

## Book Review

### External Forces, Internal Dynamics: Foreign Legal Actors and Their Impact on Domestic Affairs

ENVIRONMENTAL LITIGATION IN CHINA: A STUDY IN POLITICAL  
AMBIVALENCE. By Rachel E. Stern. New York, NY:  
Cambridge University Press, 2013. 314 pages. \$34.99.

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*This Review examines the influence of foreign legal actors on jurisdictions that are not their own. Rachel Stern, a scholar of China, reflects on this point in her groundbreaking book published in 2013. In her penultimate chapter, Stern discusses how such foreign legal actors wield influence in China because of their presence on the ground. Building off of Stern's research, this Review proceeds to ask whether foreign legal actors can influence a domestic environment when that environment prohibits them from permanently working there. The analysis below will suggest so, arguing that the forces of globalization can enable foreign legal actors to impact even a market that keeps its legal-services borders closed.*

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## Introduction

In 2009, the New Delhi-based lawyer Lalit Bhasin, who is the current president of the Society of Indian Law Firms (SILF), gave an impassioned speech reiterating a position that he had long held—that foreign legal-service providers must remain excluded from India.<sup>1</sup> That domestic clients or domestic law firms wanted or needed these foreign legal actors, he stated, was an unsupported claim that had been “shred to pieces.”<sup>2</sup> Similar sentiments have been made by lawyers in other “emerging markets.” In Brazil, where regulations are not as restrictive as in India, José Luiz Freire, the former Chairman of the Center for Studies on Law Firms (CESA in Portuguese) declared that foreigners routinely refuse to comply with the Brazilian bar’s requirements and often seek “to enter into the country ‘through the backdoor.’”<sup>3</sup> Similarly, Africa’s most populous country, Nigeria, with an economy that has reached more than 7% growth over the last decade,<sup>4</sup> has a national bar association that has maintained that foreigners who provide legal services in its domestic arena are “in clear breach . . . of the [country’s] Legal Practitioners Act.”<sup>5</sup>

These examples come from lawyers in countries that comprise a new and exciting cohort and that have garnered attention from political and business leaders, academics, and the media. Brazil, Russia, India, China, and South Africa (BRICS) are part of this emerging-market contingent, but other countries (such as Nigeria) are also regularly included, depending on what criteria are being used for measurement. Recently, for instance, different evaluators have listed the United Arab Emirates (UAE) and Qatar within the emerging-markets mix.<sup>6</sup> Another study omits South Africa as

1. Anthony Lin, *Legal Profession in India Not “Up for Sale,” Lawyer Writes*, AM. L. DAILY: WORLD (Apr. 2, 2009, 1:30 PM), <http://amlawdaily.typepad.com/amlawdaily/2009/04/the-president-of-the-society-of-indian-law-firms-lays-out-the-case-against-opening-his-countrys-legal-market-to-foreign-la.html> [<http://perma.cc/6PZB-TE9Z>]. Bhasin has since modified his position, and this point will be discussed later in this Review.

2. *Id.*

3. “E reforçou: ‘Globalização não é falta de regulamentação’, disse Freire ao criticar os grupos estrangeiros que insistem em entrar no país ‘pela porta de trás’. [And to emphasize: ‘Globalization is not a lack of regulation,’ says Freire, criticizing foreign legal groups who insist on entering the country ‘through the backdoor.’]” Rafel Baliardo, *OAB discute associação com bancas estrangeiras*, CONSULTOR JURÍDICO (May 8, 2012, 9:40 AM), <http://www.conjur.com.br/2012-mai-08/oab-faz-audiencia-publica-associacao-bancas-estrangeiras> [<http://perma.cc/9HRS-5T8Z>].

4. *GDP Growth (Annual %)*, WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?page=1> [<https://perma.cc/4TV4-VEXG>].

5. Andrea Ayemoba, *Nigeria Bar Association Introduces Measure to Eliminate Fake Lawyers*, AFR. BUS. COMMUNITIES (May 21, 2015, 11:49 AM), <http://africabusinesscommunities.com/news/nigeria-bar-association-introduces-measure-to-eliminate-fake-lawyers.html> [<http://perma.cc/ZN87-ESEY>].

6. Yousef Gamal El-Din, *MSCI Ups Qatar and UAE to Emerging Market Status*, CNBC (June 12, 2013, 10:01 AM), <http://www.cnbc.com/id/100809850> [<http://perma.cc/59NZ-5SXQ>]; Rob Kozlowski, *S&P Reclassifies Greece, Qatar and UAE as Emerging Markets*, PENSIONS &

part of its calculation, and instead finds that “the . . . ‘Next 15’, including the BRIC as well as the 11 fastest-growing countries [South Korea, Indonesia, Mexico, Turkey, Iran, Egypt, Philippines, Nigeria, Pakistan, Bangladesh, and Vietnam], will drive 80 percent of emerging-market growth.”<sup>7</sup>

Not surprisingly, within these countries the views of the respective domestic bar associations toward foreign legal actors vary. Not all are as suspicious as the above-mentioned lawyers from India, Brazil, and Nigeria. Even within these three countries, there are competing perspectives.

Clearly, domestic bar associations can influence how welcoming countries are toward foreign legal actors. Conceptually, therefore, observers have found it useful to place these emerging markets into different categories based on their receptiveness.<sup>8</sup> For example, countries such as India and Nigeria are frequently viewed as *closed* markets because foreign legal actors are prohibited from establishing offices there and are barred from practicing domestic law.<sup>9</sup>

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INV. (Sept. 15, 2014, 12:18 PM), <http://www.pionline.com/article/20140915/ONLINE/140919925/sampp-reclassifies-greece-qatar-and-uae-as-emerging-markets> [<http://perma.cc/999Y-D5NG>].

7. AIMEE KIM ET AL., MCKINSEY & CO., THE GLITTERING POWER OF CITIES FOR LUXURY GROWTH 3 (2014), <http://www.mckinseyonmarketingandsales.com/sites/default/files/pdf/LuxuryScope.pdf> [<https://perma.cc/2RPS-XHJU>].

8. See Sida Liu, *Globalization as Boundary-Blurring: International and Local Law Firms in China's Corporate Law Market*, 42 LAW & SOC'Y REV. 771, 771–73 (2008) (discussing domestic lawyers' view of foreign law firms in China and the relationship between foreign and local law firms); Frederico Normanha Ribeiro de Almeida & Paulo André Nassar, *A Ordem Dos Advogados E A Política Da Regulação Da Advocacia No Brasil* [*The Ordem dos Advogados do Brazil and the Politics of Professional Regulation in Brazil*] 10–14 (Globalization, Lawyers and Emerging Economies Project, Working Paper, 2012) (on file with the Texas Law Review) (discussing the emerging role of foreign law firms in Brazil and regulations that restrict the practice of foreign lawyers, including regulations by the Brazilian Bar Association, the *Ordem dos Advogados do Brazil*); Stephen Denyer, *Perspectives on the Global Law Firm and the International Framework* 21–22 (2013) (unpublished presentation) (on file with the Texas Law Review) (highlighting the barriers to foreign lawyers in various countries, including India, Brazil, and Nigeria). See generally Jayanth K. Krishnan, *Globetrotting Law Firms*, 23 GEO. J. LEGAL ETHICS 57, 58–61 (2010) (analyzing competing explanations for the strict regulation of foreign law firms in India and the implications for the legal domestic market).

9. Krishnan, *supra* note 8, at 59; Abdulmumini A. Oba, *Towards Regaining Learning and Correcting Leanings in the Legal Profession in Nigeria*, 1 REV. NIGERIAN L. & PRAC. 13, 26 (2007); Laurel S. Terry, *Putting the Legal Profession's Monopoly on the Practice of Law in a Global Context*, 82 FORDHAM L. REV. 2903, 2924 n.90 (2014); see also Jayanth K. Krishnan, *Peel-Off Lawyers: Legal Professionals in India's Corporate Law Firm Sector*, 9 SOCIO-LEGAL REV., no. 1, 2013, at 1 [hereinafter Krishnan, *Peel-Off Lawyers*] (arguing that the Indian legal market is already changing and discussing young legal professionals' views on how opening the market for foreign law firms would develop new norms and reduce the practice of “mobbing”).

By contrast, several other emerging markets—Brazil, China, Egypt, South Africa, Turkey, the UAE, and Vietnam—are deemed *semiclosed*.<sup>10</sup> Foreign legal-services providers can have a physical presence within these countries and are permitted to practice international law.<sup>11</sup> (In some more liberal *semiclosed* markets, foreign legal actors can hire domestic lawyers and have these colleagues work on domestic law matters; other *semiclosed* markets, however, prohibit such practices.)<sup>12</sup>

Still other emerging-market economies are labelled as *open*. These countries not only allow foreign legal actors to establish offices within their borders, but they also permit foreign lawyers to practice domestic law.<sup>13</sup> Mexico and Russia are cited as key examples of such open markets, as are Indonesia and South Korea.<sup>14</sup>

10. For the purposes of this discussion, we use the term *semiclosed* synonymously with *semiopen*, namely because *semiclosed* is the term that observers in this debate use.

11. Terry, *supra* note 9, at 2924 n.90; Almeida & Nassar, *supra* note 8, at 10–11; Denyer, *supra* note 8, at 21–22.

12. Terry, *supra* note 9, at 2924 n.90; Denyer, *supra* note 8, at 21–22.

13. Terry, *supra* note 9, at 2924 n.90; Denyer, *supra* note 8, at 20 (listing countries in which a large multinational law firm has “local law capabilities”); see Carole Silver, *Globalization and the U.S. Market in Legal Services—Shifting Identities*, 31 LAW & POL’Y INT’L BUS. 1093, 1142–44 (2000) (explaining that U.S.-based law firms have begun hiring more local attorneys rather than just offering staff with U.S.-based law expertise); Carole Silver, *Local Matters: Internationalizing Strategies for U.S. Law Firms*, 14 IND. J. GLOBAL LEGAL STUD. 67, 69 (2007) (describing how U.S. firms have begun to focus on practicing other countries’ laws rather than exclusively domestic law); Carole Silver, *Regulating International Lawyers: The Legal Consultant Rules*, 27 HOUS. J. INT’L L. 527, 528–29 (2005) (explaining the different regulatory approaches and restrictions on foreign lawyers, with an emphasis on the role of the legal consultant); Carole Silver, *Regulatory Mismatch in the International Market for Legal Services*, 23 NW. J. INT’L L. & BUS. 487, 499–502 (2003) (discussing multinational legal practices, where law firms offer expertise in multiple national legal systems in addition to U.S. law and international law); Laurel S. Terry et al., *Transnational Legal Practice*, 43 INT’L LAW. 943, 946–47 (2009) (explaining that in General Agreement on Trade in Services (GATS) treaties between two nations, the nations may allow certain foreign lawyers to practice their domestic law); Carole Silver, *Globalization of the Legal Profession: Global Innovation and the Shifting Regulatory Environment – International Frameworks 5* (2008) (unpublished presentation) (on file with the Texas Law Review) [hereinafter Silver, *Globalization of the Legal Profession*] (charting regulatory typologies for foreign lawyers in England, Germany, Mexico, Singapore, China, Korea, and India, including whether they may advise on local law).

