains a terrible backlog of cases and delay in administering justice.¹⁸² While the central and state governments have aggressively sought to bring in foreign investment, what have they done to deal with the glutted court system at home? This question is addressed in the next section.

B. Confronting (and Avoiding) India's Judicial Dilemma

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.¹⁸³ This practice is a carryover from the colonial period. The British believed that in

So far as we can tell, litigation rates never rebounded from these lows and have remained low in Independent India. There are problems in comparing British India and Independent India, but we have found figures for [uttar Pradesh] for most of these years and find the same pattern prevails (the decrease starts a little later). So our question is: what caused this dramatic implosion of litigation in 1930s India that has proved an enduring shift to a lower rate of court use. We have been unable to identify any procedural, economic or political change that explains it. But there must be a reason or reasons. The point is that there was a massive collapse in the rate of use of the courts before Independence and that the post-Independence rates of court filings remain low—but require to be adjusted for all the tribunals, etc. So the congestion in the courts is not due to so much coming in but to so little coming out.

Letter from Professor Marc Galanter to author (Feb. 12, 2006) (on file with author); see also KATHARINA PISTOR & PHILIP A. WELLONS ET AL., *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960-1995*, at 246 (1999) (tracking litigation rates); Robert Moog, *Indian Litigiousness and the Litigation Explosion: Challenging the Legend*, 33 *ASIAN SURV.* 1136, 1138-39 (1993) (noting that "surprisingly little use has been made of the [Indian] civil courts compared with the U.S. courts of general jurisdiction"). Going back even further, consider Oliver Mendelsohn, *The Pathology of the Indian Legal System*, 15 *MODERN ASIAN STUD.* 823, 849 (1981) (noting that litigation had decreased since the late-nineteenth and early-twentieth centuries).

182. In fact, among most people—lawyers, judges, and ordinary citizens—there is a sad, fatalistic attitude toward the courts in India. It is true that the Supreme Court and state high courts are accorded a great deal of respect and legitimacy by both elites and the general public. But even with the upper judiciary there is resignation in terms of the length of time it takes to receive a judgment, not to mention the anxiety over whether the judgment will be executed. See Krishnan, *supra* note 99, at 93-94.

183. *Id.* at 100. In 2002, the Indian Civil Procedure Code was overhauled, with the intent being to reduce the number of these types of appeals. See *infra* note 261 and accompanying text. It is uncertain whether such a change will make a substantive difference in how the system operates.

order to protect themselves from adverse judgments in lawsuits, they needed to preserve the right to appeal both substantive and procedural rulings from lower courts, which were generally staffed by Indians.¹⁸⁴ 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.¹⁸⁵

The tradition of prolonged appeals continues today in independent India. In civil cases, losing parties have the ability to drag cases on for years and sometimes decades. A subcategory of "delay lawyers" has even emerged who are specialists in perpetuating the length of litigation.¹⁸⁶ These lawyers are in part motivated to keep litigation pending because of the way the Indian Bar organizes its fee structure—lawyers typically receive payment per court appearance. On the criminal side, prosecutors are often seen as abusing the appeals process by litigating side issues up the court system for years while keeping the accused detained.¹⁸⁷

The backlog and delay in adjudication are also a result of too few courts and too few judges. The Law Commission report notes that there are just 13,000 lower district courts to handle the 24 million cases currently pending.¹⁸⁸ Each court thus averages over 1800 cases on its docket. More telling, though, is that India ranks among the world's lowest in terms of judge-to-population ratio. There are presently only twelve judges per every one million people in India,¹⁸⁹

184. See JERRY DUPONT, *THE COMMON LAW ABROAD: CONSTITUTIONAL AND LEGAL LEGACY OF THE BRITISH EMPIRE* 487-88 (2001); Marc Galanter, *When Legal Worlds Collide: Reflections on Bhopal, the Good Lawyer, and the American Law School*, 36 *J. LEGAL EDUC.* 292, 296-97 (1986).

185. Barry Phillips, *British Commonwealth Case Note, Pratt & Morgan v. Attorney-General for Jamaica*, 88 *AM. J. INT'L L.* 775, 775-76 (1994).

186. See Galanter & Krishnan, *supra* note 180, at 822-23.

187. Press Release, Asian Legal Res. Ctr., ALRC Statement on 'Delayed Justice Dispensation System Destroying Rule of Law in India' Received by Commission on Human Rights (Apr. 1, 2005), available at <http://www.alrc.net/pr/mainfile.php/2005pr/81>.

188. See LAW COMM'N OF INDIA, *supra* note 167, at 84; *Judge Me Not*, *supra* note 159.

189. See Writ Petition, *Common Cause of India v. Shourie* (2004), available at <http://www.commoncauseindia.org/nl/april%E2%80%93june2005/8.htm>; Galanter & Krishnan, *supra* note 180, at 834 (noting that in contrast to countries like the United States, England, and Canada, which have 10.4, 6.6, and 6.5 judges per 100,000 people, respectively, India has 1 judge per 100,000 people). *But see* B.R. Lall, *Opinion, Clearing the Judicial Backlog: More Work, Not More Judges, Is the Answer*, *TRIBUNE* (Chandigarh, India), Sept. 28, 2002, <http://www.tribuneindia.com/2002/20020928/edit.htm#4> (arguing that comparing the low number of judges in India with the higher numbers in the West is inappropriate; instead what is needed,

with nearly 5000 vacancies in the state High Courts and district courts.¹⁹⁰ As one public interest organization has noted, even if the number of cases remains constant over the next five years, India will “need ten times the existing number of Judges to cope with [its] workload.”¹⁹¹

It would be unfair to suggest that the Indian central government has altogether ignored the crisis within the judiciary. Prominent officials over the years have offered proposals for improving the speed at which justice is delivered from the courts.¹⁹² Unfortunately, these initiatives have done little in the way of substantive reform. Most recently, alternative forums that would dispose of cases more quickly are being touted as the remedy for curing the crippling court system. One forum in particular, the *Lok Adalat*, or people’s court, has been championed with special fervor for nearly two decades.¹⁹³

Elsewhere, I, together with Professor Marc Galanter, have written in depth about how *Lok Adalats* operate.¹⁹⁴ We have found that despite the uniform praise they have been receiving, the performance of *Lok Adalats* in many ways is highly problematic, both in terms of resolving cases and in the quality of justice received by the parties.¹⁹⁵ In our two-plus years of field work in India, we rarely found government officials concerned with qualitatively evaluating the substantive outcomes of *Lok Adalat* decisions or with understanding how the parties themselves view the process.¹⁹⁶ Instead these officials praised the success and efficiency of *Lok Adalats* by pointing to the high number of cases disposed of.¹⁹⁷ But upon closer scrutiny of the relevant statistics, we found that, because of the inconsistent nature under which they were kept, the data failed to

according to the author, is greater efficiency by the existing Indian benches).

