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Perry Kessaris, A. *Global business, local law: the
Indian legal system as a communal resource in
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Chapter 1

Introduction

Global business

'At its core ... globalization is about shifting forms of human contact.' It is about their 'creation' and 'multiplication', 'expansion' and 'stretching', 'intensification' and 'acceleration' (Steger, 2003, pp. 8–12). This study focuses on those forms of human contact which are triggered by foreign direct investments (FDI).¹ Made with a view to 'acquir[ing] a lasting interest in enterprises operating outside of the economy of the investor', and to gain a voice in the management of that enterprise,² this form of international economic activity has the potential to generate relatively deep and long-lasting social relationships, as compared to others such as portfolio investment or trade.

Foreign direct investments create and alter relations between many types of human actor – buyers and sellers, employers and employees, suppliers and retailers, consumers and producers, shareholders and company officials, regulators and regulatees – who may be located in the home states from which investments originate, the host states in which investments are made, and beyond. This study focuses on interactions between foreign investment, host state civil society, and host state government actors. For the purposes of the present study, *civil society actors* are defined as non-governmental, not-for-profit individuals and collectivities which seek to express, promote and defend the interests and values – whether political, ethical, cultural, scientific, religious or philanthropic – of their members or others.³ The term *government actors* refers to the political figures within national and local governments. Unless otherwise specified, it is not intended to refer to bureaucrats, whom this study generally treats as part of the legal system.

The foreign investor-government-civil society actor triumvirate is drawn together by a common preoccupation with foreign investment – doing, increasing, monitoring, controlling or even ending it. But their interests and values often diverge or even compete. What role might host state legal systems play in mediating relations between civil society, government and foreign investment actors in host states?

Local law

The proliferation of points of contact between local, foreign and international legal systems undoubtedly makes it difficult to analyse each in isolation, but to focus on state law is still a valid and important undertaking.

From the perspective of civil society actors, international law and institutions are of limited relevance in mediating day-to-day relations with government and investment actors in host states. For example, the OECD Guidelines for Multinational Enterprises provide that multinational enterprises should take account of their environmental and social impact, but are entirely voluntary and implemented by state-based National Contact Points (see OECD MNEs Guidelines website).⁴ True, some comfort can be drawn from developments such as the increasing willingness of the International Centre for the Settlement of Investment Disputes to accept *amicus* briefings from civil society actors in countries such as Bolivia, Tanzania and Argentina, which began with *Methanex Corporation v. United States of America* (2005). However, this is ‘no golden age of civil society participation in investment dispute settlement’, not least because it is dominated by civil society actors based in more developed home states (Odumosu, 2007, p. 13).⁵

From the perspective of governments, international economic laws that restrict protectionism, impose conditionality and so on, are an encroachment on national policy space. But states still determine ‘which and how much of the remedies prescribed in Washington’ to apply, and to which members of its population (Randeria, 2003, p. 323). For example, former chief economist of the World Bank Joseph Stiglitz has attributed the ability of India (and China) to weather the 1997 global economic crisis with a healthy growth rate of 5 per cent to the fact that it maintained capital controls throughout (Stiglitz, 2002, p. 125). States remain ‘pivotal’ – the greatest reference point for, and controller of the movements and behaviour of, people and business. States secure the legitimacy and accountability of those supra- and subnational governance mechanisms that globalists so often aggrandise (Hirst et al., 2002, pp. 257, 266–7 and 277 et seq.). Foreign investments exist only because state law grants and protects their rights. ‘Without the state, the corporation’ – not least the foreign investor – ‘is nothing. Literally nothing’ (Bakan, 2004, pp. 153–4). Each entity that makes up a multinational enterprise of foreign investment, such as a multinational corporation ‘is subject variously to the laws of each and every state in which it does business’ and foreign investors are rarely able, as is often suggested, to ‘evade national legislation’ just because it may be ‘in their interests to do so’ (Wallace, 2002, pp. 11 and 57).⁶ ‘All laments about the loss of state sovereignty to the contrary’ national legal systems, through their ‘legislative enactments, judicial decision-making and administrative (in) action[,] will continue to affect the way processes of globalization are mediated, experienced and resisted in India’ (Randeria, 2003, p. 324) and elsewhere. And rightly so.