14. Denyer, *supra* note 8, at 21 (describing how in Indonesia “international law firms cannot [directly] open their own offices but can have their own lawyers there working in partnership with local lawyers,” while in Korea free trade agreements with the European Union and United States (and the European Free Trade Association) “permit foreign law firms to establish branch offices now to practise foreign law and to enter partnerships with Korean lawyers in 5 years”); see also YVES DEZALAY & BRYANT G. GARTH, *ASIAN LEGAL REVIVALS: LAWYERS IN THE SHADOW OF EMPIRE* 244 (2010) (explaining that the number of foreign lawyers in Korea doubled between 1992 and 1999); JUDICIAL SYSTEM TRANSFORMATION IN THE GLOBALIZING WORLD: KOREA AND JAPAN (Dai-Kwon Choi & Kahei Rokumoto eds., 2007) (discussing the changing patterns of legal education and legal careers in South Korea, which might be seen as the initial steps towards the liberalization of the legal market there); Simon Mundy, *S Korea Opens Up to Foreign Law Firms*, FIN. TIMES (Aug. 12, 2012, 5:32 PM), <http://www.ft.com/cms/s/0/30966bac-e2c4-11e1-a463-00144feab49a.html#axzz3s3s4PcaW> [<https://perma.cc/6M2D-DTT4>].

The table below outlines the three categories of legal markets and the regulations that have been described above.

**Categories of Legal Markets in Emerging Economies<sup>15</sup>**

Category	Restrictions to Practicing International Law	Restrictions to Practicing Domestic Law	Restrictions to Hiring and Partnering with Local Lawyers	Immigration Restrictions for Foreign Legal Actors
Closed	Yes	Yes	Yes	Yes
Semiclosed	No	Yes	Yes	No
Open	No	No	No	No

The purpose of this Review is to examine whether these conventional classifications properly capture how foreign legal actors—namely foreign lawyers, foreign law firms, and international nongovernmental organizations (INGOs)—are able to access markets beyond their home jurisdictions. One thoughtful scholar who has written on arguably the most important emerging market in the world, China, is Rachel Stern. A key chapter in her recent book examines this subject of foreign legal actors. Part I of this Review provides an overview of her book and of this chapter in particular. Part II then builds off of Stern’s work. This Part contends that the discrete categories described in Table 1 need reconsideration. In addition, this Part focuses on China’s key competitor in Asia: India. India is one of the most closed legal systems in the world. Part II then runs a short thought experiment, inquiring whether foreign legal actors can nevertheless exert influence within this setting. The analysis suggests so. A country’s regulations on legal services, even when strict, can be (and often are) negotiated around and even circumvented by entrepreneurial, global players seeking market entry.<sup>16</sup> This Review concludes by offering a brief set of implications of this discussion.

15. See generally INT’L BAR ASS’N, IBA GLOBAL REGULATION AND TRADE IN LEGAL SERVICES REPORT (2014), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=1D3D3E81-472A-40E5-9D9D-68EB5F71A702> [<https://perma.cc/E9CY-FFVB>] (cataloguing various countries’ openness to foreign lawyers, including how one becomes licensed to practice, whether local nationality is required to practice, and any limitations on foreign lawyers’ practice); Denyer, *supra* note 8, at 21–22 (summarizing common barriers for foreign lawyers seeking to practice in a variety of emerging economies).

16. Carole Silver, Professor of Law, Georgetown Univ. Sch. of Law, Panel Presentation on Global Innovation and the Shifting Regulatory Environment – International Frameworks at the Harvard Law School Program on the Legal Profession Conference: Globalization of the Legal Profession (Nov. 21, 2008) (“National regulation matters, but so do other factors. Firms seem to have generated global approaches to law practice, and they take this approach like an overcoat with them wherever they go—and in some cases, even where they don’t go. Moreover, history matters—the way firms develop offices in particular jurisdictions seems to influence their approach to practice there.”); see also Silver, Globalization of the Legal Profession, *supra* note 13, at 14.

## I. China: A Semiclosed Environment

### A. *An Overview of the Stern Book*

As a semiclosed market, China allows foreign legal-service providers to have a limited presence, namely to conduct business only on international law matters.<sup>17</sup> On high-end, transnational matters, the legal services provided by foreigners within China are accepted—or at least tolerated.<sup>18</sup> But the vast majority of legal work done within the country, which involves domestic issues, is reserved exclusively for Chinese-licensed lawyers.<sup>19</sup> Therefore, existing INGOs and the more than 170 foreign law firms are kept at bay and are not to affect the business and legal potential of Chinese players.<sup>20</sup>

Consider then Stern's book, entitled *Environmental Litigation in China: A Study in Political Ambivalence*.<sup>21</sup> Stern examines the possibility of gaining "legal relief [through litigation] for environmental pollution in contemporary China."<sup>22</sup> She analyzes the role of key legal actors in environmental cases, including judges, state officials, lawyers, claimants, and INGOs.<sup>23</sup> Stern's project has multiple goals. First, she pays special

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17. If an issue involves domestic law or litigation, Chinese-licensed lawyers must handle these cases. If a Chinese-licensed lawyer opts to work for a foreign law firm, that lawyer is stripped of the ability to practice domestic law or litigation. Xueyao Li & Sida Liu, *The Learning Process of Globalization: How Chinese Law Firms Survived the Financial Crisis*, 80 *FORDHAM L. REV.* 2847, 2850 (2012); see also Andrew Godwin, *The Professional 'Tug of War': The Regulation of Foreign Lawyers in China, Business Scope Issues and Some Suggestions for Reform*, 33 *MELBOURNE U. L. REV.* 132, 137–41 (2009) (outlining the current state of China's regulatory scheme for legal service providers); Liu, *supra* note 8, at 780 (highlighting how Chinese legal regulations "explicitly leave a grey area for the foreign firms," and thus the extent to which foreign firms are allowed to participate in Chinese domestic law matters is unclear); Rachel E. Stern & Su Li, *The Outpost Office: How International Law Firms Approach the China Market*, 41 *LAW & SOC. INQUIRY* 184, 189–91, 196 (2016) (describing the constrained Chinese market and how it was not until 1992 that foreign firms could legally open offices in China).

18. Liu, *supra* note 8, at 780–84; see also Stern & Li, *supra* note 17, at 192 (explaining that since international law firms are prohibited from practicing Chinese law, the main business opportunity left is "high-end, nonlitigation services related to foreign capital").

19. Li & Liu, *supra* note 17, at 2850 (explaining that due to government restrictions, international law firms had to collaborate with domestic firms to provide legal opinions or to appear in court, resulting in a "blessing for domestic corporate law firms"); Stern & Li, *supra* note 17, at 189 (explaining that Chinese lawyers employed at foreign firms had to suspend their licenses to practice, resulting in "much legal work, such as representing litigants in court" being completed only "by Chinese lawyers working at Chinese law firms").

20. See Stern & Li, *supra* note 17, at 185, 189–91 (discussing the barriers to entry and the operational constraints for foreign firms in China).

21. RACHEL E. STERN, *ENVIRONMENTAL LITIGATION IN CHINA: A STUDY IN POLITICAL AMBIVALENCE* (2013).

22. *Id.* at 1.

23. *Id.* at 10–13.

attention to how cases make their way into the Chinese courts.<sup>24</sup> Second, she studies the conditions under which lawyers accept environmental cases and when they will try to settle them.<sup>25</sup> Third, she investigates the role of the state and its influence on the politics of environmental activism in the country.<sup>26</sup> And fourth, she is interested in how international pressure affects the dynamics of the Chinese environmental movement.<sup>27</sup>

As Stern states from the outset, she is keen on gaining a comprehensive understanding of “how litigation can contribute to social change in China.”<sup>28</sup> Environmental litigation within one-party China is of focus because so little research has been done on this subject.<sup>29</sup> Furthermore, there is an intriguing dialectic regarding environmental cases in China. On the one hand, some cases resolve themselves amicably and quietly, while others raise strong political debates, become prominent news stories, and inevitably place pressures on courts, which are asked to provide resolutions.<sup>30</sup> As Stern observes, environmental litigation offers an opportunity to “assess the potential and limits of law”<sup>31</sup> within this specific authoritarian context.

Following the introduction, Stern’s book is divided into eight chapters. Her methodology consists of a combination of using primary and secondary sources, including conducting “more than 170 open-ended interviews” in Mandarin Chinese and English.<sup>32</sup> In addition, she relies on an original “small-scale survey”<sup>33</sup> and survey data gathered by Chinese researchers working on similar issues, and she references both English- and Chinese-language sources (scholarly books, articles, and news media publications) and reviews judicial opinions from different Chinese provinces and courts.<sup>34</sup>

Much of the first portion of Stern’s book concedes that “civil environmental litigation in contemporary China is difficult.”<sup>35</sup> It was only

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24. *See id.* at 71–72 (describing how barriers to litigation impacted whether or not environmental lawsuits in rural Chinese villages reached the courts).

25. *See id.* at 151–63 (exploring the difference between lawyers as routine practitioners, “do-gooders,” and legal activists).

26. *See id.* at 115–22 (describing China’s Central Leadership and local governments as generally encouraging of environmental litigation but uneasy about innovation).

27. *See id.* at 179–94 (arguing that international funding and advocacy have had mixed results in Chinese litigation).

28. *Id.* at 1.

29. *Id.* at 2.

30. *Id.*

31. *Id.* at 3.

32. *Id.* at 11.

33. *Id.* at 12.

34. *Id.* at 11–12, 123.