190. See Writ Petition, *Shourie*, *supra* note 189; *Judge Me Not*, *supra* note 159, at 32 (noting that “20% of the judges seats lay vacant pan India”).

191. See Writ Petition, *Shourie*, *supra* note 189; see also All India Judges’ Ass’n v. Union of India (2002) 4 S.C.C. 247 (recounting numerous petitions regarding judicial vacancies and working conditions).

192. For a summary of these previous reform efforts, see Galanter & Krishnan, *supra* note 180, at 791-97.

193. See generally *id.* (discussing the emergence of the *Lok Adalat*).

194. *Id.*

195. See *id.* at 828.

196. See *id.*

197. See *id.* at 824-25.

confirm such assertions of success.¹⁹⁸ We also discovered that decision making within *Lok Adalats* often was done in an arbitrary, heavy-handed fashion.¹⁹⁹ And it was common for parties who participated in *Lok Adalats* to express great dissatisfaction with this forum and to view this reform effort as a superficial response to a problem that needed more thoughtful deliberation.²⁰⁰

The perception among many that the government is not focused on meaningful change was confirmed a few years ago by a parliamentary advisory commission staffed by a group of prominent lawyers and former judges. The commission concluded that “[i]n the last 50 years, there has been no proper allocation of funds commensurate with the corresponding increase in population, legal awareness, [and] increase in legislation.”²⁰¹

Data indicate that while the government has been aggressively courting foreign investment since the early 1990s, expenditure on the judiciary during the same period has been, in the words of former Chief Justice R.C. Lahoti, “meagre.”²⁰² Table 4 shows the financial allocation from the last three five-year budgetary plans from the central government’s Planning Commission.

198. *Id.* at 825.

199. *Id.* at 828.

200. *See, e.g., id.* at 801, 818-19.

201. NAT’L COMM’N TO REVIEW THE WORKING OF THE CONSTITUTION, A CONSULTATION PAPER ON FINANCIAL AUTONOMY OF THE INDIAN JUDICIARY § 8.1 (Sept. 26, 2001), <http://lawmin.nic.in/ncrwc/finalreport/v2b2-1.htm>.

There not being a periodic Five Year or an annual Plan for the Judiciary, the absence of such plans has compounded the problem....

In the Supreme Court and the High Courts, budgets are prepared by the respective Courts but these budgets have to be submitted to the Union or State Governments, as the case may be, which will have the final say in regard to the extent of budgetary support. On the theory that the Judiciary is not productive of ‘goods’ or utilities, or application of ‘value for money’ theory, ... the judiciary has always been a very low priority. The result is that the judiciary has never got its due share of finances in the last fifty years either for increasing the number of Courts or the number of Judicial Officers and supporting staff, in the whole country.

Id. §§ 8.1, 8.10.

202. R.C. Lahoti, Chief Justice, *Envisioning Justice in the 21st Century: Keynote Address at the Conference of the Chief Justices of the High Courts and the Chief Ministers of the States* (Sept. 18, 2004), available at http://www.ebc-india.com/lawyer/articles/2004_7_13.htm.

Table 4²⁰³

Five-year Plans	Total Five-year Budget	Allocation for Judiciary	Conversion in U.S. Dollars**
1992-1997	491,100 crores*	110 crores	\$44,000,000
1997-2002	541,207 crores	385 crores	\$106,944,444
2002-2007	893,103 crores	700 crores	\$145,833,333

* 1 crore = 10,000,000 Rupees

** conversions from Rupees to Dollars adjusted according to exchange rates in the year budget was passed

Absent context, the data in Table 4 is difficult to interpret. Consider, therefore, that from the limited statistics available from the government, between 1992 and 1998, India's Law Ministry sought to spend roughly \$160 million improving the infrastructure of the judiciary.²⁰⁴ Updating and building more courtrooms, computerizing the courts, and filling and creating more judicial posts were all projects on which the Ministry hoped to spend. Yet adjusting for currency valuation, this sum of \$160 million for this six-year period was more than the total amount of money allocated to the judiciary for both the 1992-1997 and 1997-2002 five-year plans combined. Because there was clearly not enough funding to meet the Law Ministry's goals, the needs of the judiciary failed to be satisfied. Even in the latest budget plan (from 2002 to 2007), the government has allocated only about \$146 million for the judiciary, thus continuing its woeful underfunding for this institution.

The question of why the central government has not dedicated enough funding to improve the lot of the judiciary is difficult to answer. One possibility is that this issue is simply not a priority for the government; were the government *really* to value a better-

203. The data from Table 4 come from the following sources: First, the Central Government's Planning Commission publishes five-year budgets dating back over fifty years. The total budgets for the three five-year plans in the table come from this database, which can be found at Homepage of The Planning Commission, Government of India, <http://planningcommission.nic.in/> (last visited Mar. 10, 2007). The figures for the allocation of the judiciary can be found at Lahoti, *supra* note 202. In order to make the conversions to U.S. dollars, which were adjusted for the first year of each respective budget, I relied on the historic exchange rates available from [x-rates.com](http://www.x-rates.com/), which can be found at Historic Exchange Rates, <http://www.x-rates.com/cgi-bin/hlookup.cgi> (last visited Mar. 10, 2007).