A growing body of literature does pay attention to the role of legal systems in the home states of investors as a mediator of investor-government-civil society relations. For example, home state law has been of some use to foreign civil society actors in the US, where the Alien Tort Claims Act (ATCA) of 1789 has been dusted off and used with a degree of success to sue private corporations for damage resulting from their acts abroad, where those acts are found to breach the preemptory norms of international law. Torture and slavery have been found to violate preemptory norms, and so to attract damages and other

civil remedies. Environmental harms have recently been considered under the Act, but the status of international environmental law under the ATCA remains somewhat precarious. In the UK, attempts by foreign nationals to sue UK parent companies or their foreign subsidiaries in UK courts have faced enormous and sometimes unpredictable jurisdictional challenges (see Muchlinski, 2007; Perry-Kessaris, 2007; Mank, 2007). The territorial constraints on legislative jurisdiction ensure that assistance from the regulatory authorities of home states is rarely forthcoming. For example, when a UK-based environmental group complained to the UK Department of Trade and Industry about the environmental damage threatened by a port project involving UK investment in the Dahanu region of Maharashtra, it was met with a shrug (Perez, 2002, pp. 19–20). The chances of such an institution offering a solution to an Indian civil society actor must be impossibly remote.

Relatively little attention, or respect, is paid to the role of host state legal systems in mediating investor-civil society-government relations (Rajagopal, 2005, p. 347). For example, Oren Perez (2002, pp. 24–5) has dismissed any faith in ‘regulatory capabilities of developing countries’ as ‘misguided’.⁷

Investment climate discourse

One arena in which the relationship between host state legal systems and foreign investment has been taken very seriously indeed is that of international development. The relationship between national legal systems and foreign investment first drew the attention of the World Bank in the late 1990s when its publications began to include assertions that host state legal systems – the letter of the law, and the manner in which it is implemented and interpreted – are a significant determinant of inward foreign investment levels (see World Bank, 1995 and 1996).⁸ Since 2002, the Bank has begun to refer to national legal systems as forming, along with economic and political stability and physical and financial infrastructure, part of a host state’s ‘investment climate’ (World Bank, 2002, p. 9).

The Bank began an Investment Climate Capacity Enhancement Program in 2003 with a view to supporting ‘the implementation of this corporate priority’. Its website includes online forums for ‘communities of practice’ – policy-makers, practitioners and researchers interested in investment climate issues (World Bank Investment Climate website). For over a decade, the Bank has pioneered a range of potentially valuable data sets, including national and subnational ‘Enterprise’ and ‘Doing Business’⁹ surveys with which to benchmark legal systems both objectively, based on the observations of experts, and subjectively, based on the perceptions and expectations of foreign investors (see World Bank, 2005a, pp. 9–14).¹⁰ In recent years it has summarised its findings in ‘Investment Climate Assessments’, which, as will be seen, have become hard political currency within client states. The ‘investment climate’ tag has proved popular with other international development agencies, such as the Asian Development Bank, and with international development policy makers in the United States, Japan, the United Kingdom and elsewhere. The concept was institutionalised by the 2006

establishment of an Investment Climate Facility for Africa (see DTI, 2004, p. 95; US Commercial Service Country Guide for India website and the Investment Climate Facility website).

