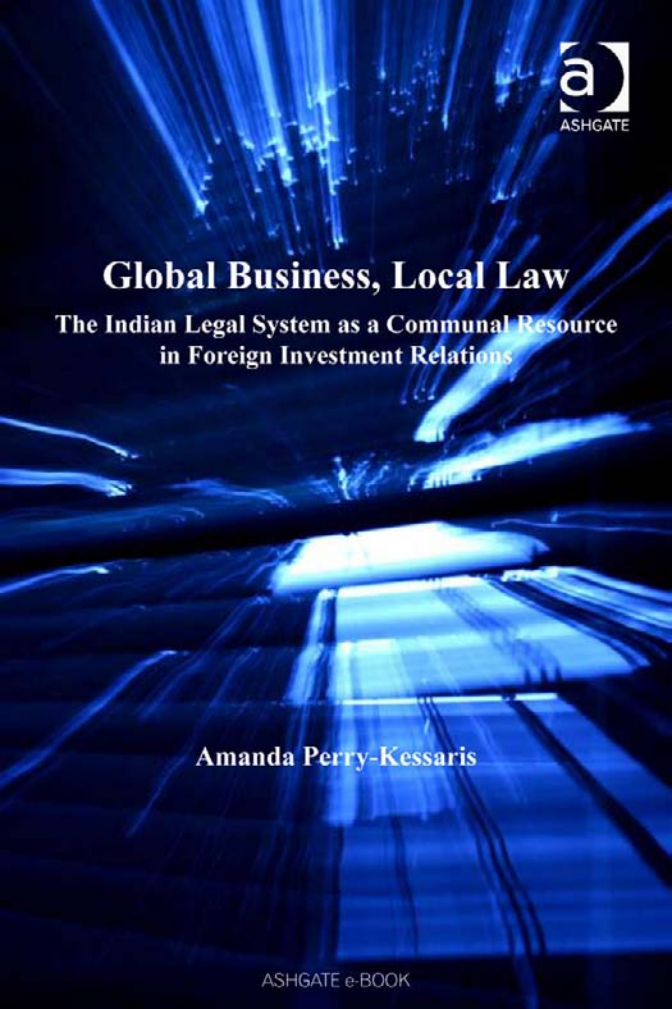
ASHGATE
Global Business, Local Law
The Indian Legal System as a Communal Resource in Foreign Investment Relations
Amanda Perry-Kessaris
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GLOBAL BUSINESS, LOCAL LAW

For and because of
Nicos, Georgina, Leo and she whom we await.

Global Business, Local Law

The Indian Legal System as a Communal Resource in Foreign Investment Relations

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List of Abbreviations

ATCA	Alien Tort Claims Act, 1789, United States
BATF	Bangalore Agenda Task Force
BJP	Bharatiya Janata Party
BOOT	Build-own-operate-transfer
CSE	Centre for Science and Environment, New Delhi
CVC	Central Vigilance Commission
DIC	Department of Industries and Commerce, Government of Karnataka
DIPP	Department for Industrial Policy and Promotion, Government of India
EIA	Environmental Impact Assessment
ESG	Environment Support Group, Bengaluru
FDI	Foreign direct investment
FICCI	Federation of Indian Chambers of Commerce and Industry
FIPB	Foreign Investment Promotion Board
IAS	Indian Administrative Service
ICC	International Chamber of Commerce
IFG	International Forum on Globalization
IOE	International Organisation of Employers
KFC	Kentucky Fried Chicken
KIADB	Karnataka Industrial Areas Development Board
KRSS	Karnataka Raja Raitha Sangha (Karnataka State Farmers Association)
KSPCB	Karnataka State Pollution Control Board
KUM	Karnataka Udyog Mitra (Friend of the Investor)
MoEF	Ministry of Environment and Forests, Government of India
NAC	National Advisory Council
NEP	New Economic Policy
NICE	Nandi Infrastructure Corridor Enterprises
NGO	Non-governmental organisation
OECD	Organisation for Economic Cooperation and Development
OUP	Oxford University Press
PAC	Public Affairs Center, Bengaluru
PGA	People's Global Action
RBI	Reserve Bank of India
SLAPP	Strategic Litigation Against Public Participation
SIA	Secretariat for Industrial Approvals, Government of India
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development

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APK
London, March, 2008.

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Chapter 1

Introduction

Global business

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

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

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

Local law

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

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

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

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

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

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

Investment climate discourse

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

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

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

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

'Seeking similarity, appreciating difference'

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

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

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

Law as a communal resource

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

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

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

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

What follows

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

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

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

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

Notes

1 This study follows the UNCTAD definition of foreign direct investment which is in turn based on the definitions contained in the fifth edition of the International Monetary Fund's Balance of Payments Manual, devised in 1993 and known as BPM5; and the third edition of the Organisation for Economic Cooperation and Development's Detailed Benchmark Definition of Foreign Direct Investment devised in 1996 and known as BD3. The foreign entity making the investment is known as the 'direct investor'; and the enterprise in which the investment is made – whether its an unincorporated branch or incorporated subsidiary – is known as a 'direct investment enterprise' (UNCTAD website, October 2006).

2 The resulting control may not be complete, but it implies some level of equity ownership by the investor in the investment enterprise, generally agreed to be a minimum of 10 per cent.

3 This is a modified form of the World Bank definition which can be seen on the World Bank Civil Society Topic website.

4 The World Bank inspection procedure is an example of a more forceful mechanism. For example, in 1998, an NGO filed a Request for Inspection with the World Bank in which it alleged that there had been inadequate consultation of tribal and NGO viewpoints during the preparation of plans for an 'eco-development' in the Nagarahole area of Karnataka. The World Bank Inspection Panel found that consultation had indeed been inadequate according to its own policy, and that as a result the project was in some respects flawed. It recommended an investigation by the Executive Directors of the Bank (Inspection Panel of the World Bank, 1998, pp. 1–4). However, the procedure only applies to World Bank projects.

5 Partnership with international and foreign civil society actors can be useful. For example, international opposition to India's Dahanu port came from WWF-UK and Global Action Response and the World Development Movement, each of which took action to raise awareness about the project (Perez, 2002, p. 15). Some commentators have criticised that lack of interaction between Indian and foreign activists arguing that India has missed opportunities for support and inspiration (Khaitan, 2004, p. 7). However, these relationships can become oppressive. For example, the Indian-based movement against World Bank-financed Narmada dam maintained links with transnational anti-World Bank campaigns. These foreign groups came to dictate the 'agendas and priorities', the 'vocabulary' and the 'timing of local action' (Randeria, 2003, p. 316).

6 Of course, the attention of foreign investors may be genuinely distracted from host state legal system by the fact that they will be continue to be subject to regulation – such as financial reporting standards – in their home state. Alternatively, investors may seek to use foreign standards as an excuse for breaching local standards. For example, when certain States partially banned Coca Cola and PepsiCo products because they allegedly contained pesticides, Coca Cola responded by declaring the pesticide levels to be within the limits allowed in the European Union (BBC News Online, 2006).