204. JUSTICE & COMPANY AFFAIRS, MINISTRY OF LAW, ANNUAL REPORT ch. III, available at http://lawmin.nic.in/An_rep/Chapter3.htm.

functioning court system, it would have placed a sustained amount of time, effort, and research into this area long ago. There have been resources available, the argument goes, but the government has spent them in an ad hoc, haphazard manner. For instance, the central government's latest 2002-2007 plan authorizes an extra \$227 million for the construction of more alternative "fast-track" courts in the worst backlogged states, including Maharashtra, Karnataka, and Andhra Pradesh.²⁰⁵ However, the funding is being used to create a greater number of *Lok Adalats*, or a variation of this problematic model,²⁰⁶ which is worrisome to those who have studied the quality of justice that is administered in these alternative forums.

An alternative hypothesis to the notion that government leaders lack the will to improve the legal system is that, given the other existing political, economic, and social welfare commitments, there is just not enough money to devote to judicial infrastructure.²⁰⁷ It is important to remember that while certain sectors of the Indian economy are booming, the country still struggles with debilitating poverty and economic hardship. More than a quarter of the population lives on less than one dollar a day.²⁰⁸ India's per capita income is less than \$800.²⁰⁹ In 2005, the government's expenditures were \$136 billion while its incoming revenue was \$111 billion—a shortfall of over \$20 billion.²¹⁰ In addition, the International Monetary Fund recently concluded that "India's large public debt

205. See Overdorf, *supra* note 165. The government of Maharashtra has provided data on fast-track courts in India. In 2005, the Central Government allocated 502.90 crores (approximately \$117 million) for the establishment of 1734 fast-track courts. The Maharashtra government report notes how the number of such courts were allocated to each state. For the states we have looked at, the following report states that Maharashtra was to receive 103 courts, Karnataka was to receive 63 courts, and Andhra Pradesh was to receive 60 courts. No information on New Delhi is provided. See MINISTRY OF HOME AFFAIRS, FAST TRACK COURTS 1, ann. III, <http://mha.nic.in/Projects%5CFastcourts.pdf> (last visited Mar. 10, 2007).

206. See Overdorf, *supra* note 165.

207. Consider that at the state level, for its 2005-2006 budget, the state of Maharashtra, for example, allocated only \$9.7 million towards increasing its number of courts and judges. See GOVERNMENT OF MAHARASHTRA, BUDGET 2005-2006 ¶ 108, <http://finance.mah.nic.in/speech2005/speech10.htm>. There has been great concern whether this earmark will make serious inroads into the problems that exist.

208. See *Now for the Hard Part*, ECONOMIST, June 3, 2006, at 3, 4 (middle insert).

209. *Id.* at 4.

210. WORLD FACTBOOK, *supra* note 156.

remains a key constraint on growth."²¹¹ Add to this that sixty-one percent of the country remains illiterate.²¹² The list could go on.

Regardless of why there is a lack of funding, the problems associated with the Indian legal system, which have existed for decades, will seem to some unconnected to the subject of legal outsourcing. After all, it is India that is seeking to liberalize and strengthen its economy; if the government is enabling and encouraging outside capitalists to enter its market to make a profit, then should we really expect these investors to focus on anything but this goal? Moreover, from a perspective of basic rights and access to justice, it is incumbent that the state—not these private foreign investors—shoulder the responsibility of remedying the delays pending in the courts.

As we have seen, however, in addition to receiving a host of affirmative incentives, legal outsourcing investors also enjoy distinct political, employment, educational, historical, and linguistic advantages by working in India. Given the favorable conditions from which they draw, these beneficiaries, as I will propose in the next Part, have an ethical obligation to provide some type of assistance to India, such as contributing to legal reform efforts. After discussing this point, I then explain that it is also in these investors' self-interests to have a better-functioning Indian judiciary. With a growing number of American firms operating in India, the reliance and expectation on the courts to deliver rulings on business matters in a fair, efficient, and timely manner will only increase. Unfortunately, the way the judiciary has handled the few cases involving U.S. companies to date cannot be comforting to either American investors or the Indian government, which is interested in acquiring this foreign capital.

211. Public Information Notice No. 06/17, Int'l Monetary Fund, IMF Executive Board Concludes 2005 Article IV Consultation with India (Feb. 21, 2006), *available at* <http://www.imf.org/external/np/sec/pn/2006/pn0617.htm>. The IMF also noted that India's debt is about eighty-six percent of GDP. *Id.*

212. *See Few Hands Make Work Light*, *ECONOMIST*, June 3, 2006, at 8, 10 (middle insert).

V. FUNDING REFORM *THROUGH* LEGAL OUTSOURCINGA. *"The Public Be Damned. I'm Working for My Stockholders."*²¹³

Are American companies, law firms, and third-party vendors that save money and enhance profits by outsourcing legal work to India obliged to improve the legal environment within which they are working? The extent to which modern businesses have felt a responsibility to improve their surrounding society can be traced back to the early 1900s.²¹⁴ Morrell Heald, in his classic work, documents how the leading capitalists of the time, such as Andrew Carnegie and Henry Ford, established various philanthropic organizations and donated millions of dollars to different charities.²¹⁵ However, by the 1920s there was both an increase in need and a shift in giving. Because the demands of the needy grew exponentially during this period, rather than relying on the patronage of wealthy donors, the businesses these donors owned or worked for began making the financial contributions.²¹⁶ The 1929 stock market crash, the ensuing depression, and World War II obviously affected charitable donations over the next two decades; but there was also a lack of scholarship evaluating the normative dimension accompanying corporate giving.

A shift toward more critical examination of corporate social responsibility began in the 1950s. Zeinab Karake-Shalhoub offers a detailed summary of the various positions that emerged during

213. This quote is from William Vanderbilt and can be found in Robert C. Solomon, *Business Ethics*, in *A COMPANION TO ETHICS* 354, 354 (Peter Singer ed., 1991).

214. Although this is not to say that awareness, or a tradition of thinking about businesses helping society, started then. After all, the idea that entrepreneurs should not be greedy and should contribute to the welfare of society was discussed as far back as Aristotle. Others also condemned profit making simply for profit making's sake. For a discussion of this point, see *id.* at 355.