Although it answers the need to take host state legal systems seriously, the discourse of ‘investment climates’ is far too investor-centric to serve as a framework for assessing the role of host state legal systems in investor-government-civil society relations. For a start, an understanding of the legal needs of civil society and government actors is essential even to an investor-centric approach, because their perceptions and expectations of legal systems will inform their legal strategies, which in turn will affect foreign investors. Furthermore, we need and ought not to begin and end with the perceptions and expectations – supposed or actual – of foreign investors. Foreign investors are, quite obviously, not the only actors to whom state legal systems are addressed. Government and civil society actors (among others) are also potential consumers, and targets, of state legal systems. There is a need for an analytical framework which will allow us to place the legal needs of governments and of civil society on something approaching the same level as those of investors, whilst acknowledging that their interests and values may differ widely.

‘Seeking similarity, appreciating difference’

Investment, government and civil society actors are targets of and served by the same state legal system, so it is necessary to keep an eye out for what is common to their relationships with law. Investment, government and civil society actors are all regulated and constrained by state law. Equally, they may be empowered by it. It is particularly important to emphasise that government actors are not mere custodians of law, they are also consumers and targets of it. In the context of the economic liberalisation of a vibrant democracy such as India, the legal system is a tool to be used against government actors, as well as by them.

Existing studies of the role of law in foreign investment processes generally focus on the perspective either of foreign investors, or of those who oppose foreign investment, or of those who regulate it. In each study, law is called upon to support the individual objectives of a given actor. The product is a patchy collection of parallel accounts, which do little to build upon or influence each other.¹¹ For example, ‘proponents of security, social justice, and environmental protection’ demand rights or regulations to address capitalism’s negative externalities and injustices. On the other hand, those who wish to advance competition and efficiency, such as the World Bank, seek rights and regulations to set the market free (Kagan and Axelrad, 2000, p. 2). Some have examined the propensity of investors and government actors to use, abuse and avoid host state law in their relations with each other (see Perry-Kessaris, 2004; Hellman et al., 2000; Haines, 2005; Wang, 2000).¹² Others have documented the legal history of individual campaigns by civil society actors against foreign investments (see Fernandes and Saldanha, 2001; Sanchez-Moreno and Higgins, 2004). In the few studies which touch upon civil society, government and foreign investment actors,

tripartite relations between those actors tend not to be placed at the centre (see for example, Wallace, 2002; Muchlinski, 2007). What is needed is an integrated analysis of the interests, values and legal needs of investment, civil society and government actors.

Law as a communal resource

For over a decade Roger Cotterrell has advocated the use of a 'law-and-community' methodology to 'clarify the contexts in which decisions about regulation must be made' (Cotterrell, 2006b, pp. 5 and 16). He employs a revitalised concept of 'community' to map and evaluate law's role in social interactions. He argues that 'networks of relations of community' exist wherever there are objectively verifiable interactions that are relatively 'stable and sustained' and are characterised by mutual interpersonal trust. Such interactions, Cotterrell argues, occur across the full range of Max Weber's four ideal types of social action: traditional, affective, belief and instrumental (Cotterrell, 1997, pp. 80–2).

The law-and-community approach enables us to 'seek similarity' (Cotterrell, 2002b, p. 49) because it highlights a universal role which law can and ought to fulfil in respect of all social interactions: the support of mutual interpersonal trust. Such trust is, Cotterrell argues, the cause and the effect of the interactions and sense of belonging that characterise relations of community. It 'encourages future interaction and provides the motivation to engage in relatively free, uncalculated relations with each other' (Cotterrell, 2006b, pp. 73–4). Drawing on Cotterrell's work, it is possible to identify three ways in which law supports trust and, thereby, the productivity that is characteristic of community-like relations. It *expresses*, in the form of contracts, institutions and so on, the trust that holds actors together; it draws actors in further by ensuring their *participation* in social life; and it *coordinates* the differences that hold actors – and different networks of community.