7 This is a somewhat surprising conclusion, given that the case he examined, resistance to the building of a Port in the ecologically sensitive Dahanu region of the Indian state of Maharastra, was solved by a particularly Indian solution: the creation by the judiciary of a hybrid authority which eventually prevented the port from being built (Perez, 2002, p. 14).

8 For the development of World Bank legal reform, see Santos, 2006.

9 For a detailed critique of the Doing Business project, see Davis and Kruse, 2007.

10 Enterprise surveys have incorporated two earlier forms of investor perception indicators: World Business Environment Surveys and Investment Climate Surveys. The former are still freely available on the dedicated website.

11 Bronwen Morgan has noted a further important schism in empirically-grounded, socio-legal work generally, which addresses the role of law in social change either in terms of rights or in terms of regulation. 'Rights scholarship' tends to address 'mobilization, social change, questions of identity and culture, to adopt the viewpoint of the 'disadvantaged or oppressed', and to focus on their 'claims of individualized entitlement' and their use of 'judicial avenues'. By contrast 'regulation scholars are more typically concerned with questions of economic efficiency, the evaluation of results, rational design of institutions and bureaucratic or discretionary modes of pursuing public interests'. Rights scholarship is often concerned with 'naming, blaming and claiming', while regulation tends to focus on 'rule-making, monitoring and implementation'. But it is in some ways more useful to think of a 'six-fold process of disputing (naming, blaming and claiming, rule-making, monitoring and implementation)', with the emphasis on rights or regulation being determined at the point when a claim is made (Morgan, 2007, pp. 2, 3 and 11).

12 See also World Bank, 2004a, p. 40.

13 In November of 2006, Bangalore was officially re-named Bengaluru to bring the city closer to its pre-colonial, Kannada name of *Benda Kaal Ooru*. It is important to note that 'communal' has a different, negative, meaning in India, where it denotes antagonisms between different social groupings, especially between Muslims and Hindus.

14 Interviewees are first designated as local (L) or foreign (F); and then according to their role as civil society actor (CS), lawyer (L), commentator (C), investment actor (I), adviser to foreign investors (A), or government actor (G). Finally they are given a number. So for example Interview LCS01 refers to an interview with a local civil society actor.

Chapter 2

Law as a Communal Resource

This chapter builds an analytical framework for investigating the role of legal systems in foreign investor-government-civil society relations.[1] It begins with an exploration of Roger Cotterrell's notion of relations of community, and the role of law in supporting such stable, trusting and productive relations. This law-and-community approach is shown to be an appropriate and enlightening lens through which to investigate the role of legal systems in investment relations. The chapter ends with two notes of caution. First, it is proposed that legal strategies adopted by investment, government and civil society actors are likely to affect how and to what extent a legal system functions as a communal resource. Second, concerns are raised about the constraints which investment climate discourse might place upon the ability of legal systems to act as a communal resource.

Relations of community

Roger Cotterrell offers up the notion of relations of community primarily as a positive unit of analysis – as a way of highlighting those social interactions that 'have some stability and moral meaning'. The nature of contemporary life requires that such an analytical framework be able to identify these social interactions even where they are 'fluid or transient', not 'territorially fixed' (Cotterrell, 2006b, p. 65). Traditional notions of society or community tend to be of limited use in this regard. So, Cotterrell proposes a version of community which is not 'a specific, empirically identifiable social phenomenon' or 'sociological object'. He suggests that 'the *sense* of community is not limited to or "imprisoned within" distinct social groups.' Instead, the term 'refers to the degree of development of certain aspects of social relationship' (Cotterrell, 1997, p. 85) – namely, stable interactions and a sense of belonging.

Such relations of community can potentially exist wherever there are *objectively* verifiable interactions that are relatively 'stable and sustained'. There is no limit to the purpose of these interactions, but Cotterrell suggests that the full range of stable and sustained interactions can be captured in four ideal types, based on Max Weber's types of social action.[2] Individuals sharing neighbourhoods or language are engaged in 'traditional' relations; those who 'share beliefs or values that stress solidarity and interdependence', such as churches, are engaged in relations of 'belief'; individuals sharing mutual affection, such as family and friends, are linked in 'affective' relations; and those who have a 'convergence of interest', such as business associations, are linked in 'instrumental' relations (Cotterrell, 1997,

pp. 80–82). As ideal types, these relations are unlikely to exist in a pure form. In addition, any individual or set of individuals may engage in interactions crossing into several of the ideal types (Cotterrell, 1997, p. 81). For example, civil society actors may be engaged in primarily instrumental relations with each other, with foreign investors and with government actors. But they often seek to represent the interests of those who are engaged in relations of other kinds, such as those based in tradition or belief.

When these interactions are accompanied by a *subjectively* experienced feeling of 'attachment or belonging to others or to something beyond the individual', then they can be regarded as relations of community (Cotterrell, 1997, p. 82). This feeling might be different for each individual engaged in a given network of relations of community, and it need not be positive. Indeed, Cotterrell's approach does not require that relations of community be voluntarily or proactively entered into. 'People find themselves trapped in social relations on which they depend but which they might not freely choose.' And some individuals 'may be blind to the larger context of their acts – the overall shape and significance of networks of community in which they participate'. However, involuntary or unconscious relationships may be expected to result in relatively narrow and shallow networks of community. Furthermore, those engaged in relations of community need not share each others' interests. For example, instrumental relations of community can exist where those interests merely 'converge' (Cotterrell, 1997, p. 86). Finally, it is significant that productive relations of community are not necessarily equal, but can 'exist between a general and his troops, an employer and an employee, even a master and slave' (Cotterrell, 2006b, p. 163).

Importantly, Cotterrell's approach 'is not related to, or even necessarily sympathetic to, communitarian ideas in political and legal philosophy'. It is neither 'philosophical' nor 'prescriptive'. Cotterrell does not seek, for example, to suggest that 'communities are more fundamental in ontological terms than individuals', or that 'our societies would be better morally, and we would be better people ethically, if we thought about communities more, and individuals less' (Cotterrell, 2006a, p. 16). Nonetheless he does assert that '[t]he social phenomenon of community … is valuable in itself because social life in any stable and rewarding sense is impossible without it'. Any given network of relations of community is almost certain to be regarded as 'bad' by at least some non-participants, and 'may not be optimal' even for those involved in them. For example, many civil society actors are destined by their own definition to be forever sceptical of the networks of community which link foreign investors; and foreign investors might, like many expatriates, heartily wish that they did not feel compelled to be entangled with each other and yet continue to be so entangled in a sustained way, with a sense of belonging and underpinned by trust. Nonetheless, it is generally the case that 'to facilitate relations of community is to enrich social life in its various forms' (Cotterrell, 2006b, pp. 162–3). Consequently, Cotterrell champions relations of community on the grounds that they tend to be necessary, if not sufficient, to human productivity.