35. *Id.* at 43. Several reasons account for the challenges claimants face. During Chairman Mao’s reign (1949–1976), dissent was not tolerated; therefore, there was no hope of effectuating environmental change through the courts. *Id.* at 17–18, 20. A further disadvantage was that there were virtually no lawyers in the country who could serve as environmental representatives for

during the mid-1970s, after the government abandoned the practices of Mao's Cultural Revolution and began initiating reforms, that the situation slowly changed.<sup>36</sup> As "China's [t]urn [t]oward [l]aw"<sup>37</sup> occurred and then continued into the 1980s, the government believed a range of new players were necessary to improve China's standard of living, including learning from those abroad.<sup>38</sup> Trying to enact reforms was complicated, and there was a steep educational curve.<sup>39</sup> Environmental activists, for instance, had to learn how to use the law: how to find and retain lawyers; how to bring cases to the courts and start litigation; how to produce evidence and prove causation; how to mobilize support from different constituencies and from the media; and how to request and receive judicial compensation.<sup>40</sup>

Outsiders, the Chinese recognized, could help.<sup>41</sup> Indeed, a small number of domestic lawyers became better skilled because of interactions with foreign counterparts.<sup>42</sup> Legal education in certain parts of the country also improved with assistance from foreign academics and foreign bar associations.<sup>43</sup> In fact, today an increasing number of universities in China offer law degrees and teach students about the complexity and multi-dimensionality of law, including public interest work such as environmental litigation.<sup>44</sup>

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clients. *Id.* at 19–21 (noting that in 1981, there were 8,571 lawyers in China); *see also* Ethan Michelson, *Access to Lawyers: A Comparative Analysis of the Supply of Lawyers in China and the United States*, 7 NAT'L TAIWAN U. L. REV. 223, 247–48 (2012) [hereinafter Michelson, *Access to Lawyers*] (identifying as an area of interest for further study whether the growth in the Chinese legal profession is having a positive impact on access to legal services and hence on access to justice by ordinary claimants in China). For an assessment of the political characteristics of the Chinese legal profession, in general, and lawyers, in particular, *see generally* Ethan Michelson & Sida Liu, *What Do Chinese Lawyers Want? Political Values and Legal Practice*, in CHINA'S EMERGING MIDDLE CLASS: BEYOND ECONOMIC TRANSFORMATION 310, 310–33 (Cheng Li ed., 2010); and Ethan Michelson, *Unhooking from the State: Chinese Lawyers in Transition* (Aug. 2003) (unpublished Ph.D. dissertation, The University of Chicago). From a development perspective, the absence of lawyers hindered commercial negotiations, business transactions, the execution of contracts, financial dealings, and environmental litigation.

36. STERN, *supra* note 21, at 18.

37. *Id.*

38. *See, e.g.*, YE WEILI, *GROWING UP IN THE PEOPLE'S REPUBLIC* 137 (2005) (noting that the Chinese government's decision in 1978 to send students abroad "showed the country's desire to reconnect herself to the rest of the world," and has contributed to the country's "profound transformation economically, socially, and culturally").

39. *See* STERN, *supra* note 21, at 19 (discussing the Hundred Flowers Campaign backlash against the new legal system before the legal resurgence of the 1980s).

40. *Id.* at 46–53, 56–58, 62–67.

41. *See id.* at 36 (noting China's firm connection to the outside world and the international legitimacy, in political and economic terms, from which China derives).

42. *Id.* at 179–81.

43. *See id.* at 183–86 (discussing the types and amount of legal assistance provided to China—particularly by the United States).

44. *Id.* at 186–87. The Chinese state also has become more specialized to focus on environmental claims. *See infra* text accompanying notes 19–23.



These developments prompt Stern to ask: “[W]hat can be said about patterns of success and failure in environmental lawsuits?”<sup>45</sup> Stern readily acknowledges that “no more than 1 percent of environmental disputes reach courts.”<sup>46</sup> However, this small fraction does not necessarily mean those that do make it lack legal or public policy relevance. For instance, Stern discusses how in 2005 the prestigious Peking University, with a team of six professors and a group of graduate students, cleverly saw a spillover in the Songhua River “as an opportunity to push forward environmental public interest law.”<sup>47</sup> The team ultimately prevailed in a case against the powerful PetroChina Corporation, which resulted in “the highest fine possible”<sup>48</sup> against this environmental polluter. (Interestingly, the rhetoric and grievances espoused by the claimants in this Chinese litigation closely resembled what had long been demanded by parallel public interest plaintiffs abroad, suggesting that the diffusion of such values has pollinated China as well.<sup>49</sup>)

At the same time, Stern notes that Chinese judges have to be careful not to issue judgments that contradict the state’s policies.<sup>50</sup> In 2003, two judges were fired for having invalidated a provincial ordinance, showing that “judicial review remains unwelcome [in China].”<sup>51</sup> Renegade judges who attempt to buck the system know that such transgressions place them in jeopardy of losing their positions on the bench.<sup>52</sup> There is thus an ambivalence that judges feel towards environmental cases.<sup>53</sup> On the one hand, judges enjoy opportunities to be the champions of important public interest matters that have benefits for society. On the other hand, judges must be careful not to upset state leaders who have the power to remove them.

But as is seen throughout the second half of Stern’s book, even with these constraints, judges want to remain relevant. The looming Chinese state is certainly omnipresent, and the philosophy that the “law should serve the Chinese Communist Party (CCP)” is an overarching principle that is pervasive.<sup>54</sup> Nevertheless, judges can and do make a difference.<sup>55</sup> By needing to serve as the key intermediaries, arbiters, and sometimes even

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45. STERN, *supra* note 21, at 94.

46. *Id.* at 71.

47. *Id.* at 85.

48. *Id.* at 87.

49. *See id.* at 205–06.

50. *Id.* at 134–37, 212.

51. *Id.* at 212.

52. *See id.* at 136 (describing possible repercussions for judges who make “wrong decisions,” including poor annual evaluations, lower annual bonuses, transfers, or demotions).

53. *Id.* at 132–33.

54. *Id.* at 123.

55. Stern notes that “pollution disputes show innovation at the margins as courts occasionally offer new legal interpretations or validate new types of claims.” *Id.* at 125.

advocates in environmental cases, judges occupy a special place within Chinese institutional governance.<sup>56</sup> Moreover, judges crave information. Certain foreign legal actors based in China are one group that can help; they are discussed next.

### B. *The Role of INGOs*

To begin, the INGOs to which Stern refers comprise a range of associations, including the American Bar Association (ABA), the Ford Foundation, the Rockefeller Foundation, the Rockefeller Brothers Fund, the Clinton Foundation, the Gates Foundation, and the Global Greengrants Fund.<sup>57</sup> Despite the gauntlet of bureaucratic and political restrictions confronting INGOs, their presence has indeed been felt. In the areas of international human rights discourse, for example, INGOs have worked with Chinese lawyers and other civil-society activists to advance a new rhetoric that is carefully employed to promote the needs of those who are suffering.<sup>58</sup> INGOs that prioritize democratization also have had an influence among those Chinese wishing to see the state more greatly liberalized.<sup>59</sup>

As for the environment, INGOs have made inroads, especially when working with their burgeoning domestic counterparts. Consider two key developments that occurred towards the latter part of the 2000s. In 2007, at the seventeenth Party Congress, Chinese President Hu Jintao declared to the world that the “ecological civilization” of Chinese society had to be safeguarded.<sup>60</sup> Then in 2008, China hosted what it promoted as the “Green Olympics.”<sup>61</sup> These moments relate back to what began occurring in China in the early 2000s. At that time, the domestic NGO sector started to grow.<sup>62</sup>

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56. *See id.* at 146–47 (noting how judges have “incentives to innovate” and may “nudge[re] forward social change” through their decision making).

57. *Id.* at 183, 186, 188 n.15.

58. *See id.* at 187 (noting that attorneys use arguments that link environmental law programs with democracy and human rights, which helps gain congressional support and wins grants for those programs).

59. *Id.* at 187.

60. *Id.* at 110; *see also* Elizabeth M. Lynch, *Rachel Stern on China’s Environmental Rights Movement*, CHINA L. & POL’Y (Aug. 6, 2013) <http://chinalawandpolicy.com/2013/08/06/rachel-stern-on-chinas-environmental-rights-movement/> [<http://perma.cc/E7GF-HVUL>] [hereinafter Stern Interview Transcript Part I] (describing Wen Jiabao’s first use of the phrase “ecological civilization” as “a sign that environmental issues were rising in prominence for the central government”).

61. Stern Interview Transcript Part I, *supra* note 60 (noting Stern’s description of the Green Olympics as one of three events in the 2000s that drew attention to environmental issues inside China).

62. *Id.* (describing the creation of the first generation of Chinese environmental NGOs in the 1990s and the dramatic expansion of domestic NGOs in the mid-2000s); *see also* STERN, *supra* note 21 at 63–64 (explaining how, in the early 2000s, the activities of “environmental journalists”

In addition, foreign aid through INGOs also entered the scene.<sup>63</sup> The cooperation between these domestic and international partners had an effect on the government, which, because the global media was watching, knew it could not dismiss the demands made by these activists.<sup>64</sup> The government, therefore, during the seventeenth Party Congress and as part of its branding of the 2008 Olympics, sought to impress the global community with its commitment to the environment.<sup>65</sup>

The INGO effect has occurred in other spaces as well. Foreign funding and foreign lawyers continue to bring about changes in Chinese legal education. An increasing number of Chinese law schools have foreign faculty involvement, where students are now being exposed to different models of pedagogy and clinical legal education, including learning how to litigate environmental cases.<sup>66</sup> In addition, foreign organizations hold training sessions, conferences, and best-practice seminars for Chinese activists, lawyers, and other civil society leaders.<sup>67</sup> Even Chinese administrative law has developed in a sophisticated manner.<sup>68</sup> Citing the work of

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increased alongside the domestic NGO sector, for example, by the establishment of the Chinese NGO named Green Earth Volunteers).

63. STERN, *supra* note 21, at 182–87.

64. See Elizabeth M. Lynch, *Rachel Stern on Environmental Litigation in China – Success or Failure?*, CHINA L. & POL’Y (Aug. 12, 2013), <http://chinalawandpolicy.com/2013/08/12/rachel-stern-on-environmental-litigation-in-china-success-or-failure/> [<https://perma.cc/B5K9-GKKM>] [hereinafter Stern Interview Transcript Part II] (“So the media attention itself is a victory regardless of what [environmental lawsuit plaintiffs] actually get. . . . [A]s the real story is about raising environmental consciousness and creating groundwork for the environmental movement, any lawsuit that gets national attention is a success.”); Stern Interview Transcript Part I, *supra* note 60 (“In democracies elections are the mechanism by which government officials are held accountable. And here [in China] you have a government that is really trying to be responsive . . . . But that’s because of fears of unrest or media pressure or being embarrassed; not because of elections.” (alteration in original)).

65. See STERN, *supra* note 21, at 109–13 (noting the increased attention to environmental protection by Chinese officials starting in the 2000s, resulting in increases in media coverage and public interest in environmental issues); *Greening of 2008 Beijing Olympic Games Impressive Says UN Environment Programme Report*, UNITED NATIONS ENV’T PROGRAMME (Oct. 25, 2007), <http://www.unep.org/documents.multilingual/default.asp?DocumentID=519&ArticleID=5687&l=en> [<https://perma.cc/2MD7-YJGP>] (highlighting the government’s commitment to the environment as part of its preparation for the 2008 Olympics); Stern Interview Transcript Part I, *supra* note 60 (suggesting the promotion of the “Green Olympics” and associated international media scrutiny of China’s environmental movement prompted the Chinese government’s increased responsiveness to environmental issues).