Just as an integrated analysis of multiple interests and values necessitates and facilitates the appreciation of similarities, it also necessitates and facilitates the identification of differences. Flexible, yet robust, law-and-community analysis allows us simultaneously to hold in mind a broad range of contemporary actors and their 'fluctuating', 'overlapping', complex and transnational relations (Cotterrell, 2006b, pp. 7 and 67). We become able to 'appreciate difference' in the values, interests and legal needs that are central to each of these relations (Cotterrell, 2002b, p. 49). For example, government actors tend to hold a uniquely privileged position in respect of the production and implementation of law, and are sometimes able to act as gatekeepers to the legal system. By contrast, civil society actors might be expected to regard law as hierarchical, interventionist, hostile and alien. A further distinction might be drawn, using the terminology of Sarat and Scheingold (1998), between the overtly value-laden 'cause lawyering' in which civil society actors are primarily engaged, and the ostensibly 'value-neutral mainstream lawyering' favoured by foreign investors (Sarat and Scheingold, 2007, p. 8).

Such an appreciation of difference – in interests and values and, therefore, in legal needs – is ‘particularly necessary today when the importance of instrumental economic relations is so strongly emphasised politically, and legal analysis seems impelled towards a similar emphasis’ (Cotterrell, 2002b, p. 78). Economic values, such as efficiency and competition, are used to evaluate an ever-wider range of social relations, including those which take place through legal systems. Furthermore, it is increasingly accepted that the interests of those engaged in instrumental economic relations ought to be promoted ahead of those engaged in other forms of social relations. This preoccupation with liberal economic values and interests is narrowing socio-legal landscapes across the globe through processes which Bronwen Morgan (2003) has termed ‘thick meta-regulation’. The possibility of particular concern to the present study is that liberal economic values and interests may be challenging the present and future capacity of national legal systems to act as communal resource in investor-government-civil society relations.

What follows

The present study explores the role of state legal systems in foreign investor-government-civil society relations through a law-and-community lens. It first outlines how state legal systems might secure the productivity of community-like relations in general (Chapter 2). The aim is to produce a theoretical framework for the analysis of law and foreign investment, which may be applied in any location. This analytical framework is then applied to foreign investor-government-civil society relations in and around the city of Bengaluru (formerly Bangalore), capital of the southern Indian State of Karnataka (Chapters 3 to 6).¹³

Much of the material for this case study was collected in elite semi-structured interviews lasting for one to two hours with individuals such as investors, lawyers, business advisors, commentators, bureaucrats and civil society representatives in Bengaluru (2003) and London (2005 and 2006). Interviewees were selected partly because of their designation – for example, all the foreign government-appointed advisers to foreign investors in the city; and partly by recommendation – for example, journalists or academics proposed by other interviewees as experts on foreign investment.

General trends in the comments of interviewees are reported, supported by illustrative quotations. Interviewees are only referred to individually when they are responsible for a specific quotation. The identities of interviewees have been kept confidential, but their general designation can be derived from their code.¹⁴

In order to maintain flow, accessibility and appeal across disciplinary and geographical divides, much of the technical and location-specific detail is placed in footnotes where it may be pursued by those with a special interest.