The invigorated and untrammelled vision of relations of community proposed by Cotterrell allows us to analyse the productivity of relations between multiple actors from diverse backgrounds. Such a facility is essential to envisaging

and securing 'a society at ease with itself in conditions of rapid change and increasing cultural and social diversity' (Cotterrell, 2006b, pp. 77–8). So, civil society actors can be thought of as linked in a network of stable and trusting relations, primarily instrumental, but perhaps also involving relations of belief or tradition, with interests converging around the process of monitoring issues affecting what they perceive to be the public good. Similarly, we can think of government actors as linked in another network of relations, probably primarily instrumental, with interests converging around the process of administering public powers. A corporation cannot engage in social interactions because the legal constructs of limited liability and legal personality compel corporations to share many of the characteristics of a psychopath: 'singularly self-interested and unable to feel genuine concern for others', 'irresponsible', 'manipulat[ive]', 'grandiose', interacting only 'superficially' with others, reticent 'to responsibility for their own actions and are unable to show remorse' (Bakan, 2004, pp. 16, 18, 37, 56–8 and 109). However, the actors who represent foreign investment can and do engage in social interactions, and these interactions may constitute relations of community. In *Law's Community*, Cotterrell expressed uncertainty as to whether interactions associated with global capitalism can ever be community-like (Cotterrell, 1996, pp. 332). However, as he came to see relations of community in terms of Weber's ideal types of social interaction, his conception of community was transformed from one of specific groups, to one of networks of people interacting fluidly. In the process of that abstraction, Cotterrell's version of community became able to accommodate the full range of contemporary social interactions, which are at once stable yet 'fluctuating' and 'overlapping', and characterised by diverse and sometimes trans-national relations of conflict, cooperation and co-existence (2006b, pp. 7 and 67). Even 'market relations are not antagonistic to or incompatible with' Cotterrell's version of relations of community. Indeed, instrumental communities are often centred around market transactions (Cotterrell, 1996, pp. 331). So, foreign investment actors might be linked together in primarily instrumental community-like relations, with their interests converging around the processes of foreign investment.

Mutual interpersonal trust

What allows relations of community, in all their diverse forms, to exist and flourish? Cotterrell proposes that mutual interpersonal trust is the key. Mutual interpersonal trust and relations of community form a virtuous circle. Trust is the cause and the effect of the interactions and sense of belonging that characterise relations of community. It 'encourages future interaction and provides the motivation to engage in relatively free, uncalculated relations with each other'. And as 'trust relations flourish and strengthen,' so 'community flourishes as something subjectively experienced in a sense of attachment and objectively definable in stable patterns of interaction' (2006b, pp. 73–4). Conversely, where trust does not exist, there will be none of the stable, sustained, productive social interactions that characterise community.

Cotterrell is not alone in emphasising the importance of trust. A substantial body of literature explores its economic and political significance. For example, Don Tapscott and David Ticoll argue in *The Naked Corporation* that businesses depend on 'sustained, trusting relationships' with five categories of stakeholder: employees, partners, customers, shareholders and communities (2003, p. 27 and pp. 95–252). They propose that in the context of these relationships, 'trust is the expectation that others will be honest, accountable, considerate and open' (p. 78). They present a detailed model of the relationship between 'values' and 'value', suggesting that when businesses have integrity, their stakeholders trust them, which in turn strengthens relationships between business and stakeholders, which in turn produces value (p. 74). Taking a broader, macro-economic perspective, Francis Fukuyama has noted that 'social capital' – the 'habits' of 'reciprocity, moral obligation, duty toward community, and trust' – are 'inherent' in all societies, to greater or lesser degrees. In successful economies, such social capital 'leavens' the economic 'building blocks' of laws, contracts and rationality (Fukuyama, 1996, pp. 7 and 11). International organisations have been influenced by this literature.[3] For example, the Seventh Global Forum on Reinventing Government focused on the topic of 'Building Trust in Government', arguing that when trust in government is 'compromised', then 'the general public interest is undermined' (Global Forum on Reinventing Government, 2007, Preamble). And the World Bank's World Development Report of 2005 notes that high levels of 'trust between market participants' help to keep transaction costs low; and the 'level of trust … citizens have in firms and markets' determines the extent to which a liberal market economy will prove successful. 'Governments influence, and are influenced by, both' forms of trust (World Bank, 2004b, pp. 50–51).

The key contributions of Cotterrell's work to the literature on trust are threefold. First, he draws attention to the fundamentally interpersonal, social nature of trusting relationships. These micro-level interpersonal interactions can be scaled up to explain other macro-level phenomena, but they remain fundamentally social. For example, he observes that '*impersonal* systems of confidence', including systems of governance, are often indirectly 'underpinned by and, in a sense, modelled on idealised relations of mutual *interpersonal* trust' (1997, p. 87, original emphasis). Second, he emphasises that trust is vital to *all* types of stable, productive social interactions. It then becomes clear that trust can serve as a reference point for a systematic and integrated analysis of relations within and between multiple networks of community, for example those which might be formed by foreign investment, civil society and government actors. Third, Cotterrell identifies and elaborates on law's role in nurturing trust and, thereby, relations of community.

Legal mechanisms

Econo-centric approaches to law such as investment climate discourse tend to treat law as a resource for facilitating, either directly or through regulation, private transactions between individuals. To be sure, these are real and legitimate roles for

law. But Cotterrell argues that law's function cannot be limited to the 'facilitat[ion] and regulat[ion]' of interactions between 'individual citizens'. Its 'aspiration is towards … something more than the society of morally unconnected, rights-possessing individuals that liberal philosophy' and, indeed, economics, 'tends to presuppose' (1996, pp. 18 and 334). So he urges us 'to keep a firm attachment to the idea of law as a *communal*' resource (2002a, p. 643, original emphasis), and directs our attention outwards and upwards, towards law's 'utopian, aspirational face', which has launched many thousands of 'hopes of emancipation and progress throughout modern history' (1996, p. 17).

Law functions as a 'communal' resource by 'approving and protecting the empirical conditions that facilitate' mutual interpersonal trust (Cotterrell, 2002a, p. 643 and 1997, p. 88). It is possible to identify three specific mechanisms through which a legal system can and should function as a communal resource.

First, legal systems *express* what already holds actors together. Second, legal systems draw actors in further by ensuring their *participation* in social life. Third, legal systems *coordinate* the differences that hold actors apart. Each communal legal mechanism functions, to different degrees, as a marker, consolidator and developer of networks of community.

Expression

The first communal function of state law is to express the trusting relations which characterise various networks of community. It does this by 'authoritatively defining the character' of whatever 'organisations, associations, practices, transactions or institutions' are themselves expressions of various relations of community (Cotterrell, 1997, p. 88). For this reason, 'the growing complexity and bulk of law' can be regarded as a 'reflection of the increasing complexity, intricacy and richness of communal social relations' (Cotterrell, 2006b, p. 161).