66. STERN, *supra* note 21, at 166–68, 167 & n.28, 186–87, 221.

67. See *id.* at 167–68, 183–86 (discussing how foreign organizations assist the Chinese through training, clinical practices, and other law-related events).

68. See *id.* at 38–39, 40 tbl.1.3 (tracing the development of environmental administrative law over the last two decades and summarizing the types of administrative litigation available).

Zhang Xuehua, Stern explains that recently the Chinese Environmental Protection Bureau has been suing polluters in court for not following its administrative orders.<sup>69</sup>

Yet Stern recognizes that there is another important reason for having INGOs working in the country. Namely, INGOs have helped introduce new perspectives into Chinese legal culture for lawyers, activists, and judges to absorb.<sup>70</sup> Innovative means of conveying concepts and of rhetorically framing legal claims are crucial for those seeking to promote environmental justice, and INGOs have educated domestic players who are eager to learn.<sup>71</sup> Furthermore, Stern sees INGO activity within Chinese society as a broader form of diplomatic relationship building that has the potential to lead to stronger ties in other, yet unexplored areas of common interests.<sup>72</sup>

In sum, Stern is cautiously optimistic about the future of environmental litigation in China.<sup>73</sup> Relatively recently, it was almost unimaginable to consider the possibility of an environmental culture existing within the country.<sup>74</sup> However, such a situation is real and on display today.<sup>75</sup> Increasingly, everyday Chinese citizens expect their government to respond to their environmental concerns and, to some extent, the state appears to be listening.<sup>76</sup>

Stern has a concluding observation relating to how several foreign organizations are now exiting China. Given China's wealth, the need for foreign aid to assist in the country's development is largely unnecessary, but Stern still sees value in foreigners continuing to have a presence in the

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69. *Id.* at 215–16; Stern Interview Transcript Part II, *supra* note 64. Stern does not discuss whether Chinese administrators have been paying attention to similar developments in other countries where such tactics in fact have been used, although she mentions how China is behind other emerging economies such as Brazil and India with respect to environmental protection. STERN, *supra* note 21, at 215, 227. But other scholars have discussed this type of “globalization of administrative law.” Migai Akech, *Globalization, the Rule of (Administrative) Law, and the Realization of Democratic Governance in Africa: Realities, Challenges, and Prospects*, 20 *IND. J. GLOBAL LEGAL STUD.* 339, 343 (2013). It is reasonable to hypothesize that such institutional borrowing may be indeed occurring in the Chinese context as well.

70. STERN, *supra* note 21, at 180–84, 190–93.

71. *Id.* at 180–83.

72. *See id.* at 181–82 (noting that soft support can lead to foreign connections and regions being “linked and bounded” and mentioning how INGOs attempt to cultivate governmental allies).

73. *Id.* at 233–34.

74. *See id.* at 6–7 (describing how the opportunity for legal advocacy was shrinking in the early 2000s).

75. *See id.* at 232–33 (summarizing reactions to and consequences of environmental litigation in China and noting that China's current developments are “on the cutting edge of society's understanding of itself”).

76. *See, e.g., id.* at 10 (mentioning that a majority of environmental disputes are handled by the government); *id.* at 33–35 (describing governmental reaction to failure to meet the “Five-Year Plan”); *id.* at 225–28 (tracing the development of China's “bottom-up experimentation” of activism, implicitly sanctioned by political ambivalence and silence from Party officials).

country.<sup>77</sup> She notes: “Out of both necessity and convenience, much money is also allocated to INGOs with an office in China. These middlemen [INGOs’ officers in China] play a pivotal role in turning grant applications into workable projects.”<sup>78</sup> Regarding environmental cases, in particular, she explains that

[a]lthough there is no tally of total international funding for litigation, an examination of Ford’s [i.e., the Ford Foundation’s] annual reports shows that it gave at least US\$2.9 million to Chinese legal aid organizations between 2000 and 2008. This is not a huge amount in absolute terms, but the [Chinese] landscape of legal advocacy would clearly look quite different without international support.<sup>79</sup>

In an interview Stern gave regarding her book, she takes this point one step further, arguing that if INGOs leave China

we are going to lose a lot of knowledge about China because the people who have been involved in these projects for a really long time—like folks at the Ford Foundation and the American Bar Association—these are some of the Americans who are most knowledgeable about what’s going on in China and some of the very few American voices that are on the ground participating in . . . domestic debates over what should happen with [the] rule of law.<sup>80</sup>

It is this precise point upon which this Review will expand. We do not disagree with Stern that “on the ground” interactions between foreign actors and domestic stakeholders can result in information, opportunities, and benefits for all parties.<sup>81</sup> The question is: What if foreign actors—including foreign lawyers—are prohibited from establishing a presence in a country and practicing their profession in a jurisdiction that is not their own? What, if any, influence can they have on a domestic legal landscape? This issue is examined below by focusing on an extremely closed country for foreign legal services and one that is often seen as China’s rival: India.

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77. See Elizabeth M. Lynch, *Rachel Stern on the Role of the Foreign NGO & the Future of China’s Environmental Movement*, CHINA L. & POL’Y (Aug. 15, 2013), <http://chinalawandpolicy.com/2013/08/15/rachel-stern-on-the-role-of-the-foreign-ngo-the-future-of-chinas-environmental-movement/> [<https://perma.cc/KPX2-7Z9B>] [hereinafter Stern Interview Transcript Part III] (postulating that international aid programs should be considered as a “tool of diplomacy,” rather than a means of assisting China’s development).

78. STERN, *supra* note 21, at 188.

79. *Id.* at 168 (footnote omitted).

80. Stern Interview Transcript Part III, *supra* note 77.

81. Stern expands upon this point in her newest article, published with Su Li, where they examine the reasons why foreign law firms have entered China, the opportunities and challenges that these firms face, and why many remain in spite of the economic and political difficulties they encounter. See Stern & Li, *supra* note 17, at 192–96, 203–04.

## II. Accessing without Access: India's Legal Services Market

### A. *Background and Contextualizing the Situation*

The market comparisons between China and India have long roots. The two countries have the two largest populations in the world, with China at 1.36 billion and India at 1.29 billion.<sup>82</sup> Bilateral trade between the two countries is also worth noting, since the “China-India trade [relationship] is growing at nearly three times the pace of US-China trade” and will exceed “\$409.2 billion . . . [by] 2020.”<sup>83</sup> In addition, for the first quarter of 2015, China and India's gross domestic product growth numbers were comparable—7.0% and 7.5%, respectively.<sup>84</sup>

Yet China and India's economies have also faced problems. In August of 2015, the Chinese government devalued its currency, “triggering the yuan's biggest one-day drop since China ended a dual-currency system in January 1994.”<sup>85</sup> Prior to 2015's gains, the Indian economy had slowed as well, resulting in “a nearly three-year slump” between 2011 and 2014.<sup>86</sup> Both countries also struggle with poverty and great disparities in wealth—although unlike China, India is a comparatively robust, consolidated democracy with a free press, independent judiciary, and rights-oriented constitution.<sup>87</sup>

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82. *Data: China*, WORLD BANK, <http://data.worldbank.org/country/china> [<https://perma.cc/3L5D-EZGE>] (indicating that China's total population in 2014 was 1.364 billion); *Data: India*, WORLD BANK, <http://data.worldbank.org/country/india> [<http://perma.cc/4RGU-M7JD>] (indicating that India's total population in 2014 was 1.295 billion).

83. Anil K. Gupta & Haiyan Wang, *China and India: Greater Economic Integration*, CHINA BUS. REV. (Sept. 1, 2009), <http://www.chinabusinessreview.com/china-and-india-greater-economic-integration/> [<http://perma.cc/FQ6R-KFP9>].

84. *India Overtakes China in GDP Growth Rate; Economists Say Figures May Not Reflect Ground Situation*, DNA INDIA (May 30, 2015, 7:20 AM), <http://www.dnaindia.com/money/report-india-overtakes-china-in-gdp-growth-rate-economists-say-figures-may-not-reflect-ground-situation-2090466> [<http://perma.cc/BX9Y-KK25>].

85. *China Rattles Markets with Yuan Devaluation*, BLOOMBERG (Aug. 10, 2015, 8:24 PM), <http://www.bloomberg.com/news/articles/2015-08-11/china-weakens-yuan-reference-rate-by-record-1-9-amid-slowdown> [<http://perma.cc/VG4W-2P3D>].

86. Raymong Zhong, *India's Economic Growth Slows to 5.3%*, WALL STREET J. (Nov. 28, 2014, 3:10 PM), <http://www.wsj.com/articles/indian-gdp-growth-slows-to-5-3-1417178062> [<http://perma.cc/YV75-V7AT>].

87. Jayanth K. Krishnan, *Social Policy Advocacy and the Role of the Courts in India*, AM. ASIAN REV., Summer 2013, at 91, 95–96; Lloyd I. Rudolph & Susanne Hoeber Rudolph, *Redoing the Constitutional Design: From an Interventionist to a Regulatory State*, in THE SUCCESS OF INDIA'S DEMOCRACY 127, 132–34 (Atul Kohli ed., 2001). See generally INDIA'S DEMOCRACY: AN ANALYSIS OF CHANGING STATE-SOCIETY RELATIONS (Atul Kohli ed., 1988) (examining the development and transformations in India's democracy).

Regarding liberalization, it was previously mentioned that China began opening its markets during the late 1970s.<sup>88</sup> India's liberalization efforts occurred in the early 1990s.<sup>89</sup> While China had a head start and has benefitted accordingly, India's prosperity has also grown over the past two decades.<sup>90</sup> A range of foreign investors has flowed into India, and the probusiness government that was elected in 2014 promises to keep India's development at the forefront of its political agenda.<sup>91</sup>

Yet there is one set of foreign interests that has not formally penetrated India's market: foreign law firms. Since the early 1990s, law firms (mainly from the United States and Britain) have sought to establish a presence in India.<sup>92</sup> The arguments they offer are straightforward:

- The many American and British investors who work in India want their lawyers on Indian soil representing their interests;<sup>93</sup> such lawyers could serve as key liaisons between Indians and foreign investors, enhancing bilateral and multilateral trade.<sup>94</sup>
- If allowed into India, foreign law firms could work and even partner with Indian law firms, resulting in the sharing of best practices and business strategies.<sup>95</sup>
- Indeed, the prohibition of partnerships between foreign and Indian law firms increases costs to Indian clients who

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88. STERN, *supra* note 21, at 17.

89. Krishnan, *supra* note 8, at 64; Krishnan, *Peel-Off Lawyers*, *supra* note 9, at 6.

90. See Krishnan, *supra* note 8, at 64, 78 (noting the opening of India's economy and the prosperity that followed thereafter). See generally VIJAY JOSHI & I.M.D. LITTLE, *INDIA'S ECONOMIC REFORMS, 1991–2001* (1996) (examining the economic reforms in the early 1990s that led to the liberalization and growth of India's economy).