Notes

- 1 This study follows the UNCTAD definition of foreign direct investment which is in turn based on the definitions contained in the fifth edition of the International Monetary Fund's Balance of Payments Manual, devised in 1993 and known as BPM5; and the third edition of the Organisation for Economic Cooperation and Development's Detailed Benchmark Definition of Foreign Direct Investment devised in 1996 and known as BD3. The foreign entity making the investment is known as the 'direct investor'; and the enterprise in which the investment is made – whether its an unincorporated branch or incorporated subsidiary – is known as a 'direct investment enterprise' (UNCTAD website, October 2006).
- 2 The resulting control may not be complete, but it implies some level of equity ownership by the investor in the investment enterprise, generally agreed to be a minimum of 10 per cent.
- 3 This is a modified form of the World Bank definition which can be seen on the World Bank Civil Society Topic website.
- 4 The World Bank inspection procedure is an example of a more forceful mechanism. For example, in 1998, an NGO filed a Request for Inspection with the World Bank in which it alleged that there had been inadequate consultation of tribal and NGO viewpoints during the preparation of plans for an 'eco-development' in the Nagarahole area of Karnataka. The World Bank Inspection Panel found that consultation had indeed been inadequate according to its own policy, and that as a result the project was in some respects flawed. It recommended an investigation by the Executive Directors of the Bank (Inspection Panel of the World Bank, 1998, pp. 1–4). However, the procedure only applies to World Bank projects.
- 5 Partnership with international and foreign civil society actors can be useful. For example, international opposition to India's Dahanu port came from WWF-UK and Global Action Response and the World Development Movement, each of which took action to raise awareness about the project (Perez, 2002, p. 15). Some commentators have criticised that lack of interaction between Indian and foreign activists arguing that India has missed opportunities for support and inspiration (Khaitan, 2004, p. 7). However, these relationships can become oppressive. For example, the Indian-based movement against World Bank-financed Narmada dam maintained links with transnational anti-World Bank campaigns. These foreign groups came to dictate the 'agendas and priorities', the 'vocabulary' and the 'timing of local action' (Randeria, 2003, p. 316).
- 6 Of course, the attention of foreign investors may be genuinely distracted from host state legal system by the fact that they will be continue to be subject to regulation – such as financial reporting standards – in their home state. Alternatively, investors may seek to use foreign standards as an excuse for breaching local standards. For example, when certain States partially banned Coca Cola and PepsiCo products because they allegedly contained pesticides, Coca Cola responded by declaring the pesticide levels to be within the limits allowed in the European Union (BBC News Online, 2006).
- 7 This is a somewhat surprising conclusion, given that the case he examined, resistance to the building of a Port in the ecologically sensitive Dahanu region of the Indian state of Maharashtra, was solved by a particularly Indian solution: the creation by the judiciary of a hybrid authority which eventually prevented the port from being built (Perez, 2002, p. 14).
- 8 For the development of World Bank legal reform, see Santos, 2006.

- 9 For a detailed critique of the Doing Business project, see Davis and Kruse, 2007.
- 10 Enterprise surveys have incorporated two earlier forms of investor perception indicators: World Business Environment Surveys and Investment Climate Surveys. The former are still freely available on the dedicated website.
- 11 Bronwen Morgan has noted a further important schism in empirically-grounded, socio-legal work generally, which addresses the role of law in social change either in terms of rights or in terms of regulation. 'Rights scholarship' tends to address 'mobilization, social change, questions of identity and culture, to adopt the viewpoint of the 'disadvantaged or oppressed', and to focus on their 'claims of individualized entitlement' and their use of 'judicial avenues'. By contrast 'regulation scholars are more typically concerned with questions of economic efficiency, the evaluation of results, rational design of institutions and bureaucratic or discretionary modes of pursuing public interests'. Rights scholarship is often concerned with 'naming, blaming and claiming', while regulation tends to focus on 'rule-making, monitoring and implementation'. But it is in some ways more useful to think of a 'six-fold process of disputing (naming, blaming and claiming, rule-making, monitoring and implementation)', with the emphasis on rights or regulation being determined at the point when a claim is made (Morgan, 2007, pp. 2, 3 and 11).
- 12 See also World Bank, 2004a, p. 40.
- 13 In November of 2006, Bangalore was officially re-named Bengaluru to bring the city closer to its pre-colonial, Kannada name of *Benda Kaal Ooru*. It is important to note that 'communal' has a different, negative, meaning in India, where it denotes antagonisms between different social groupings, especially between Muslims and Hindus.
- 14 Interviewees are first designated as local (L) or foreign (F); and then according to their role as civil society actor (CS), lawyer (L), commentator (C), investment actor (I), adviser to foreign investors (A), or government actor (G). Finally they are given a number. So for example Interview LCS01 refers to an interview with a local civil society actor.