The character of a network of relations grounded in belief might be expressed in laws governing the creation and operation of temples. The law of adoption might express affective relations. Networks of community founded in traditional relations might be expressed in rights of common pasture. Instrumental economic relations of community will require that individuals have interpersonal trust in each other's 'honesty, fair dealing and good faith' (Cotterrell, 2006b, p. 164). Law supports the existence of such trust by stabilising the basic components of commercial interaction, such as companies (organisations) and contracts (transactions) (Cotterrell, 1997, p. 86). Here Cotterrell is echoing the work of Ian Macneil on the relational theory of contract. For example, Macneil has observed that contracts are 'instruments of social cooperation'. The role of (state) contract law is not only to offer 'general stability' as a background to such social relations, but also to be 'directly facilitative' of them, supporting 'cooperation' and the 'continuation of interdependence' between the parties (quoted in Campbell, 2001, pp. 10–11 and 14).

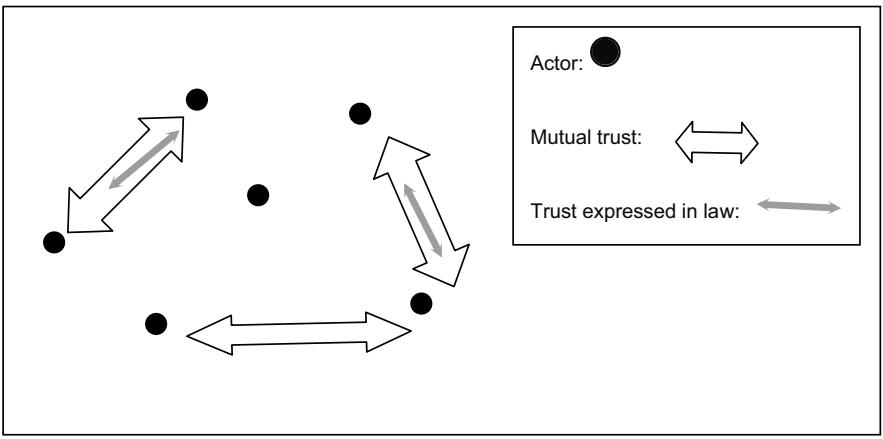

Figure 2.1 Expressing mutual interpersonal trust

Participation

The second communal role for the legal system is to ensure participation in social life. Each individual must be given 'sufficient material and cultural resources', as well as 'the opportunity and freedom … to be involved fully and actively in determining the nature and projects' of those networks of relations of community to which they are party. Participation in 'collective life' is important because it 'stabilise[s]' and 'reinforce[s]' the mutual interpersonal trust upon which productive, community-like relations are based (Cotterrell, 1996, pp. 299–301 and 332–3). Widespread participation serves not only to consolidate existing community-like relations, but also to establish the conditions under which new community-like relations might develop.

Legal systems facilitate participation in two ways. First, they cultivate and protect the general security and autonomy of individual actors so that they may 'participate effectively in shaping the conditions of collective life' (Cotterrell, 1996, pp. 299–301). Second, legal systems – in particular, bureaucracies and judiciaries – can facilitate specific instances of participation by creating and maintaining gateways through which it can occur. These gateways may be ad hoc and informal, or their character may be expressed, and thereby formalised, in law.

Of course, many forms of participation do not involve the legal system. For example, the terms 'shareholder' and 'consumer' democracy have been applied to the much vaunted impact of purchasing and investment choices on the behaviour of market actors (see for example, World Bank, 2000, p. 62). Similarly, civil society actors may 'participate' through demonstrations, negotiations and other informal tactics aimed directly at market actors. Compliance with state law may be a by-product, but state law did not create the gateway to participation.[4] These extra-legal forms of participation are not the focus of the present study.

The benefits of widespread participation in one aspect of social life, namely governance, are widely recognised among social and political scientists.[5] '[T]he active participation of the governed in their own government, even their resistance' is '[a]t the centre of liberal thought and political practice' (van Krieken, 2001, p. 12). The benefits of participation, and in particular of tripartite participation by civil society, private sector and state actors, have accordingly been noted at an international level with increasing frequency in recent years. For example, in the environmental field, rights of public participation, access to information and access to justice were declared in Principle 10 of the 1992 Rio Declaration. That aspiration found concrete expression in the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, signed in 1998 under the auspices of the United Nations Economic Commission for Europe. The call for participation was widened in 1999, when then Secretary General of the United Nations, Kofi Annan, famously called upon business leaders to join UN agencies and civil society actors in a Global Compact to support progress in relation to social and environmental issues. By 2007, the Global Forum on Reinventing Government defined governance itself as 'the process of interaction between three sets of actors – the State, civil society, and the private sector – in making political, administrative, economic, and social decisions that affect citizens'. It observed that trust in government is enhanced by the participation of the private sector in the form of public-private partnerships, and of civil society through 'effective society engagement' (Global Forum on Reinventing Government, 2007, paras. 5 and 8 and Aide Memoire). In 2001, an OECD document observed that government engagement with civil society actors can help to produce better policies, and to reduce risk of costly failures (Gramberger, 2001, p. 22). The Fourth Global Forum on Reinventing Government, organised by the United Nations in Marrakech in 2002, was on the theme of 'Citizens, Businesses, and Governments: Partnerships for Development and Democracy'. The tripartite theme was also emphasised in the Sixth Global Forum on Reinventing Government, addressing the title 'Towards Participatory and Transparent Governance'. The resulting Seoul Declaration states that 'by encouraging networking to create mutually reinforcing relationships and broad-based collaboration among all actors in society' governments can improve governance (Global Forum on Reinventing Government, 2006, para. 8). Furthermore, the importance of tripartite participation is now widely accepted by each category of actor. For instance, in a joint statement responding to the UN Millennium Development Goals, the International Chamber of Commerce (ICC) and the International Organisation of Employers (IOE) have suggested that although governments hold 'the main responsibility' for poverty eradication 'addressing these challenges will require concerted effort and partnership by all actors … at the local and international levels' (ICC/OIE, 2005, p. 2). And even those civil society actors who are expressly 'anti' globalisation often accept that they must work with the private sector and governments to make the 'system of globalization' more equitable (International Forum on Globalization, 2002, pp. 13–14).[6] It is now often remarked that non-state actors 'have taken over many functions of the state' (Randeria, 2003, p. 307; see also Hertz, 2002).

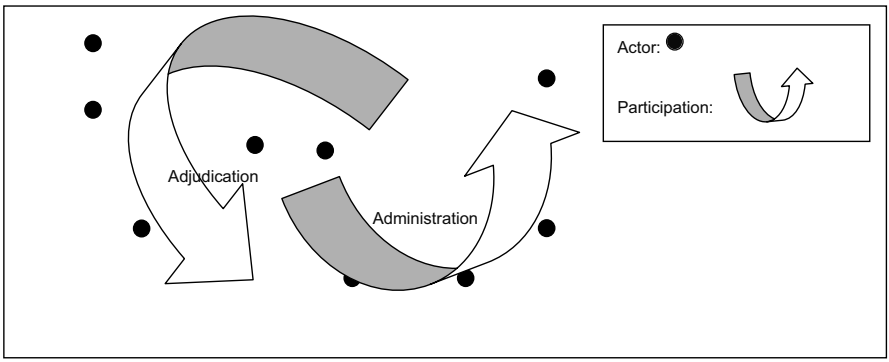

Figure 2.2 Securing broad participation

The particular contribution of Cotterrell's law-and-community lens is to emphasise that participation must be broad if it is to be of any communal use. So, a culture of participation must extend beyond the government, investment and civil society actors who are of central concern to this study and much international policy. Furthermore, it seems that deep, individualistic participation by a narrow group of actors may be damaging to community-like relations, because it may erode trust among other actors.