215. See MORRELL HEALD, *THE SOCIAL RESPONSIBILITIES OF BUSINESS: COMPANY AND COMMUNITY, 1900-1960*, at 17-18, 87-88 (1970). Heald's work is discussed and cited in WILLIAM C. FREDERICK ET AL., *BUSINESS AND SOCIETY: CORPORATE STRATEGY, PUBLIC POLICY, ETHICS* 28-29 (1988). For works on Henry Ford that discuss this point, as well as his unfortunate racist, anti-Semitic views, see NEIL BALDWIN, *HENRY FORD AND THE JEWS: THE MASS PRODUCTION OF HATE* (2001); DOUGLAS BRINKLEY, *WHEELS FOR THE WORLD: HENRY FORD, HIS COMPANY, AND A CENTURY OF PROGRESS, 1903-2003* (2003); MAX WALLACE, *THE AMERICAN AXIS: HENRY FORD, CHARLES LINDBERGH, AND THE RISE OF THE THIRD REICH* (2003).

216. See FREDERICK ET AL., *supra* note 215, at 29.

the 1950s and in the subsequent decades.²¹⁷ For instance, H.R. Bowen, in 1953, and Richard Eells, in 1956, each argued that corporations had an obligation to ensure that their actions conformed to the prevailing norms of society.²¹⁸

At the same time, however, a competing view emerged. According to this perspective, the main goal for corporate leaders or managers had to be profit maximization for shareholders.²¹⁹ As Milton Friedman argued some years later, doing otherwise would lead to economic inefficiency, impose various internal costs on the company, and impair the market from naturally defining the welfare needs of the particular society in which the business operated.²²⁰ More important for Friedman, though, was that burdening companies with social responsibility mandates was unfair to society and potentially corruptive.²²¹ Business executives were not trained in public policy matters—that was, according to Friedman, the jurisdiction of elected officials and bureaucrats.²²² Although corporate responsibility proponents seemed to advocate giving businesses the additional power of affecting social policy, for Friedman this amounted to concentrating power in the hands of an isolated, elite group.²²³

As the years passed, various responses to Friedman emerged, some of which built on the earlier positions of both Bowen and Eells. There were, for example, those who argued that, with the increased wealth and power corporations possessed, they had a moral duty to ensure that their business operations did not adversely affect the environment, the rights of consumers, and the overall public interest.²²⁴ Several of these scholars saw society as having specific

217. ZEINAB A. KARAKE-SHALHOUB, ORGANIZATIONAL DOWNSIZING, DISCRIMINATION, AND CORPORATE SOCIAL RESPONSIBILITY 16-36 (1999).

218. *Id.* at 17. See generally H.R. BOWEN, THE SOCIAL RESPONSIBILITY OF THE BUSINESSMAN (1953); RICHARD EELLS, CORPORATION GIVING IN A FREE SOCIETY (1956).

219. See KARAKE-SHALHOUB, *supra* note 217, at 18 (citing classic works in the field, including Theodore Levitt, *The Dangers of Social Responsibility*, HARV. BUS. REV., Sept-Oct. 1958, at 41-50, J.A. LIVINGSTON, THE AMERICAN STOCKHOLDER (1958), and LOUIS KELSO & MORTIMER J. ADLER, THE CAPITALIST MANIFESTO (1958)).

220. See MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133-36 (1962); KARAKE-SHALHOUB, *supra* note 217, at 18.

221. See FRIEDMAN, *supra* note 220, at 133-36.

222. *Id.*

223. *Id.*; see KARAKE-SHALHOUB, *supra* note 217, at 18, 24-27.

224. This point of view is summarized in FREDERICK ET AL., *supra* note 215, at 36 (citing

needs and demands, and saw corporations as having a social justice obligation to meet and respond to these issues.²²⁵

Others approached corporate responsibility from a different angle. For this group, shareholders were only one constituency that corporate managers had to consider. There were additional “stakeholders” whose situations deserved consideration.²²⁶ Determining who qualified as a stakeholder depended on the advocating theorist, but the category could be as broad as “the employees, the consumers and the suppliers as well as the surrounding community and the society at large.”²²⁷ The attraction of this perspective was that it necessarily required corporate managers to contemplate how their actions affected a wider circle of interests.

There were other, more direct economic reasons why the Friedman position seemed untenable to those in favor of corporate social responsibility. Where businesses affirmatively and voluntarily engaged in improving society, there would be less likelihood of intrusive governmental regulations.²²⁸ And being active and responsible within its society also bettered the public image and reputation of the corporation—which would likely lead to increased customer satisfaction and loyalty, easier recruitment of committed, dedicated employees, and greater investment in that business.²²⁹

This thumbnail sketch of the different perspectives on corporate social responsibility may suggest that these viewpoints were mutually exclusive. In fact, there was some shared common ground. For one thing, even among the most ardent supporters of corporate

a prominent book that was published in the 1960s, KEITH DAVIS & ROBERT BLOMSTROM, *BUSINESS AND ITS ENVIRONMENT* (1966)).

225. See KARAKE-SHALHOUB, *supra* note 217, at 28-29 (citing JAMES J. BRUMMER, *CORPORATE RESPONSIBILITY AND LEGITIMACY: AN INTERDISCIPLINARY ANALYSIS* (1991)); Robert Hay & Edmund Gray, *Social Responsibilities of Business Managers*, in *MANAGING CORPORATE SOCIAL RESPONSIBILITY* 138 (Archie B. Carroll ed., 1977); S. Prakash Sethi, *Dimensions of Corporate Social Performance: An Analytical Framework*, in *MANAGING CORPORATE SOCIAL RESPONSIBILITY*, *supra*, at 69-75); see also PETER A. FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* 31-47 (1984).

226. See KARAKE-SHALHOUB, *supra* note 217, at 27-28.

227. Solomon, *supra* note 213, at 360; see also Kenneth E. Goodpaster, *The Concept of Corporate Responsibility*, 2 *J. BUS. ETHICS* 1 (1983) (discussing the “principle of moral projection”); Kenneth E. Goodpaster & John B. Matthews, Jr., *Can a Corporation Have a Conscience?*, *HARV. BUS. REV.*, Jan.-Feb. 1982, at 132 (arguing that an organization can have a conscience).