91. Sadanand Dhume, *PM Narendra Modi Needs to Deliver on Economic Promises to Retain Global Approval*, *ECON. TIMES* (May 26, 2015, 11:42 AM), [http://articles.economictimes.indiatimes.com/2015-05-26/news/62671668\\_1\\_pm-narendra-modi-chinese-president-xi-jinping-manmohan-singh](http://articles.economictimes.indiatimes.com/2015-05-26/news/62671668_1_pm-narendra-modi-chinese-president-xi-jinping-manmohan-singh) [<http://perma.cc/8CL8-CFHT>]; Arvind Panagariya, *The Promise of Modinomics*, *FOREIGN AFF.* (June 10, 2014), <https://www.foreignaffairs.com/articles/india/2014-06-10/promise-modinomics> [<https://perma.cc/TQQ8-PV5F>].

92. Krishnan, *supra* note 8, at 65.

93. *Id.* at 65–66.

94. *Id.*; see also Mihaela Papa & David B. Wilkins, *Globalization, Lawyers and India: Toward a Theoretical Synthesis of Globalization Studies and the Sociology of the Legal Profession*, 18 *INT'L J. LEGAL PROF.* 175, 181 (2011) (explaining, in the context of transnational business deals, the potential benefits of allowing foreign law firms into India); Jayanth K. Krishnan & Anand Dayal, *The Foreign Law Firm Debate in India: An Overview 2* (July 13, 2015) (unpublished presentation) (on file with the Texas Law Review) (noting that “US law firms are key enablers for enhancing bilateral trade and investment”). The authors are grateful to the lawyers Anand Dayal, Thomas Valenti, and Laurence Wiener for their astute observations regarding this point.

95. Krishnan, *supra* note 8, at 77; see also Krishnan & Dayal, *supra* note 94, at 2 (noting the potential for U.S. lawyers in India to “pair with local Indian lawyers and thereby more effectively serve clients in the country”).

presently are unable to seek legal assistance from such an entity operating under one roof.<sup>96</sup>

- It is cheaper and more convenient for Indian business clients who need access to foreign law firms to have these firms readily available on the ground.<sup>97</sup>

These assertions from foreign law firms are not new. Soon after India liberalized its economy in the early 1990s, two law firms from the United States—Chadbourne & Parke and White & Case—and one from Britain—Ashurst—established offices in India, making similar arguments.<sup>98</sup> Subsequently in 1995, a lawsuit was brought by the Indian nonprofit organization Lawyers Collective seeking a judicial order to shutter these firms.<sup>99</sup>

Supported by the Bar Council of India (BCI) and other Indian law firms, the Lawyers Collective maintained that the institution in charge of issuing licenses to foreign entities to work in India, the Reserve Bank of India, erred in granting these firms operating permits.<sup>100</sup> Foreign law firms were only allowed entry “for the restrictive purposes of learning about the [Indian] business environment, collecting investment information, serving as official representatives of the foreign firms to the Indian government and to Indian businesses, and promoting relationships and collaborations with those interested in such cooperative initiatives.”<sup>101</sup> According to the petitioners, however, the American and British lawyers were doing much more, including practicing law, which was in direct violation of the Indian Advocates Act of 1961.<sup>102</sup>

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96. Krishnan, *supra* note 8, at 77; *see also* Papa & Wilkins, *supra* note 94, at 178 (discussing the promising benefits of globalization for the Indian legal market); Krishnan & Dayal, *supra* note 94, at 2 (arguing that prohibiting foreign law firms from practicing in India, according to several observers, results in increased costs for both Indian and foreign businesses).

97. Krishnan, *supra* note 8, at 78. *See generally* Krishnan, *Peel-Off Lawyers*, *supra* note 9 (explaining India’s corporate legal sector).

98. Krishnan, *supra* note 8, at 65.

99. *Id.* at 68.

100. *Lawyers Collective v. Bar Council of India*, Writ Petition No. 1526 of 1995, ¶ 2, at 3 (Bombay HC Oct. 4 & 9, 1995), [http://www.legallyindia.com/images/stories/pdf/1995-Lawyers\\_Collective-vs-Ashurst&Ors\\_judgment.PDF](http://www.legallyindia.com/images/stories/pdf/1995-Lawyers_Collective-vs-Ashurst&Ors_judgment.PDF) [<https://perma.cc/SEK5-6QC9>] [hereinafter *Lawyers Collective 1995 Order*]; *see also* Krishnan, *supra* note 8, at 65–69 (explaining the *Lawyers Collective v. Bar Council of India* case). In 1995, the Bombay High Court recognized that under the statute, the “rendering [of] legal assistance and/or . . . executing [of] documents, negotiations, and settlements of documents would certainly amount to [the] practice of law,” but ordered additional investigation to determine to what extent the foreign firms were violating the statute. *Id.* at 68 (quoting *Lawyers Collective 1995 Order*, ¶ 1, at 5).

101. Krishnan, *supra* note 8, at 66.

102. *See Lawyers Collective 1995 Order*, *supra* note 100, ¶ 3, at 7 (discussing the allegation that the firm in question did work that “consisted of drafting documents, reviewing and providing comments on documents, conducting negotiations and advising clients on international standards and customary practice relating to the client’s transaction”); Krishnan, *supra* note 8, at 68 (noting that some of the lawyers were deemed to be working on transactional deals).



After more than a decade in the courts, the case was finally decided in 2009 by the Bombay High Court, which ruled in favor of the Lawyers Collective.<sup>103</sup> By this time, Chadbourne and White & Case had both left India, and Ashurst soon closed its office.<sup>104</sup> In 2012, the Madras High Court (a parallel High Court to the Bombay High Court, but in a different state—Tamil Nadu) in the case of *A.K. Balaji v. Government of India*<sup>105</sup> issued a similar ruling, holding that the Reserve Bank of India could not issue licenses to foreign firms to open offices.<sup>106</sup> The Madras court also stated that under the Advocates Act, foreign lawyers were barred from practicing both litigation and transactional legal work.<sup>107</sup> And while foreign lawyers still could technically fly in and fly out of India for certain professional purposes, even in these circumstances they were permitted in the country only for a short duration.<sup>108</sup> As of this writing, the case is pending in front of the Indian Supreme Court.<sup>109</sup>

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103. Lawyers Collective v. Bar Council of India, Writ Petition No. 1526 of 1995, ¶ 60, at 39 (Bombay HC Dec. 16, 2009) <http://media2.intoday.in/business/2009/12/16/1526of1995/Judgement.pdf> [<https://perma.cc/PQ42-EMR3>] [hereinafter *Lawyers Collective* 2009 Judgment]; Krishnan, *supra* note 8, at 68–69.

104. Krishnan, *supra* note 8, at 69; Kian Ganz, *Ashurst Shuts Down Indian Office; Not Unhappy*, LEGALLY INDIA (Feb. 19, 2010, 4:13 AM), <http://www.legallyindia.com/20100218517/Law-firms/ashurst-shuts-down-indian-office-not-unhappy> [<https://perma.cc/UE43-Y2Z7>].

105. *A.K. Balaji v. Gov't of India*, Writ Petition No. 5614 of 2010 (Madras HC Feb. 12, 2012), [http://judis.nic.in/judis\\_chennai/qrydisp.aspx?filename=35290](http://judis.nic.in/judis_chennai/qrydisp.aspx?filename=35290) [<http://perma.cc/Z5KH-U2AC>] [hereinafter *A.K. Balaji* 2012 Judgment].

106. *Id.* ¶44 (“[T]he fact of the case before the Bombay High Court [was] that the respondents which were foreign law firms practising the profession of law in US/UK sought permission to . . . render legal assistance to another person in all litigious and non-litigious matters. The Bombay High Court, therefore, rightly held that establishing liaison office in India by the foreign law firm and rendering liaisoning activities in all forms cannot be permitted since such activities are opposed to the provisions of the Advocates Act and the Bar Council of India Rules. We do not differ from the view taken by the Bombay High Court on this aspect.”); *see also Entry of Foreign Law Firms into India—Yes or No?*, LEGAL INDIA (Sept. 25, 2012), <http://www.legalindia.com/entry-of-foreign-law-firms-into-india-yes-or-no/> [<http://perma.cc/LT85-X7R8>] (arguing that the *A.K. Balaji* holding is unduly restrictive on foreign lawyers).

107. *A.K. Balaji* 2012 Judgment, *supra* note 105, ¶ 63(i) (“Foreign law firms or foreign lawyers cannot practice the profession of law in India either on the litigation or non-litigation side, unless they fulfil [sic] the requirement of the Advocates Act, 1961 and the Bar Council of India Rules.”); *see also Entry of Foreign Law Firms into India—Yes or No?*, *supra* note 106 (explaining that the *Balaji* holding specifically clarified that the expression “to practice the profession of law” in the Advocates Act covers persons practicing litigious as well as nonlitigious matters).

108. *A.K. Balaji* 2012 Judgment, *supra* note 105, ¶ 63(ii) (“[T]here is no bar either in the Act or the Rules for the foreign law firms or foreign lawyers to visit India for a temporary period on a fly in and fly out basis, for the purpose of giving legal advise to their clients in India . . .” (emphasis added)). *But c.f.* *Global Indian Lawyers v. Bar Council of India*, Special Leave Petition No. 11263 of 2015 (India 2015), <http://www.scribd.com/doc/261101691/GILA-SLP-in-foreign-law-firms-SC-case> [<https://perma.cc/NBA8-UAAU>] (challenging the rulings in both the Bombay and Madras High Court cases); Aebra Coe, *BigLaw May Finally Get Answer on Opening Door to India*, LAW360 (Sept. 15, 2015, 5:20 PM) (summarizing the Special Leave Petition before the Indian Supreme Court); Prachi Srivastava, *Unexpected Ally: Who Exactly Is the Indian Lawyers Body Intervening in Foreign Law Firms Case that Has Harish Salve Helping Pro Bono?*,

*B. Political Developments . . . and Possible Changes?*

In 2014, India witnessed a cataclysmic shift in its electoral political scene. The long-standing, historic Congress Party was resoundingly defeated, and the center-right Bharatiya Janata Party (BJP) came to power.<sup>110</sup> This new party in charge overtly favors foreign investment.<sup>111</sup> The current government has signaled that it is favorable to the entry of foreign law firms. Prime Minister Modi himself has stated: “We shouldn’t think that if foreign lawyers come here, they will take away our jobs.”<sup>112</sup> Similarly, Commerce Secretary Rajeev Kher added that allowing foreign lawyers to work on some areas of law “will give our lawyers opportunities of employment and young professionals will get experience in modern legal practices.”<sup>113</sup>

The question is whether this government support will change the views of opponents.<sup>114</sup> The two main opposition forces have been the BCI and

LEGALLY INDIA (Apr. 7, 2015, 1:00 PM), <http://www.legallyindia.com/Law-firms/unexpected-ally-who-exactly-is-the-indian-lawyers-body-intervening-in-foreign-law-firms-case-that-has-harish-salve-helping-pro-bono> [<http://perma.cc/C2GB-LGP2>] (discussing an association of Indian lawyers challenging the arguments and the outcome of the *Lawyers Collective* case); Phil Taylor, *Court Clarifies Legality of Foreign Lawyers’ Activities in India*, INT’L BAR ASS’N (Mar. 1, 2012), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=f4023622-dd3b-433b-a664-d749ffd8868c> [<http://perma.cc/S9XZ-EXTD>] (discussing the decision to outlaw “so-called fly-in/fly-out activities,” under which foreign lawyers visit India for short periods to advise clients on foreign law issues).