Coordination

The third communal legal mechanism is to coordinate between the interests and values of various networks of community. 'An emphasis on community does not imply an absence of conflict.' It actually 'highlights key foci of legal contradiction and controversy' (Cotterrell, 2006a, p. 23). A community approach to law suggests the 'gaps' which have been the subject of so much socio-legal scholarship (see Kessler, 1995, p. 771) must exist not between law on the one hand and the social on the other, but between conflicting 'types of social relations (and their law)' (Cotterrell, 2006a, pp. 19–20). The 'legal needs, … structure [,] … consciousness and outlook' of networks of community vary considerably, and 'the needs of order require that there be … a coordinating power'. This function is performed by state legal system, which is able to 'insist, coercively, on the prevalence … of its legal vision and legal controls' and so 'dominates' all other laws (Cotterrell, 2006b, p. 75).

For all 'the actual and potential variety, complexity, and fragmentation of contemporary regulation', it remains the case that 'contemporary legal regulation is *structured and co-ordinated by centralized governmental power*' (Cotterrell, 1996, p. 307, original emphasis).[7] A state legal system must be able to 'co-ordinate, integrate, and respect the experiences of social existence characteristic of different' relations of community (Cotterrell, 1996, p. 334). Coordination is the most sophisticated of the three communal legal mechanisms. It marks and consolidates multiple existing networks of community by balancing their values and interests.

This task is more 'complex' and demanding of the state legal system than that of acting as a mere 'facilitator and regulator of the interactions of individual citizens' (Cotterrell, 1996, p. 334).

In a community approach to law, the individual's responsibility is to 'maintain mutual interpersonal trust in the form necessary' to the form of communal relations in which they are involved, and when there is a 'betrayal of trust' this gives rise to liability. But because individuals may be members of several communities, and because communities and their needs may be 'barbarous as judged by the standards of *other* networks', individuals may find that they simultaneously breach and fulfil obligations across networks of community. In cases of inter-network conflict, 'where no other means of reconciliation are possible, the most powerful regulation – often the law of the state – puts an end to disagreement about where responsibility lies and what it entails'. It 'adjudicates between the claims and perspectives of different communities, and purports to rule conclusively about liability' (Cotterrell, 2006b, pp. 163–5).

In so doing, the legal system will create winners and losers. What is important from a law-and-community perspective is to maintain the sense that coordination has taken place, and that the door is open for future coordination, in which the values and interests that lose today might yet be the winners of tomorrow. Such coordination might take place, for example, in legislative drafting, judicial decision-making, and administrative discretion. Here, politicians, judges and bureaucrats determine the appropriate balance of interests and values between multiple networks of community, proto-community and other forms of social relationship.

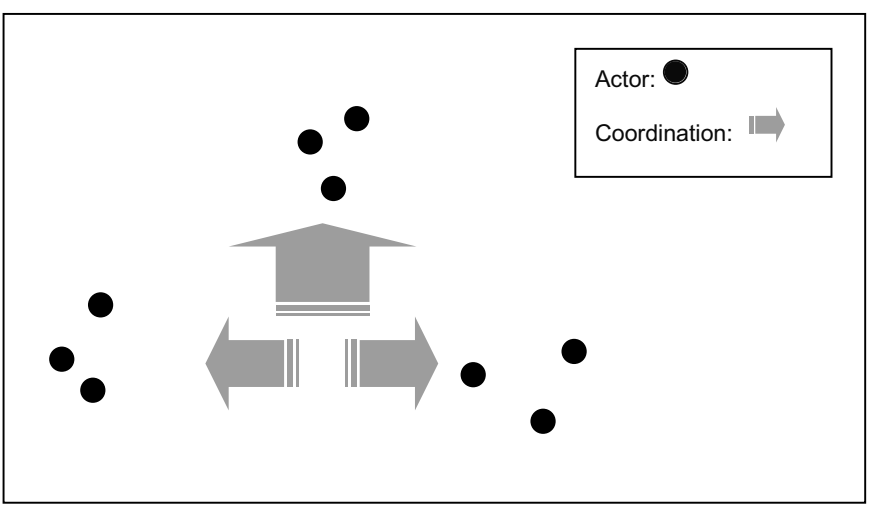

Figure 2.3 Coordinating between interests and values of multiple networks

Dynamics

The theoretical framework outlined above establishes an aspirational view of law as a communal resource. But what are the obstacles to its practical realisation? One obstacle is that socio-legal scholars tend to be rightly sceptical as to law's ability straightforwardly to fulfil any function. Their minds turn instantly to the myriad complexities of law's day-to-day operation, which stem from the fact that law is 'an aspect of social life' (Cotterrell, 1996, p. 307), that the two are 'inseparable and mutually constituting' (Kessler, 1995, p. 772). Any analysis of law as a communal resource must therefore take account of not only the structure of legal mechanisms, but also of the dynamics of their operation.

Law is not a neutral technology. As the 2006 World Development Report *Equity and Development* emphasised, law plays complex, occasionally dichotomous, social and political functions. For example, law and the manner in which it is enforced can 'do much to level the playing field in the political, economic and socio-cultural domains', but it can also 'become politically entrenched and limited to helping the better-off' (World Bank, 2005, p. 13). Law is about 'social power' – 'the capacity to control, protect against, or affect the conduct' of others (Cotterrell, 1996, pp. 5–6). What is of interest to socio-legal enquiry is 'how a certain side or part of the social *takes the form of law*' (Cotterrell, 2006a, pp. 19–20. Original emphasis.) – or, indeed, does not take the form of law; or only partially takes the form of law; or appears to but does not, in fact, take the form of law. Individuals often experience social power as law in the form of an ambient sense of security. For, where it is present, the rule of law ensures that power is 'kept in balance' (Cotterrell, 1996, p. 5), that it is 'predictable and precise and its exercise more orderly', so that it is 'somewhat more bearable to those subject to it' (Cotterrell, 2002a, p. 643). Although the precise meaning of the concept remains somewhat unsettled, there has long been widespread agreement that it offers numerous benefits (see Tamanaha, 2004). For example, investment climate discourse recognises this experience of law as promoting efficiency and certainty, and so as being conducive to investment. In addition to benefiting from this background comfort, actors can actively adopt strategies with respect to law: using it, abusing it or avoiding it.