228. See FREDRICK ET AL., *supra* note 215, at 36-37.

229. *Id.*

responsibility, the notion that profit making was normatively “bad” was not a point emphasized in the discourse.²³⁰ Likewise, later supporters of Friedman’s thesis, while defending the principle of corporate autonomy, accepted that corporations were obliged to comply with certain public and governmental expectations.²³¹ And important present-day scholarship has moved the discussion forward by building on various aspects of this debate to address new, but still related, questions of corporate governance.²³²

One prominent corporate law scholar and legal ethicist advancing the dialogue in this direction is Lawrence Mitchell. While embracing various aspects of capitalism and the practice of profit-seeking and profit-making, Mitchell also argues that American corporate managers have fallen prey to the short term, stock-price-maximization desires of their shareholders. In doing so, corporate managers have ignored the interests of other constituents and the interests of society at large.²³³ For Mitchell, a host of institutional and cultural factors contribute to managers emphasizing immediate financial gratification for their shareholders. Existing laws insulate corpora-

230. See KARAKE-SHALHOUB, *supra* note 217, at 20-24 (citing, among others, PETER DRUCKER, *MANAGEMENT: TASKS, RESPONSIBILITIES, PRACTICES* (1974); JOSEPH WILLIAM MCGUIRE, *BUSINESS AND SOCIETY* (1963)); see also ROGER M. D’APRIX, *IN SEARCH OF A CORPORATE SOUL* (1976) (discussing how organizations can “humanize and update themselves”); Solomon, *supra* note 213, at 356-57. Consider also the famous work of Herbert Simon and his concept of “satisficing,” which related to the notion that, while earning profits was an acceptable goal, it was not the only goal, nor did profits have to be maximized. The idea Simon put forth, drawing in part on the stakeholder model, was that business managers had to consider multiple interests. In the long term, reaching a level of satisfaction, or satisficing, for the various constituencies often was preferable to maximizing the profits for one group, which could come at the expense of others. See generally HERBERT A. SIMON, *MODELS OF BOUNDED RATIONALITY* (1982); Herbert Simon, *Decision Making and Problem Solving*, in *DECISION MAKING: ALTERNATIVES TO RATIONAL CHOICE MODELS* 32, 36-37 (Mary Zey ed., 1992); Herbert A. Simon, *Satisficing*, in 4 *THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS* 243, 243-45 (John Eatwell et al. eds., 1987).

231. See generally ARCHIE B. CARROLL, *BUSINESS & SOCIETY: ETHICS AND STAKEHOLDER MANAGEMENT* ch. 1-2 (6th ed. 2006) (noting that regulation of business is part of the social contract); RAGHURAM G. RAJAN & LUIGI ZINGALES, *SAVING CAPITALISM FROM THE CAPITALISTS: UNLEASHING THE POWER OF FINANCIAL MARKETS TO CREATE WEALTH AND SPREAD OPPORTUNITY* 2 (2003) (arguing that capitalists seeking protection become strange allies with politicians during periods of economic downturn).

232. See, e.g., CARROLL, *supra* note 231; MITCHELL, *supra* note 18, at 4 (suggesting that the maximization of shareholder value has not been the historical purpose of corporations); RAJAN & ZINGALES, *supra* note 231, at 293-310 (proposing reforms that would not interfere with free markets).

233. See MITCHELL, *supra* note 18, at 3-11, 135-84.

tions from liability and from taking responsibility for their actions that often adversely affect nonshareholder interests.²³⁴ In addition, the emergence of new types of investors, such as day traders, who are ready to invest but have little allegiance to the corporation, its employees, or surrounding communities, also feed this frenzy.²³⁵ And a lack of social vision on the part of managers, along with a corporate culture that values excessive greed and selfishness, serve as other reasons why corporate social responsibility is too often eschewed.²³⁶

This status quo, from a normative point of view, is unacceptable to Mitchell. To curb their power, Mitchell proposes limiting the influence shareholders have on corporate decision making.²³⁷ He argues further that asocial behavior by American corporations is not restricted to within the United States.²³⁸ He is acutely aware of how American corporations abroad have turned a blind eye to, and in some cases participated in, the turmoil within the societies in which they operate.²³⁹

234. *Id.* at 97-207.

235. *Id.* at 149-51, 165-84.

236. *Id.* at 4-11, 84-94. For a terrific article on the intersection of legal ethics, corporate culture, principles of accounting, and the professional obligations of executives and, in particular, business lawyers, see Lawrence A. Cunningham, *Sharing Accounting's Burden: Business Lawyers in Enron's Dark Shadows*, 57 *BUS. LAW.* 1421 (2002). In this article Professor Cunningham examines how a culture of isolation has emerged in which lawyers working in or for corporations often have little understanding of how the financial and accounting practices operate. What ultimately ends up happening, as Cunningham lucidly describes, is that situations emerge like Enron, which he considers mainly a giant accounting failure. Cunningham argues that the lack of emphasis on accounting practices in business law courses in law school, along with the equivocalness of legal ethics regarding the obligations of corporate lawyers, helps perpetuate a culture of irresponsibility or "pass[ing]-the-buck." *Id.* at 1454.

237. See MITCHELL, *supra* note 18, at 157-64. For example, he argues that shareholders should be limited in how influential they are in the election of managers, and that the fashion in which the shareholders are able to demand information from the corporate brass should be rethought. Interestingly, he also suggests that managers provide an expansive array of information to shareholders regarding how the corporation's activities impact—and are impacted by—the society in which it functions. The point here is that if shareholders are more aware of their surroundings, they may be more inclined to support, and even push for, the corporation engaging in societal outreach programs. *Id.* For a response to these and other arguments by Mitchell, see Douglas M. Branson, *Corporate Irresponsibility—America's Newest Export*, 65 *U. PITT. L. REV.* 911 (2004) (book review).

238. MITCHELL, *supra* note 18, at 1-2.

239. *Id.*

Given the extent to which American legal outsourcing companies benefit by working in India while the legal environment around them sits on the brink of collapse, there are a few questions that arise. Do these firms have a moral obligation to help? Are there other reasons they may have for wanting to help? If so, what are they? And how might they help?

Along the lines of what Mitchell and other corporate responsibility scholars argue, I suggest in the final Part of this Article that the answer to the first inquiry is yes. I subsequently explain that there are also self-interested reasons that investors ought to be willing to provide assistance. I then discuss how such assistance might come to fruition.