109. *Case Status*, SUP. CT. INDIA, <http://courtnic.nic.in/courtnicsc.asp> (search by “Case Number,” “Case Type: SLP (Civil),” “Case No.: 11263,” and “Year: 2015”) (last visited Mar. 29, 2016).

110. The BJP, which has its roots in Hindu-nationalism, won 282 of the 545 seats in the lower house and, together with its allies, 336 seats overall. See Niharika Mandhana, *Narendra Modi’s Election Win Heralds New Era in India*, WALL STREET J. (May 17, 2014, 12:20 AM), <http://www.wsj.com/articles/SB10001424052702304908304579564810455296606> [<http://perma.cc/X4VM-MESY>] (explaining that BJP rode a wave of voter discontent with the incumbent Congress party and a sharply slowing economy); Liz Mathew & Ami Shah, *Narendra Modi Makes Election History as BJP Gets Majority on Its Own*, LIVE MINT (May 17, 2014, 6:30 PM), <http://www.livemint.com/Politics/vGyzihxgQEuYmzRmyRA1vN/Election-results-2014-Counting-begins-as-Narendra-Modi-eyes.html> [<http://perma.cc/4DFS-6XRP>] (commenting that the election set a record for the highest number of seats won by any Indian party on its own since the 1984 Lok Sabha elections).

111. Mandhana, *supra* note 110; Mathew & Shah, *supra* note 110.

112. *Narendra Modi Speaks for Foreign Lawyers’ Entry: Fears of Foreign Domination Unfounded*, LEGALLY INDIA (Apr. 25, 2015, 12:23 AM), <http://www.legallyindia.com/Law-firms/narendra-modi-speaks-for-foreign-lawyers-entry-fears-of-foreign-domination-unfounded> [<http://perma.cc/2QTW-UMX7>].

113. Asit Ranjan Mishra, *Govt May Soon Liberalize Legal Services*, LIVE MINT (Apr. 6, 2015, 1:32 AM), <http://www.livemint.com/Politics/PwlaQ7gOvELjM6TFprSuDO/Govt-may-soon-liberalize-legal-services.html> [<http://perma.cc/D5LE-MANA>].

114. See Krishnan, *supra* note 8, at 93–97 (outlining three proposals to change the current policy toward foreign lawyers practicing in India, utilizing a gradual integrative process that would be sensitive to opponents’ concerns and dissenting opinions); *Foreign Lawyers May Get Toehold, But Won’t Be Allowed to Fight Cases*, TIMES INDIA (June 30, 2015, 3:20 AM), <http://timesofindia.indiatimes.com/india/Foreign-lawyers-may-get-toehold-but-wont-be-allowed>

SILF.<sup>115</sup> The BCI is the statutorily established body that regulates the legal profession under the Indian Advocates Act of 1961.<sup>116</sup> The BCI also mandates enrollment of all courtroom litigators in India, oversees the recently adopted bar exam and legal education in the country, and sets forth guidelines on how advocates are to practice their profession.<sup>117</sup>

Unfortunately, the BCI has not kept verifiable figures on how many advocates it currently has on its rolls. Estimates range from 1.2 to 1.7 million, although these statistics have come under scrutiny, and the BCI's own president has said that “[t]hirty [percent] of all lawyers are fake, who either hold fraudulent degrees or are non-practising persons.”<sup>118</sup> (On this 30% remark, Kian Ganz has reported that “the BCI has an arithmetical challenge and never really had any exact idea of the number of lawyers it was actually supposed to be regulating in India.”<sup>119</sup>) What is known is that most lawyers work as solo practitioners in the lower courts, toiling away and struggling to maintain a steady stream of clients.<sup>120</sup>

Yet it is these same lawyers—those unconnected to high-level transactional, commercial dealings—who have been among the fiercest and most vocal opponents of allowing foreign law firms into India.<sup>121</sup> Why? In part, there is a symbolic component, with these lawyers employing colonial imagery in their rhetoric and advancing a hypernationalist platform when expressing their opposition.<sup>122</sup> There also is an instrumental aspect: many

-to-fight-cases/articleshow/47873203.cms [http://perma.cc/FXJ7-8RQ6] (explaining that although the Indian government and opponents of liberalization have begun discussing a gradual opening up of the legal-services sector to foreign firms, litigation services will likely remain the exclusive domain of Indian lawyers).

115. *E.g.*, *Law Firms Oppose Entry of Foreign Players*, BUS. STANDARD (Sept. 27, 2007), [http://www.business-standard.com/article/economy-policy/law-firms-oppose-entry-of-foreign-players-107092701111\\_1.html](http://www.business-standard.com/article/economy-policy/law-firms-oppose-entry-of-foreign-players-107092701111_1.html) [https://perma.cc/T5Y5-REDB] (“‘We are totally opposed to opening . . . legal services to foreign law firms,’ said the President of the Society of Indian Law Firms (SILF) . . .”); Utkarsh Anand, *BCI to SC: Foreign Lawyers Can’t Be Allowed Even in Seminars*, INDIAN EXPRESS (Apr. 3, 2015, 2:26 AM), <http://indianexpress.com/article/india/india-others/bci-to-sc-foreign-lawyers-cant-be-allowed-even-in-seminars/> [https://perma.cc/CP79-RAX7].

116. Krishnan, *supra* note 8, at 61.

117. Advocates Act, 1961, Nos. 7, 25, Acts of Parliament, 1961 (India).

118. *See* Kian Ganz, *One Third of the Profession Is Fake, Claims BCI Chief. So Can the Real Lawyers Please Stand Up?*, LEGALLY INDIA (July 27, 2015, 6:28 PM), <http://www.legallyindia.com/Bar-Bench-Litigation/one-third-of-the-profession-is-fake-claims-bci-chief-so-can-the-real-lawyers-please-stand-up> [http://perma.cc/ZD5Q-5EKC] (discussing the BCI’s “arithmetical challenge” in regulating Indian lawyers, since the state bar councils maintain the rolls of advocates and the BCI has had only sporadic access to these lists).

119. *Id.*

120. Krishnan, *supra* note 8, at 61–62; *see also* Jayanth K. Krishnan et al., *Grappling at the Grassroots: Access to Justice in India’s Lower Tier*, 27 HARV. HUM. RTS. J. 151, 164–65, 179 (2014) (“Many lawyers concede that their daily professional lives are a struggle to eke out an existence to support themselves and their families.”).

121. Krishnan, *supra* note 8, at 81.

122. *Id.* at 60.

of these lawyers genuinely believe that once foreign law firms are admitted into India, they will soon be vying to gain access into the courts.<sup>123</sup>

These lawyers have been joined in their opposition efforts by SILF.<sup>124</sup> SILF, which was founded in 2000, has more than 100 Indian law-firm members as part of its organization.<sup>125</sup> It has no statutory standing; rather, it is an interest group that seeks to promote the agenda of its member base.<sup>126</sup> SILF has long opposed the entry of foreign law firms, listing a string of arguments, including that countries such as the United Kingdom and United States do not allow full reciprocity for Indian lawyers to work in those jurisdictions.<sup>127</sup> SILF also believes that foreign law firms will engage in unfair trade practices—for example, by cutting fees so low that Indian firms will be unable to compete.<sup>128</sup> Once the Indian firms have dissolved, the foreigners will raise prices, thereby creating a monopoly.<sup>129</sup> Finally, SILF suggests that Indian clients are perfectly happy with their Indian lawyers and do not wish to engage foreign counsel.<sup>130</sup>

Yet with the new government in power, SILF and the current BCI Chairman, M.K. Mishra, appear to be relenting.<sup>131</sup> Moreover, key members within the bar, namely several elite advocates who practice in front of the Supreme Court or who are lawyers in major law firms, have also dissented from the opposition.<sup>132</sup> There have been others, too, who have been placing pressure on the government to open the market, including:

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123. *Id.* at 90.

124. *Id.* at 63–65.

125. *SILF – Introduction*, SILF, <http://www.silf.org.in/1/Introduction.htm> [<https://perma.cc/55M7-S69N>]; *SILF - Brief History*, SILF, <http://www.silf.org.in/2/Brief-History.htm> [<https://perma.cc/D9B3-3ZNX>].

126. *SILF – Mission & Goals*, SILF, <http://www.silf.org.in/3/Mission-and-Goals.htm> [<https://perma.cc/99G9-29CL>]; see also Katie Feuer, *Opening India's Legal Market: The Madras High Court Cracks the Door for Foreign Lawyers*, 37 B.C. INT'L & COMP. L. REV. (E. SUPP.) 16, 21 (2014) (discussing SILF as an organization opposing competition from foreign firms).

127. See Krishnan, *supra* note 8, at 85 (describing the regulatory requirements with which Indian lawyers must comply when trying to practice in the United States or United Kingdom and how accordingly for some “it is galling that . . . American and British law firms have no qualms arguing that they should be able to come freely into India and establish their practices”).

128. *Id.* at 82–83.

129. *Id.* at 83.

130. Uttam Sengupta, *Who Needs Foreign Law Firms Here?*, OUTLOOK (July 24, 2012), <http://www.outlookindia.com/article/who-needs-foreign-law-firms-here/281727> [<http://perma.cc/GY35-SS4D>] (interviewing SILF's president concerning competition from foreign firms).

131. See Prachi Shrivastava, *Lalit Bhasin: SILF Wants to Start Long Legal Liberalisation Process in 2015, Says BCI & Gov't Agree*, LEGALLY INDIA (Feb. 24, 2015, 5:26 AM), <http://www.legallyindia.com/Law-firms/lalit-bhasin-silf-wants-to-start-long-legal-liberalisation-process-in-2015-says-bci-gov-t-agree> [<http://perma.cc/TF9T-KE6J>] (discussing how SILF and the BCI chairman support opening the Indian legal market to foreign competition).

132. See Krishnan, *supra* note 8, at 88 (describing perspectives of proliberalization lawyers, including some elite Indian law firm lawyers' standpoint).