An actor may exercise social power through law, *using* it or *abusing* it to 'coerce, influence, make things happen, and get things done'. Here the 'interpretation, application and enforcement of legal doctrine' are like 'an army of retainers' that 'strengthens and emboldens' the individual in their task. Law can be employed to 'threaten[]' other actors 'in precise, calculated, and complex ways', or to 'neutralize' what defences other actors may have 'against moral demands … exploitations, victimisations, nuisances or inconveniences'. For those who are the targets of the use and abuse of law, the empowering legal experience is turned on its head. In particular when law is abused, the experience of 'being subject to official control or interference' may make the target actor feel disempowered – 'vulnera[ble] and insecure[]' (Cotterrell, 1996, pp. 4–5). '[S]ubtle, unrecognized' legal strategies, 'such as foot-dragging, sabotage' and other 'micro-acts of resistance', which occur 'in and through law', may be intended and/or perceived as 'resistance against law', as 'resistance by means of law' or as 'resistance which redefines the meaning of

law'. So Sally Engel Merry has argued that it is necessary to 'take a broader view of what law does' for actors, 'and how it does it', to look beyond high profile legal events, such as cases won, because 'the language and categories of law … can be powerful' – and, indeed, disempowering, whether or not a case is won (Merry, 1995, pp. 14–16).[8] State and non-state actors alike (ab)use law, treating it as a 'scapegoat' – a reason why a certain course of action must or must not be pursued; and as a 'magic charm' – a cure all (Benda Beckmann, 1989). For instance, regulation has been described as a 'two sided' process, in which state law is used by regulators 'as a means of controlling', and by regulatees as 'a means of escaping control' (McBarnet and Whelan, 1991, p. 848). A foreign investor might use corruption to divert the attentions and intentions of regulators. Some investment actors may take regulations 'as a fixed constraint', as 'part of a business environment' to which 'they must try to adapt', even 'internalizing' the 'basic norms of the regulatory programs and legal regimes they encounter' (Kagan and Axelrad, 2000b, pp. 373 and 376). Others may find themselves 'made helpless' by the incomprehensible 'technicality and obscurity' of bureaucracy (Cotterrell, 1996, p. 4).[9] But still others pursue a strategy of 'creative compliance', lobbying to determine the content of legislation, 'manipulati[ng]' legislation 'to turn it – no matter what the intentions of legislators or enforcers – to the service of their own interests and to avoid unwanted control'. Similarly, a civil society actor might deliberately entangle a foreign investment actor in the legal system's transaction costs-inducing web of litigation.

And, of course, social power is something that can be exercised and experienced in ways that do not refer directly to state law. It may that state law is not used either because it is available, or because it is actively *avoided.* Strategies of avoidance have been widely documented in commercial, employment and residential practice (see, for example, Stone et al., Macaulay, 1963; de Soto, 1990). So, foreign investment actors might eschew contracts and courts in favour of 'informal' mechanisms such as negotiation, bullying, or lying low to escape the attentions of regulators. Investors can also structure their operations so as to minimise or otherwise control their exposure to India's legal system. For example, some may be able to operate as a foreign (liaison, project or branch office) national, rather than as a local (joint-venture or wholly foreign-owned) company.[10] Government actors can also act informally, for example, by not writing down their instructions to bureaucrats. Civil society actors can choose to use informal pressure systems to achieve their objectives, rather than engaging with the implementation of formal state law. In the extreme, each actor might choose not to undertake the proposed activity at all – not protesting, governing or investing.[11]

The 'shadow' of investment climate discourse

A second potential barrier between legal theory and reality is the ever growing dominance of the World Bank's 'investment climate' discourse. In *Social Citizenship in the Shadow of Competition* (2003), Bronwen Morgan told of an emerging, global 'culture of rulemaking' or 'meta-regulation'. 'Thin' forms of