B. Sketching Out Ethical and Economic Justifications for a “Good Governance Fee”: Concluding Remarks

For those interested in outsourcing legal work, India provides an array of incentives. The advantages that these businesses receive, though, are not totally one-sided. As we have seen, the Indian economy has been infused with tens of millions of dollars from this investment, and Indians who work in this sector enjoy greater personal wealth. Furthermore, the outsourcing of legal work to India is helping at least a certain segment of workers become more specialized, which has been a feature noticeably lacking among Indian legal professionals for decades. In his observation of the Indian Bar, in particular, Marc Galanter some years back observed that “[a]mong the prominent features of Indian lawyers are their orientation to courts to the exclusion of other legal settings; their orientation to litigation rather than advising, negotiating or planning; their conceptualism and orientation to rules; their individualism; and their lack of specialization.”²⁴⁰

Galanter’s nearly twenty-year-old description still holds true for a large percentage of Indian lawyers. Most Indian lawyers remain as courtroom litigators and are rarely involved in transactional work.²⁴¹ As legal outsourcing to India continues, however, we will

240. See Galanter, *supra* note 184, at 282.

241. In fact, the vast majority practice in lower-level district courts, with a smaller number working in their respective state high courts, and with only 100 to 150 working primarily in the national Supreme Court. Increasingly, there are lawyers who work in law firms (with

likely see a group of new legal professionals emerging—some of whom are lawyers but many of whom are not—who as a class will become experts in an area of law in which there is now increasing global demand. Presuming that more specialization occurs, which will likely lead to more competition, innovation, and a possible transformation of the Indian legal profession, legal outsourcing then will have had an influencing effect.

Even if legal outsourcing generates these economic and other benefits, is there any other obligation that these foreign investors owe to Indian society? I believe there is. American law firms, companies, and third-party vendors that outsource legal work to India do not do so in a vacuum. As they receive low-cost legal services, the society that helps to provide these financial savings continues to suffer with a legal system mired in delay and paralyzed by a weak judicial infrastructure.

Moreover, the vast majority of Indians remain unaffected by legal outsourcing. These hundreds of millions of Indians need better access to the legal process and less delay in the amount of time their cases are adjudicated. There are important steps that could be taken to improve the legal climate within the country, including providing more funding for legal aid, investing in judicial education and training, hiring more judges, researching reduction of abuse of the civil and criminal procedure codes, and building more physical courtrooms. But these initiatives cost money, which as we have seen, the Indian government cannot—or is not willing to—spend. Given that legal outsourcing entrepreneurs draw from the Indian legal environment, profit from the advantages they receive by working within India, and presumably possess resources that could be used to help defray costs associated with legal reform, it would

typically no more than 75 lawyers), government agencies, domestic companies, and nongovernmental organizations. See Jayanth K. Krishnan, *Transgressive Cause Lawyering in the Developing World*, in *THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE* 349, 355 (Austin Sarat & Stuart A. Scheingold eds., 2005); Jayanth K. Krishnan, Essay, *Lawyering for a Cause and Experiences from Abroad*, 94 CAL. L. REV. 574, 590-91 (2006) [hereinafter Krishnan, *Lawyering for a Cause*].

be the epitome of “selfishness,”²⁴² to use Lawrence Mitchell’s term, for these businesses to not chip in.

One immediate question some will have is why should legal outsourcers be singled-out? Other types of foreign businesses surely receive the same, if not greater, benefits by working in India. Why should these other enterprises not be asked to contribute?

This Article has focused on legal outsourcers, with an emphasis on the benefits they secure and corresponding obligations they owe. Assuming that other types of foreign investors hold similar advantages, however, there is no reason that they ought to be exempt from the obligation to help. In fact, a few American, nonlegal businesses have already realized the implications of working within India’s delay-plagued legal environment.²⁴³ After serious consideration, SpectRx Inc., a Georgia company that manufactures medical devices, decided against outsourcing work to India.²⁴⁴ A key factor, according to in-house counsel Michael Lasky, was that because “[t]he Indian legal system is close to nonfunctional ... [t]here’s a wide open risk”²⁴⁵ that the courts would not be able to enforce confidentiality agreements the company asks its customers to sign.

Issues relating to confidentiality fall under the larger category of contracts, other types of which might take years or decades to enforce in court as well. Imagine a situation in which an American

242. See MITCHELL, *supra* note 18, at 36. Mitchell’s argument rests in part on John Rawls’s classic notion that institutions, whether they be governmental or corporate, should have leaders who are entrusted to take actions that ensure the results are just and equitable to society. *Id.* at 30, 74 n.f.; JOHN RAWLS, *A THEORY OF JUSTICE* 54-60 (1971).

243. In 2002, John Hewko authored a provocative study examining the factors that affect whether a developing country receives foreign investment. Contrary to the views of many leaders within international donor agencies, nongovernmental organizations, and democratic nations, Hewko argued that a developing country’s legal system was of little relevance to investors. Instead, he found that investors based their decisions on the actions of the host country’s legislature and bureaucracy, as well as on “the existence of real business opportunities and the overall visceral perception” of the environment. See John Hewko, *Foreign Direct Investment: Does the Rule of Law Matter?*, 4 (Carnegie Endowment for Peace, Working Paper No. 26, 2002), available at <http://www.carnegieendowment.org/files/wp26.pdf>. Even though Hewko focused on post-Soviet countries in his study, his thesis might well explain the enthusiasm of most investors currently doing or planning to do business in India. Given the present dilemma of the Indian legal system, Hewko’s enthusiasm and argument seem short-sighted when we consider the cases discussed in the ensuing paragraphs.

244. See Emily Kopp, *A Smaller Legal World*, FULTON COUNTY DAILY REP., Dec. 13, 2005, available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1134394503849>.

245. *Id.*

company contracts with an Indian developer to build a new office tower that never comes to fruition. Or what if after the tower is built, there are structural defects that the American company wants the Indian developer to correct? There are numerous other scenarios worth conjuring, and in each of these it is possible that the American business would prevail in court. The question, however, is after how much time? And, ultimately, is the pay-off worth it to the American company even with a cheaper labor market at its disposal?