- Younger generation, “peel-off” lawyers. Namely, those who have formed their own corporate firms by breaking away from older, traditional firms. These lawyers often have been exposed to legal education or legal practice settings abroad and see the advantages of a competitive, global market existing in India.<sup>133</sup>
- Law students (particularly from the better law schools in India) and various legal educators.<sup>134</sup>
- Prominent Indian business leaders and general counsels, particularly those who have a global reach.<sup>135</sup>
- Foreign businesses working in India.<sup>136</sup>
- Interest groups, such as the US–India Business Council; the ABA; the Indian National Bar Association; and the UK Law Society.<sup>137</sup>
- The business-focused and legal-focused media.<sup>138</sup>

Some optimism, therefore, exists that a change in policy is on the horizon.<sup>139</sup> At the same time, Indian opponents are doing what they can to

133. Krishnan, *Peel-Off Lawyers*, *supra* note 9, at 31–32.

134. *See* Krishnan, *supra* note 8, at 78–79 (explaining how law students would potentially benefit from the presence of foreign firms); Krishnan & Dayal, *supra* note 94, at 2.

135. *See* Manju Manglani, *Indian Businesses and Law Firms Strongly Support Liberalisation of India’s Legal Market*, MANAGING PARTNER (June 29, 2012), <http://www.managingpartner.com/news/business-strategy/indian-businesses-and-law-firms-strongly-support-liberalisation-india%E2%80%99s-legal> [<http://perma.cc/46B7-TC6G>] (summarizing a survey of large Indian businesses and law firms).

136. Krishnan & Dayal, *supra* note 94, at 2.

137. *Id.*

138. *Id.*

139. Questions remain as to how the path to admission will work. Statutorily, a parliamentary change to the Advocates Act might be required. Within the Act, there is an Indian citizenship requirement; there is also a legal education requirement, stating that only lawyers who graduate from law schools accredited or recognized as legitimate by the BCI can practice. Advocates Act, 1961, No. 25, Acts of Parliament, 1961 (India). If amendments to the Act are necessary, there could be a protracted battle in Parliament. There is, however, an alternative argument. Per the Act, foreign nationals are eligible for enrollment “if citizens of India, duly qualified, are permitted to practise law in that other [foreign] country.” *Id.* § 24(1)(a). The reciprocity argument, contrary to what SILF says, has thus been met insofar as the United States and United Kingdom are concerned, because Indian citizens can practice in these two countries once they have the necessary credentials. In addition, § 47(2) of the Act empowers the BCI to decide which qualifications matter; it may be as strict or liberal in interpreting this provision as it sees fit. *Id.* § 47(2). Given this latter position, as long as the BCI is willing to cooperate, the regulatory hurdles for granting foreign law firms market access into India appear to be minimal. The 2008 Bar Council of India, Rules of Legal Education, Schedule V, lists the criteria for acknowledged law schools, which include, ironically, several from the United States. *Foreign Universities Whose Degrees in Law Are Recognised by the Bar Council of India*, B. COUNCIL INDIA, <http://www.barcouncilofindia.org/about/legal-education/list-of-foreign-universities-whose-degrees-in-law-are-recognised-by-the-bar-council-of-india/> [<https://perma.cc/K3T9-CGCH>]. For the list of acknowledged law schools in India, see LIST OF FOREIGN UNIVERSITIES WHOSE DEGREES IN

stop, or at least delay, this outcome.<sup>140</sup> Their recent tactics have had teeth, causing some to worry that the liberalization of the Indian legal services sector will not happen.<sup>141</sup>

So what if this is the case? What if foreign law firms continue to be blocked with no changes in sight? In the next and final subpart, this Review will outline why those who have been hopeful are now appearing rather somber. Thereafter, this Review will suggest that even if the opponents are successful in stalling liberalization, the lens used to view this debate has, until now, been rather binary. Influence can occur noticeably and substantively, even where foreign actors are not on the ground. Such has been the case in India for a long time.

### C. *Efforts to Delay, But Do They Matter? A Thought Experiment*

In 2014, SILF President Lalit Bhasin announced that he and his organization would be changing their position on allowing foreign lawyers into the country.<sup>142</sup> SILF now accepts “a [three] phased sequential approach for [the] entry of foreign legal consultants [FLCs] and law firms into India over a period of five to seven years.”<sup>143</sup> (FLC would be the term used for a foreign lawyer working in India.<sup>144</sup>) Critics have argued that this plan is nothing more than a stalling tactic that would take ten or more years before foreign law firms could enter.<sup>145</sup> Phase I, as outlined by SILF, involves improving the domestic situation for Indian firms, including: allowing Indian firms to operate as full-fledged limited liability partnerships

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LAW RECOGNIZED BY THE BAR COUNCIL OF INDIA, BAR COUNCIL INDIA (2012), <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/List-of-Foreign-Universities-May-2012.pdf> [https://perma.cc/53V4-P6P6].

140. See Krishnan, *supra* note 8, at 59.

141. See Kian Ganz, *Why Foreign Law Firms Are Most Likely to Enter India Now (or Never): An Investigation into the Realities of Legal Policy, Lobbying & Backroom Talks*, LEGALLY INDIA (Mar. 3, 2015, 7:00 AM), <http://www.legallyindia.com/Law-firms/legal-market-liberalisation-investigation-into-lobbying-and-policy> [http://perma.cc/M9JA-CPP7].

142. Lalit Bhasin, *Follow a Phased Sequential Approach for Entry*, BUS. STANDARD (Dec. 14, 2014, 10:34 PM), [http://www.business-standard.com/article/opinion/follow-a-phased-sequential-approach-for-entry-114121400627\\_1.html](http://www.business-standard.com/article/opinion/follow-a-phased-sequential-approach-for-entry-114121400627_1.html) [http://perma.cc/A6EE-4D7G].

143. *Id.* The ABA has a model rule on this issue, which codifies the parameters of FLCs. MODEL RULE FOR THE LICENSING AND PRACTICE OF FOREIGN LEGAL CONSULTANTS (AM. BAR ASS'N 2006), <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/FLC.authcheckdam.pdf> [http://perma.cc/7URW-H865]. Many U.S. states follow variations of this model rule. See generally AM. BAR ASS'N STATE IMPLEMENTATION OF ABA MJP POLICIES (2010), <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/recommendations.authcheckdam.pdf> [http://perma.cc/9TD5-URMB] (listing states who have adopted some form of the model FLC rule). Hence, implementing the government's position should not be a problem in India, with American firms seemingly becoming the immediate beneficiaries, as the regulatory changes would allow American lawyers to qualify as FLCs.

144. See Bhasin, *supra* note 142.

145. E.g., Ganz, *supra* note 141.

(which is currently not available); lifting archaic prohibitions on Indian firms from advertising; and “[c]easing of [the] practice of Indian law outside of India by foreign lawyers and foreign firms.”<sup>146</sup>

All three points are ones that SILF’s critics deride. Regarding the first two, they would require parliamentary or civil-service cooperation, which would take time.<sup>147</sup> On the third point, how in the world, critics say, could such a principle be enforced?<sup>148</sup> How could one foreign law firm be expected to patrol the practices of other foreign firms?<sup>149</sup> This is all pretext, these critics argue, because the SILF lawyers know that it will be impossible to meet such a standard; so long as it is, SILF can argue that the foreign firms have not upheld their end of the bargain and thus should not be granted entry.<sup>150</sup>

There are also hurdles with SILF’s Phase II. True, this second phase includes some reasonable regulations, such as having foreign lawyers restricted to practicing their home country’s laws, being subject to the BCI’s code of conduct, and complying with India’s immigration regulations.<sup>151</sup> But other aspects are troubling. For example, under Phase II, a foreign lawyer in India who is disciplined by the BCI is expected to have this judgment recognized by that lawyer’s own governing bar association.<sup>152</sup> Yet such a blanket requirement triggers a range of due process and equal protection issues, to which most foreign bar organizations will object.<sup>153</sup> There is also a curious requirement that an FLC stay in India to retain her authorization license and that she not “quote from or summarise advice concerning the law of India which has been rendered by an Advocate duly admitted under the law in India.”<sup>154</sup> These provisions effectively negate the entire purpose for an FLC to exist. And under Phase II, foreign law firms would be subjected to a long probationary period (seven years), after which there would be a review by the “Bar

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146. SOC’Y OF INDIAN LAW FIRMS, PROPOSAL FROM SOCIETY OF INDIAN LAW FIRMS TO INDIAN COMMERCE MINISTRY (n.d.) (on file with the Texas Law Review) [hereinafter SOC’Y OF INDIAN LAW FIRMS, PROPOSAL].

147. Cf. Krishnan, *supra* note 8, at 92–93 (noting the burdensome political process that Indian politicians need to handle with respect to the admission of foreign lawyers and suggesting that any policy change would be unlikely).

148. *Id.* at 93–94.

149. *See id.*

150. *E.g.*, Ganz, *supra* note 141.

151. SOC’Y OF INDIAN LAW FIRMS, PROPOSAL, *supra* note 146, at 2–3.

152. *Id.* at 3 (requiring “[c]onfirmation from the concerned Foreign Bar Council that any decision of the BCI in disciplinary proceedings will be honoured by such Foreign Bar Council”).

153. We once again thank Mr. Anand Dayal for bringing this point to our attention.

154. SOC’Y OF INDIAN LAW FIRMS, PROPOSED RULES REGULATING FOREIGN LEGAL CONSULTANTS 2 (n.d.) (on file with the Texas Law Review) [hereinafter SOC’Y OF INDIAN LAW FIRMS, PROPOSED RULES].

Council of India, Ministry of Law, Ministry of Commerce & Industry, and Indian law firms and lawyers”<sup>155</sup> regarding how liberalization has impacted the domestic legal environment.

It is only after these two stages are completed that a foreign law firm would be eligible for a license from the BCI.<sup>156</sup> But, according to the Phase III provisions, not all firms that make it past the first two stages will receive licenses, as the “[n]umber [is] to be limited.”<sup>157</sup> To add to all this, during the summer of 2015, SILF, together with the BCI, took another aggressive step. Both organizations filed suit against the “Big Four accountancy firms, PwC [PricewaterhouseCoopers], Deloitte, KPMG and EY [Ernst & Young], for allegedly ‘engaging in the unauthorised practice’ of law.”<sup>158</sup> Given that these firms have been in India for years, many saw the timing of this move as a preemptive warning shot against the current government and to those foreign law firms contemplating moving to India.<sup>159</sup> It is, therefore, not difficult to understand why SILF’s actions have been met with skepticism.

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The authors of this Review firmly believe that the Indian market ought to be liberalized—and quickly. The effects on the ground, per Stern’s observations in China, would be profound and positive in India as well. Moreover, with the new government’s continued retention of political capital, there is an opportunity in India that has not existed before. The time has come to liberalize, and hopefully that will happen soon.