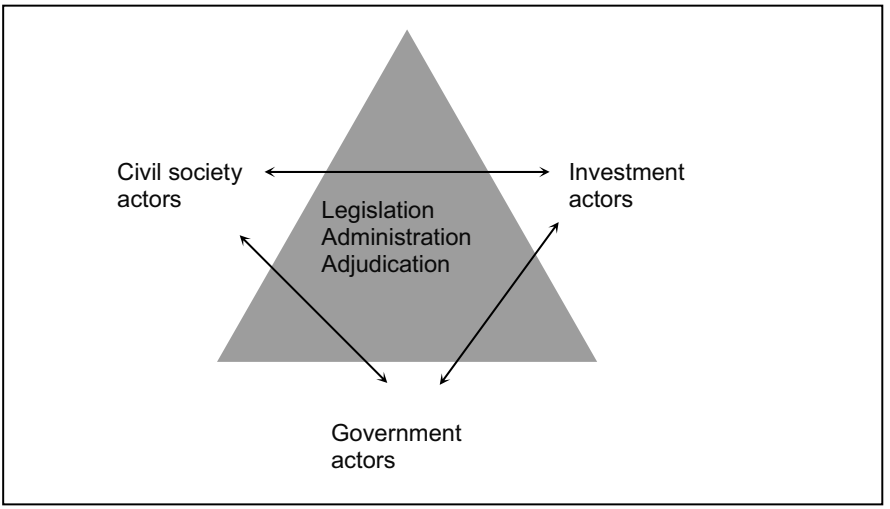

Figure 2.4 Using the legal system

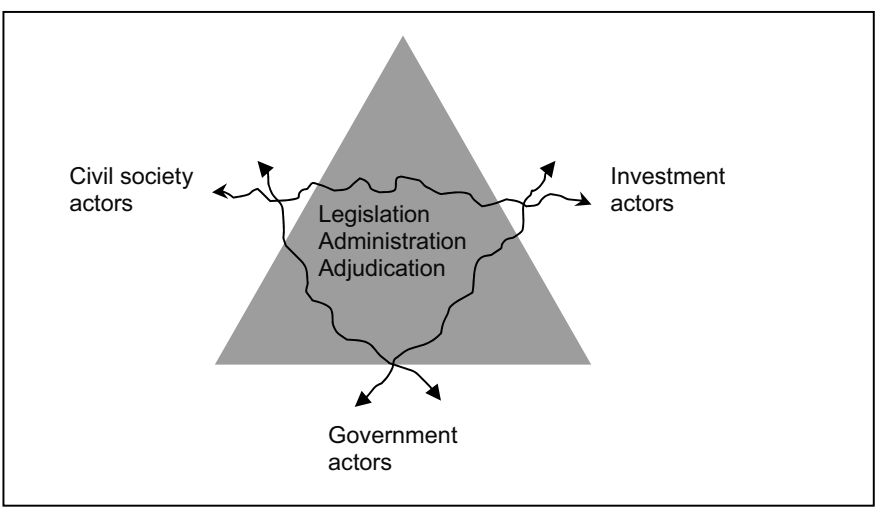

Figure 2.5 Abusing the legal system

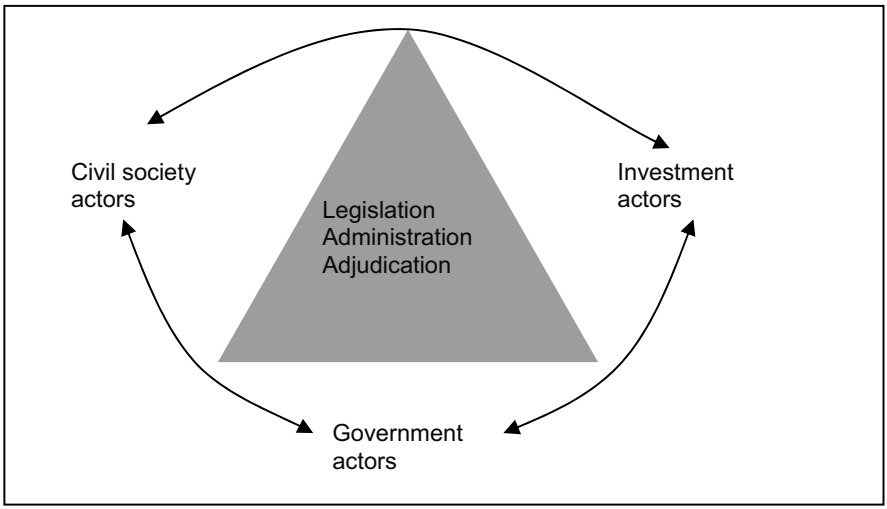

Figure 2.6 Avoiding the legal system

meta-regulation apply a 'check-list rationality' to assess legal systems. 'They impose a burden on how decisions are made' by requiring that 'policy choices … be justified in terms of economic values, such as efficiency, competition and cost-benefit analysis' (Morgan, 2003, pp. 9 and 37). In its 'thicker' incarnations, meta-regulation determines not only 'how decisions are made' but also 'what decisions are made'. In principle, such thick meta-regulation could act as a method of 'temper[ing] the worst externalities of markets or their most extreme distributive impacts'. But most often it is, explicitly or implicitly, regarded 'as a technique for imposing or facilitating market governance' (Morgan, 2003, pp. 2, 9 and 37–8) – for the promotion of economic interests. The investment climate discourse promulgated by the World Bank is a source of both thin and thick meta-regulation.

Thin meta-regulation

The Bank is an interventionist lender. It has the capacity to influence laws and norms both through conditions attached to its loans, and through the individual instances and broad patterns of the implementation of its operational policies in projects. Since the mid-1990s, the Bank has argued that host state legal systems must be efficient and predictable, and that these qualities are best achieved in the context of stable, accessible and clear laws; limited bureaucratic discretion; low corruption; and the separation of executive, judicial and legislative powers. In the terminology of Pistor and Wellons (1998) investment climate discourse prefers laws to be created and implemented in a 'rule-based' rather than 'discretionary' fashion, because the former are deemed to be more efficient and predictable.[12] Client states have accordingly been strongly encouraged to reform their legal

systems so that they better met these alleged preferences of foreign investment actors (Perry, 2000a, 2000b and 2001; Perry-Kessaris, 2003). So, investment climate discourse is a potential source of what Morgan terms 'thin meta-regulation': it applies economic values to assess the validity of the methods by which laws are made and enforced, and it is part of the taken-for-granted context within which legal reforms are made in the Bank's client countries.

From a law-and-community perspective, this is significant because economic values are just one kind of values. Many economic values are not exclusive to economists. For instance, a number of dreary yet popular adages hail the merits of efficiency: waste not want not, too many cooks spoil the broth, a stitch in time saves nine. But economists bring a particular narrowness to the definition of these terms, and urgency to their promotion. For example, while many economists may acknowledge that there are philosophical and ethical objections to inequality, they are often careful to justify any attention they may pay to inequality on the grounds that it has implications for efficiency (see Ray, 1998, chs 6 and 7; World Bank, 2005). Economics is about producing the largest possible pie. Questions of distribution – how much pie each individual has, whether the dry crust or the luxuriant core – are not a central economic concern.[13] Crucially, the landscape of economic theory is populated by rational utility maximisers. The non-rational – 'or perhaps *differently* rational' (Cotterrell, 2006a, p. 2) – musings and decisions in which all humans engage to a greater or lesser extent, do not feature. For instance, the 'instrumental narrative' of the economic approach to law regards legal procedures 'that fail[s] to generate significant behavioral changes' to be inefficient – 'a complete waste of social resources', in need of 'external intervention or "fixing" … whether by abandoning the legal route or by making it effective' (Perez, 2002, p. 4). However, as Niklas Luhmann (1992) and Gunther Teubner (1993) have each emphasised, there are 'no limits on the kind of motivations that drive people to invoke the law in social interactions'. Although 'the wish to achieve certain tangible benefits is of course an important type of motivation, it is not the only one'. For example, actors might also regard 'law as a vehicle for coordination, as a mode for achieving social cohesion, as a medium for expression, and as carrier of hope' (Perez, 2002, p. 26; see Kessler, 1995, pp. 770–1).

Thick meta-regulation

Investment climate discourse goes further, also acting as a source of thick, market-oriented, meta-regulation. The starting point for legal reform which flows from investment climate discourse is that actors in the private sector, including foreign investors, should generally get what they want, because they know what is good for them, and what is good for them is generally good for everyone else. We are all buoyed by their private success, for economic growth is essential to development, and foreign investment is essential to economic growth. In the terminology of Pistor and Wellons (1998), investment climate discourse advocates and facilitates a shift in 'allocative' power from the state to the market, including foreign investment actors. Such shifts may be reflected in amendments to the content and structure of private law governing, for example, contract, company, property and tort; and public law

governing, for example, environmental and zoning regulations. Alternatively, the law may remain the same while the purposes to which they are put, and whether by state or market, change dramatically. As an economy is liberalised, allocative law is increasingly employed both by market actors in newly accessible fields of economic activity, and by state actors to ensure that where it retains authority, it increasingly makes decisions favourable to market actors (Pistor and Wellons, 1998, p. 27).[14]

So, investment climate discourse is also a source of thick meta-regulation: it expects that law will promote a liberal market economy, and it is part of the taken-for-granted context within which legal reforms are made in client countries of the World Bank. Those social relations which are 'practised as a matter of irrational habit' and have their 'origins in "irrational" phenomena like religion and traditional ethics' are regarded as 'necessary' – but primarily as a handmaidens to 'the proper functioning of rational economic and political institutions' (Fukuyama, 1996, p. 325). In the context of a law-and-community framework, this is significant because market relationships, including investments, are just one kind of relationship. When law 'serves' one form of social bond 'exclusively' and 'at the expense of protecting and promoting the well-being of other kinds of social bonds, other types of community, it fails to meet some important demands' (Cotterrell, 2006b, p. 154).

From climate to community?

Might the World Bank itself conceivably recast its market-oriented investment climate approach in the flexible, yet robust, terms of relations of community? There is room for hope. The World Bank has historically tended to take a fundamentally economic approach to the matter of poverty reduction, and to the role of law in poverty reduction.[15] The Bank's 10,000 staff come from 160 different countries and represent a diverse range of ages, functions and perspectives. It employs specialists in a wide a variety of disciplines, including political scientists, lawyers, sociologists, anthropologists, environmentalists, financial analysts, and engineers. However, 'a clash of expertise … animates much of the Bank's activities and staff relations and often impedes interdisciplinary work'. Within this clash of disciplines, 'the most influential disciplinary community, based on its intellectual leadership and career advancement within the institution, is that of economists'. Not only do non-economists feel compelled to 'translate their writing and speech into an economist's language and quantify their observations in an effort to gain legitimacy for their ideas,' they sometimes even 'call themselves economists in order to gain legitimacy among other staff'. For example, while Bank lawyers would regard the honouring of human rights as an independently legitimate normative goal, Bank economists tend to require that the 'value-added' by human rights to a project be demonstrated in economic terms (Sarfaty, 2007).