Two concrete examples where American business executives have pondered these inquiries involved Cogentrix Energy Corp. and the years of litigation in which it was involved during the 1990s, and more recently, the Coca-Cola Corp. (Coke) and the lawsuits it has fought. In 1992, Cogentrix, which is headquartered in Charlotte, North Carolina, signed a deal with the Indian state government of Karnataka to establish a \$1.3 billion coal-fired power plant near the well-known Mulki River.²⁴⁶ Almost immediately, environmental groups filed multiple public interest litigation petitions in the state's high court.²⁴⁷ The groups argued that the planned site for the power plant would cause irreparable damage to the river on which indigenous communities relied for their agricultural and fishing needs.²⁴⁸ Subsequent petitions were then filed accusing Cogentrix of bribing a government agency to approve the company's construction plans.²⁴⁹

Parallel suits have also been brought against Coke over the past five years. Coke has twenty-seven bottling facilities across India and another seventeen franchisee-owned operations.²⁵⁰ Coke has invested over \$1 billion in India, employs around 6000 Indians, and asserts that its business contributes to an additional 125,000 jobs in the country.²⁵¹ Environmental and indigenous rights activists argue, however, that Coke's bottling plants have displaced thou-

246. The Mulki River is located near the city of Mangalore (not Bangalore). See Ranjit Dev Raj, *Indian Supreme Court Clears Cogentrix of Corruption*, ASIA TIMES ONLINE, Dec. 15, 1999, <http://www.atimes.com/ind-pak/AL15Df01.html>.

247. See *id.*

248. See *id.*

249. See *id.*

250. Coke has set up a website that details its operations in India. See Coca-Cola India: Key Facts, http://www.cokefacts.org/facts/facts_in_keyfacts.shtml (last visited Mar. 10, 2007).

251. *Id.*

sands of local villagers.²⁵² They claim that Coke has misused and hoarded scarce water resources, leaving communities barren.²⁵³ Critics contend that Coke has contaminated local environments with pollutants and that the company's product itself is of lesser quality than what is sold in the West.²⁵⁴

Cogentrix and Coke have denied these charges both in the media and in court. Cogentrix spent from 1992 until the end of the decade litigating its case up and down the Indian courts. Finally, in December of 1999, the company decided to pull out of Karnataka and cease its operations, even before an anticipated ruling from the Supreme Court on the bribery charges.²⁵⁵ As the company stated, its decision was based in large part on the endless appeals by its opponents and delays allowed by the Indian legal system.²⁵⁶

Coke has been engaged in constant litigation since 2002. In fact, the company has had a tumultuous history in India. In the late 1970s, Coke was ordered out of the country by then Minister of Industry George Fernandes for not giving its Indian subsidiaries more of an equity stake in the corporation.²⁵⁷ Coke returned two decades later, but one looming question is whether the mounting

252. India Resource Center is a prominent activist organization that has been championing the rights of indigenous communities throughout India. It has been fighting Coke and the company's business practices for decades. See generally India Resource Center, <http://www.indiaresource.org/> (last visited Mar. 10, 2007).

253. *Id.*; see also India Resource Center, Campaign To Hold Coca-Cola Accountable, <http://www.indiaresource.org/campaigns/coke/index.html> (last visited Mar. 10, 2007) [hereinafter *Campaign*].

254. See *Campaign*, *supra* note 253.

255. The Court ultimately cleared Cogentrix. See *State of Karnataka v. Arun Kumar Agarwal*, A.I.R. 1999 S.C. 888; Raj, *supra* note 246.

256. See Raj, *supra* note 246. Cogentrix, at the time, noted that the use of public interest litigation by its opponents had run amok and contributed to the prolonged litigation process. Tony Allison, *Enron's Eight-year Power Struggle in India*, ASIA TIMES ONLINE, Jan. 18, 2001, <http://www.atimes.com/reports/CA13Ai01.html>. Recently, the Prime Minister of India, Dr. Manmohan Singh, expressed similar concern about the possibility of public interest litigation petitions becoming a burden on India's efforts to modernize and implement economic reform: "We need to reflect whether we have reached a stage where the pendulum has swung to the other extreme, whether [public interest litigation] has become a tool for obstruction, delay and, sometimes, harassment." See J. Venkatesan, *Manmohan: Judicial Activism Should Be Used with Restraint*, HINDU, Mar. 12, 2006, <http://www.hindu.com/2006/03/12/stories/2006031205570800.htm>.

257. See Paranjay Guha Thakurta, *Coke: The Arrogance of a Multinational*, REDIFF INDIA, July 20, 2002, available at <http://www.indiaresource.org/campaigns/coke/2003/arroganceofmultinational.html>.

lawsuits will lead the company to scale back its investments, or even force it to depart India once again.

To be sure, lawyers for Cogentrix and Coke used different procedural delaying tactics for their clients' benefit, and there is further evidence to suggest that their critics' claims are far from baseless.²⁵⁸ In my past writings I have sided with the litigation efforts of environmental and indigenous movements in similar types of cases,²⁵⁹ but evaluating the substantive merits of these two particular matters is not the purpose of this Part. Rather, the point of significance is the length of time that parties like Cogentrix and Coke, as well as their opponents, must wait before hearing final judgments on the petitions filed in court.²⁶⁰ Whether more U.S. companies follow the lead of Cogentrix is an open question, but that the possibility exists should be unsettling for a government anxious for more foreign investment and for American businesses that wish to continue hiring comparatively cheaper workers.

There is one possible way to improve the situation. To fund the above-mentioned reform initiatives, the Indian government could make a financial demand from American companies benefitting from the practice of outsourcing. It could impose what might be called a "good governance fee." The fee would be progressive in nature and would have to be calculated in a way so as not to deter current or future rates of foreign investment. Consider the possibilities of collecting even a fraction of the outsourcing revenue that comes into India. One could imagine, for example, that the money could be used immediately to expand judicial education and training programs.

Alternatively, the government could devote the revenue generated from this fee to establish an independent commission to study ways

258. For an interesting discussion highlighting this point with respect to Cogentrix, in particular, see Jayati Ghosh, *The Curious Case of Cogentrix: What are Multinationals and the Comprador Groups to Do?*, 17 *FRONTLINE*, Jan. 7, 2000, at 100.