Yet what if the status quo remains? Employing a thought experiment may be useful at this point. To begin, consider that globalization has enabled foreign and Indian lawyers to engage with each other for years. Today’s globalized technology—particularly the use of the Internet, improved conference-calling services, and video platforms—allows for the

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155. SOC’Y OF INDIAN LAW FIRMS, PROPOSAL, *supra* note 146, at 3.

156. *Id.* at 2.

157. *Id.* at 4 (stating that the “[n]umber of foreign lawyers in all (including those in the permitted foreign firms and joint ventures) [is] to be limited in the beginning and thereafter [there will be] a gradual increase of foreign lawyers so licensed”).

158. *New Target Acquired? SILF, Bar Council Serve Notice on Big 4 Consulting Firms for Illegal Practice of Law*, LEGALLY INDIA (July 13, 2015, 12:02 AM), <http://www.legallyindia.com/Bar-Bench-Litigation/new-target-acquired-silf-bar-council-serve-notice-on-big-4-consulting-firms-for-illegal-practice-of-law> [<http://perma.cc/G92E-PSRA>].

159. *E.g.*, Ashwin Mohan, *Big 4 Firms Face Charges of Unauthorized Practice of Law*, ECON. TIMES (July 13, 2015, 11:14 AM), [http://articles.economictimes.indiatimes.com/2015-07-13/news/64370854\\_1\\_indian-law-firms-advocates-act-bar-council](http://articles.economictimes.indiatimes.com/2015-07-13/news/64370854_1_indian-law-firms-advocates-act-bar-council) [<https://perma.cc/TB9W-B2ZR>].



potential to have twenty-four-hour workdays with real-time interaction. Lawyers from around the world are able to do many aspects of high-stakes commercial dealings without needing to leave their home jurisdictions.<sup>160</sup>

Next, consider the technological advancements in air travel, which is now more affordable and available to different destinations than even two decades ago. International lawyers regularly meet with one another at conferences around the globe, and in these settings there are opportunities for lawyers to learn best practices from one another. Furthermore, beyond just gathering in cities outside of India, foreign lawyers regularly travel to India.

For example, several international law firms have established “India desks” in designated locations around the globe, and foreign lawyers working in these practices frequently visit India to consult with clients, government leaders, and Indian lawyers.<sup>161</sup> Foreign arbitration lawyers routinely fly-in and fly-out of India to participate in hearings and engage with both allied and opposing counsel.<sup>162</sup> Foreign lawyers are often panelists and keynote speakers at conferences held in India, and they visit as lecturers at Indian law schools.<sup>163</sup> (Some foreign law firms also visit certain Indian campuses to recruit.<sup>164</sup>) In addition, foreign lawyers are guests on Indian media programs and are quoted in Indian political, business, and legal newspapers, and they serve as consultants and advisors on different projects, both in the private and public sectors.<sup>165</sup> And foreign lawyers impact the Indian economy, as they run businesses (including

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160. See Laurel S. Terry, *The Legal World Is Flat: Globalization and Its Effect on Lawyers Practicing in Non-Global Law Firms*, 28 NW. J. INT’L L. & BUS. 527, 537 (2008) (explaining that complex legal work has been sent offshore in the past).

161. The authors collected primary data on the number of major international law firms that have India desks, which amounts to forty-eight. For the list of law firms, please contact the authors or the *Texas Law Review*.

162. See Krishnan, *supra* note 8, at 59 n.9 (describing situations in which a foreign lawyer might be permitted to litigate in India); Terry, *supra* note 9, at 2910 (noting Indian court decisions regarding foreign lawyers’ participation in international arbitration proceedings in India).

163. Jonathan Gingerich et al., *The Anatomy of Legal Recruitment in India: Tracing the Tracks of Globalization* 22–24 (HLS Ctr. on the Legal Profession Res. Paper Series, Paper No. 6, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2523027](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2523027) [https://perma.cc/924N-J4EX] (describing the process that international law firms undergo in recruiting students on Indian campuses); see also 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 HIST. 447, 493 (2004) (describing the formation of a panel with professors from abroad to assess National Law Schools in India).

164. Gingerich et al., *supra* note 163, at 22–24.

165. See, e.g., Mark Plotkin et al., *Steering the Deal Through*, INDIA BUS. L.J., Sept. 2009, at 31, 32–33 (providing tips and advice from D.C. lawyers for Indian businesses in an Indian Business and Law publication).

outsourcing operations, call centers, and publishing houses) that hire Indians in a range of employment positions.<sup>166</sup>

This “mobility arrow” flows in the other direction as well. Since India liberalized in 1991, a wave of Indian lawyers and Indian law students have gone abroad for sustained periods of time.<sup>167</sup> The latter have pursued foreign degrees and foreign employment in places like the United Kingdom, the United States, Continental Europe, the Middle East, and other parts of Asia.<sup>168</sup> Indian law firms have “seconded” their lawyers to certain friendly firms abroad.<sup>169</sup> When these individuals return, they bring back with them a host of experiences that can often change the dynamics of the legal-profession settings in which they work.<sup>170</sup> Even if they do not come back, the networks, connections, and professional circles they had within India continue, and they are now able to serve as a bridge between their old and new environments.

Another enormous benefit that globalization and technological advancement have brought to bear is that clients, with a click of a mouse, can directly contact lawyers who are located abroad.<sup>171</sup> Of course, there

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166. See Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2195–96 (2007) (highlighting some of the economic benefits of legal outsourcing in India); see also Krishnan, *supra* note 8, at 86 (explaining that Western law firms hire Indians in legal-process outsourcing); Papa & Wilkins, *supra* note 94, at 183 (noting that international law firms are increasingly hiring lawyers from India’s top law schools).

167. Swethaa Ballakrishnen, *Homeward Bound: What Does a Global Legal Education Offer the Indian Returnees?*, 80 FORDHAM L. REV. 2441, 2443–45, 2472 (2012); Krishnan, *Peel-Off Lawyers*, *supra* note 9, at 6–7, 8.

168. See Ballakrishnen, *supra* note 167, at 2453 (noting that there has been “a constant increase in the number of Indian LL.M. aspirants”); John Flood, *Legal Education in the Global Context: Challenges from Globalization, Technology and Changes in Government Regulation* 21–22 (Univ. of Westminster Sch. of Law, Working Paper No. 11-16, 2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1906687](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1906687) [<https://perma.cc/Q2X9-LGTX>] (commenting on the flow of students from India to Western countries).

169. Kian Ganz, *Clifford Chance Sends Senior Partner to Live with AZB in India*, LEGALLY INDIA (June 6, 2009, 2:58 PM), <http://www.legallyindia.com/2009060637/Law-firms/clifford-chance-sends-senior-partner-to-live-in-india-with-azb> [<http://perma.cc/6UA4-FVSP>]; Kian Ganz, *Singh & Associates to Launch Singapore with Two, Plans for NY, Lon, HK Bases*, LEGALLY INDIA (June 22, 2013, 4:39 PM), <http://www.legallyindia.com/201307223857> [<http://perma.cc/K7ZN-PM66>].

170. See Ballakrishnen, *supra* note 167, at 2462–74 (explaining the benefits of the LL.M. program to individual students).

171. It is true that such interactions do not provide for in-depth connections, as might be available if, say, foreign lawyers were firmly entrenched in cities like Delhi, Mumbai, or Bangalore. Still, as has been discussed, these existing alternatives do offer chances for both foreign and Indian lawyers to work with each other in substantive, meaningful ways.

might be great convenience (and possible cost savings) in having foreign lawyers on the ground and in the same time zone. But the fact is that pathways and access to foreign lawyers for clients are no longer as difficult as they once were.<sup>172</sup>

### Conclusion

This Review began with an overview of the important research conducted by Rachel Stern. Her book on the growth of the environmental litigation movement in China demonstrates an intellectual sophistication and places her story into the broader comparative discourse on globalization. Furthermore, an important chapter in her book focuses on how international forces help shape the dynamics of the domestic environment. Whether the external actors are foreign law firms or foreign NGOs, the fact that they are in the country working with local stakeholders allows them the opportunity to influence both the political and legal landscapes.

The issue, however, that this Review has sought to build upon is whether such physical presence is necessary for influence to be exerted. By focusing on India—one of the most closed markets in the world, where foreign lawyers are prohibited from establishing a permanent, on the ground office—this Review has shown that the discussion is more complicated than it is binary. Influence can manifest itself in multiple ways, and regulations that continue barring foreign lawyers from the Indian legal market are simply not as meaningful as both supporters and opponents have suggested.

For too long, the discourse has centered on whether foreign lawyers can establish offices and practice law within India. The arguments from both supporters and opponents have at times been excessive. Some proponents of liberalization have accused those on the other side of being economically greedy, protectionist, and solely interested in preserving their existing fiefdoms.<sup>173</sup> Conversely, certain opponents of accelerated liberalization have stated that foreign law firms are simply keen on

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172. Interestingly, several such clients are corporations that have opted to grow their own in-house counsel offices, in part as a means of bringing them in closer contact with foreign lawyers. See Vikramaditya S. Khanna & David B. Wilkins, *Globalization and the Rise of the In-House Counsel Movement in India*, in *THE INDIAN LEGAL PROFESSION IN THE AGE OF GLOBALIZATION: THE RISE OF THE CORPORATE LEGAL SECTOR AND ITS IMPACT ON LAWYERS AND SOCIETY* (David B. Wilkins, Vikramaditya Khanna & David Trubek eds., forthcoming 2016). Rather than hiring out, Indian in-house counsel today can do much of the needed legal work, have connections abroad, and belong to global organizations like the Association of Corporate Counsel, which provides a platform for interaction between these Indian lawyers and their colleagues around the globe. *Id.*

173. Krishnan, *supra* note 8, at 81–84, 87.

exploiting the fertile Indian market. These foreign lawyers, such critics claim, are no different than the British colonizers who unabashedly looted Indian resources throughout the pre-independence period.<sup>174</sup> Emotions are clearly raw.

For this reason, this Review has sought to dial back the highly charged rhetoric. As long-time observers of the changing nature of the legal profession in different regions of the world, the authors of this Review favor and see the benefits of allowing legal-services markets to be accessible to lawyers from different jurisdictions, particularly as younger lawyers and law students search for desirable and diverse employment opportunities. But it is also key to remember that globalization and the improvement of technology over the past two decades have changed communication, the ways ideas are dispersed, and how lawyers practice law on the international stage. Having a physical presence within a country may be sufficient to exert influence within a domestic legal environment, but it is not always necessary. Our discussion of India showcases this point. In sum, we hope that those on the frontlines will not forget the nuances of this debate, as well as how there are various factors affecting the globalizing legal profession today.

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174. *See id.* at 60 (describing this perspective that foreign law firms have been perceived as “modern-day Western colonialists” by some Indian legal professionals).