259. See, e.g., Krishnan, *Lawyering for a Cause*, *supra* note 241.

260. Interestingly, as India has sought to become a full-fledged member of the World Trade Organization, it has, as a prerequisite, been required to comply with the Trade Related Aspects of Intellectual Property Rights (TRIPs) agreement. For one study noting that the country's courts have assisted in making the transition in a substantive, timely way, see Anoop Narayanan, Majmudar & Co., *India: A Changing IP Environment*, http://www.buildingipvalue.com/06AP/318_321.htm; see also World Trade Organization, TRIPs Material on the WTO Website, [http://www.wto.org/english/tratop_e/trips_e/trips_e.htm#What Are](http://www.wto.org/english/tratop_e/trips_e/trips_e.htm#What%20Are).

to end frivolous delaying tactics used by lawyers without infringing on the rights of those being represented. In 2002, a series of amendments were passed to the Indian Civil Procedure Code that attempted to curb the number of interlocutory appeals.²⁶¹ Since then, there has not been any serious academic study evaluating the merits of these amendments and whether further initiatives are needed.²⁶²

Another alternative would be to use the fee to provide legal aid to the large portions of the population that lack the necessary resources to ensure their legal rights are safeguarded. One model to consider would be the interest on lawyers' trust accounts programs (IOLTA) in the United States, which are state plans that were set up after 1980 to help fund low-income legal services.²⁶³ IOLTA funds come from the interest earned on monies lawyers hold for clients in certain trust accounts. States then distribute this interest to various legal aid programs within their jurisdiction. On average, IOLTA programs across the United States generate over \$130 million a year.²⁶⁴ Similarly, in India a percentage of money earned from the good governance fee could be held in an interest-bearing account that pays out revenue to legitimate, but often resource-hungry

261. *Bill Putting Justice on Fast Track Passed*, TRIBUNE (Chandigarh, India), May 14, 2002, available at <http://www.tribuneindia.com/20020514/main3.htm>.

262. Some may suggest that my focus on reforming the courts in India, as a means of being beneficial to the interests of foreign investors, misses what is already occurring within the country—namely the use of commercial arbitration forums. It is believed that many multinational corporations, in their agreements with either Indian government agencies or Indian businesses, place within their contracts provisions to resolve disputes in arbitration forums rather than in the Indian courts. Here too, however, rigorous study is required to determine whether such an alternative is working to the satisfaction of the parties or instead is going in the direction of how *Lok Adalats* are functioning. From the scattering of reports that exist, there are questions as to whether these arbitration forums are indeed operating any better than the regular courts. *Indian Arbitration Needs To Improve: Justice Balakrishnan*, Dec. 9, 2006, ARBITRATION.INDLAW.COM, available at <http://arbitration.indlaw.com/Guest/News/ViewNewsDetail.asp?NewsID=B3334AC096FAE9FFC0E79A538BBE14F6>; *Judge Calls for Amendment to Arbitration Law*, HINDU, Dec. 7, 2003, available at <http://www.hinduonnet.com/2003/12/07/stories/2003120703121000.htm>.

263. For a useful, detailed discussion on IOLTA programs, see David Luban, Essay, *Taking Out the Adversary: The Assault on Progressive Public-interest Lawyers*, 91 CAL. L. REV. 209 (2003); see also *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003) (5-4 decision) (holding that IOLTA programs were constitutional).

264. This figure is from 2003, the last available data provided by the American Bar Association's IOLTA webpage. See *What Is IOLTA?*, <http://www.iolta.org/grants.cfm> (last visited Mar. 10, 2007).

nongovernmental and state organizations that work on legal aid for the needy.

The point is that a contribution like the good governance fee could be used to help improve a struggling legal system as well as help a significant percentage of the population. If such a fee is directed toward particular projects, such as increasing the number of judges and courtrooms, the effects could directly serve the interests of the foreign investors themselves. The critical question is whether the Americans engaged in outsourcing would agree to this proposal. Recall that, at least in terms of legal outsourcing companies, firms like Intellevate are free from any tax obligations for the next several years.²⁶⁵ Be it tax-exempt status or lower labor wages, India is attractive because of the overall cheaper costs. But if these costs begin to rise, then the decision to outsource to India will surely be reevaluated.

One American who was interviewed for this study and who works as a third-party legal outsourcing vendor stressed that framing the fee would be significant in how well it is received.²⁶⁶ This individual believes that, because of the amount of money Indians have saved American lawyers and clients, U.S. legal outsourcers indeed have an obligation to help India's legal system.²⁶⁷ To this vendor, the nature of the Indian legal profession is likely to be altered because of current legal outsourcing practices.²⁶⁸ For instance, once these Indian legal workers become familiar enough with how to draft patent applications on their own, they will leave the American vendor, form their own firm, hire a cheaper U.S.-licensed lawyer to sign off on work they do, and compete directly for clients.

The effect, according to this vendor, will be two-fold. First, the Indian firm will be able to charge less than the U.S. vendor, perhaps even eventually rendering the latter obsolete.²⁶⁹ Second, while it is charging less, the Indian firm will still be making far greater profits than most other businesses (legal and nonlegal) in the Indian marketplace.²⁷⁰ As other similar types of legal specialty

265. See *supra* note 91 and accompanying text.

266. Interview with a third-party vendor who wished to remain anonymous (Mar. 2, 2006).

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

firms emerge, the result will be further disparity between those with wealth and the vast majority of Indians who struggle to make ends meet. Because American legal outsourcing practices will have contributed to this change in the profession and to the widening gap, this vendor believes that he, and others like him, have a duty to help.²⁷¹ Yet he also maintains that his altruistic attitude will be a minority viewpoint among those in his industry.²⁷² For him, emphasizing that the tax will be used to enact reforms in the judiciary—which will be beneficial to U.S. businesses—is the best way to convince investors of its merit.²⁷³

Irrespective of how the good governance fee is framed, the key is that if the interests of ordinary Indians, as well as American businesses, are to be protected, then there must be changes made in how India's legal process functions. In sum, the hope is that this study has fulfilled two goals. First, that it has shed light on the different ways American entrepreneurs are outsourcing legal work to India. Second, that it has provoked a discussion of the ethical obligations and economic incentives for Americans to assist a society which is providing, but at the same time is in need of, so much.

271. *Id.*

272. *Id.*

273. *Id.*