However, over the years 'non-economic' values and interests such as equity have gradually found their way into World Bank policies and projects. Robert McNamara is generally regarded as having introduced a heightened sense of moral urgency to the institution's dealings while he was President of the Bank (1968–1981). He famously coined the term 'absolute poverty' in 1973, and insisted that more

attention must be paid to understanding the causes and effects of unequal income distribution, and the responsibility of governments to meet the 'basic needs' of their populations. But it was not until 1984 that a 'sociological' component was introduced into the project appraisal process, and it was only in the 1990s that a 'proactive commitment to enhance the social impact of its projects' was made (World Bank, 2003b, p. 5 and Annex 1). In 1999, then President of the World Bank, James D. Wolfensohn, drafted a Comprehensive Development Framework (Wolfensohn, 1999). Responding to criticisms that the neo-liberal emphasis of preceding years had been unduly narrow, and drawing on Amartya Sen's conception of *Development as Freedom* (1999), the Framework presents freedom from poverty as the new target, and economic and social development as part of an 'interdependent' whole (Santos, 2006, p. 268). Development was now understood to entail more than economic growth, something equitable and sustainable. Law was no longer restricted to facilitating and encouraging economic growth, it is also directly charged with promoting social development (Santos, 2006, p. 276). Much was made, at least in some quarters of the Bank, of conducting 'social analysis' with a view to 'incorporating social dimensions into World Bank operations' (World Bank, 2003b, p. 5 and Annex 1). The theme was elaborated at length in the 2006 World Development Report entitled *Equity and Development*, which emphasises repeatedly that equity and efficiency are often mutually reinforcing objectives (World Bank, 2005). This Report inspired a 2005 World Bank Legal Forum on Law Equity and Development aimed 'at bringing together an outstanding group of critical thinkers and experts to exchange ideas about the latest development thinking and to reflect on future directions in the field of equity and development'. Participants included a number of prominent socio-legal scholars, many of whom are referred to in the present study (World Bank Legal Forum website).

Nonetheless, the promise of Comprehensive Development 'to include the social is', according to Kerry Rittich, 'almost completely unreflected in the core legal and institutional reform project'. Legal reform continues to privilege 'the promotion of efficiency and competition through the protection of property and contract rights'. To the extent that they are represented, social objectives tend to be visualised through an economic lens: from the perspective of individuals, valued primarily because they promote economic growth. Despite prominent pledges to abandon the cookie cutter, '[t]here is surprisingly little diversity in either the discourse or the prescriptions about legal reform'. Instead, Bank policy and practice often assumes a 'congruence or an overlap between the institutional demands of social justice and economic growth', so 'the incorporation of social objectives into the development agenda' is seen to have 'few necessary institutional implications' (Rittich, 2006, p. 228).[16] Despite the progressive thinking evidenced in the Comprehensive Development Framework, commentators continue to be troubled by the dominance of economic principles in the theory and practice of law and development generally. They continue to query the tendency to deify market forces, to rely on a narrow set of evaluative criteria such as efficiency, to mathematise social problems and to promote homogenization (see, for example, contributions in Trubek and Santos, 2006). They worry that the developmental potential of law is or may be muted and distorted, for those who dwell on the

'efficiency-enhancing properties' of legal systems are unlikely to appreciate how 'myriad social and economic norms, rules and institutions may affect the realization of different social objectives' (Rittich, 2006, p. 249).

The following sections investigate how such concerns play out in the minds of those who might wish the World Bank to allow an understanding of law's potential communal roles to influence its investment climate discourse.

Participation Liberal economic theory welcomes participation to the extent that it promotes economic values. For example, opportunities for non-state actors to challenge state actors who implement law without following proper procedures are welcomed as reducing discretionary behaviour and, thereby, the inefficiencies of uncertainty (see Pistor and Wellons, 1998, p. 27). The World Bank's Environment Strategy for South Asia refers to the Bank's objectives of 'promoting participatory and community-driven development approaches … and private sector participation (World Bank, 2001, p. 7). And participation is thought to improve the design of laws and institutions, securing certainty and saving costs in the long term.

But meta-regulating economic dictat requires that such participation conform to economic values. The central question for those within the World Bank who are concerned with participation and civil engagement is whether public institutions can simultaneously improve their accountability, by increasing civil participation, and their 'decisiveness', thereby meeting public expectations for improvements in operational efficiency, whilst simultaneously increasing civic participation (Reuben, 2003, p. 3). Participation in the public sector processes of law making, implementation and adjudication can be expected to be somewhat contra-indicated in investment climate discourse, taking too long, introducing too much uncertainty, costing too much.

Furthermore, thick, meta-regulating investment climate discourse requires that participation promote, or at least not interfere with, economic interests. Investment climate discourse accordingly pays special attention to participation by foreign investors in the creation and implementation of law, encouraging the sense that businesses are the 'partners', rather than the 'victims' or 'adversaries', of government (Bakan, 2004, p. 107). For example, since their earliest incarnations in the mid-1990s, World Bank surveys of investors such as the Enterprise Surveys produced by the Rapid Response Unit have benchmarked the extent to which investors are notified and consulted when their host states undertake legal reform. Such opportunities were welcomed as a way of ensuring the 'credibility' of the investment climate (World Bank, 2004a, p. 44).

If participation is to promote mutual interpersonal trust, it is more important that it be broad than that it be efficient. Investment climate discourse itself has identified that uneven access to participation among investors leads to 'state capture', in which 'firms that are part of the favored circle tend to face a more attractive policy environment than other firms' (World Bank, 2004a, p. 44; see also Hellman et al., 2000). This is anti-competitive, therefore inefficient and undesirable.[17] Here the discourse has been influenced by Robert Putnam's *Bowling Alone* (2000), which points out that while 'bridging' social capital is inclusive and

outward-looking, acting as 'a sociological WD-40', 'bonding' social capital acts as 'a kind of sociological superglue', exclusive, inward-looking and connecting like actors with like (Putnam, 2000, pp. 22–3). Left unchecked, bonding capital can lead to cronyism, corruption and inter-ethnic strife (World Bank, 2004a, p. 51; see Chua, 2003). The legal system can mitigate the negative effects of such bonding capital, and maximise the benefits of relatively inclusive bridging capital, by ensuring that participation by foreign investors is broad.

But from a law-and-community perspective, it is important to look beyond the lot of the foreign investor and to address unevenness in participation across categories of actor. For example, the superficially 'compelling and innocuous' notion of business-government partnership takes on a darker significance when it is recalled that company law requires corporations such as foreign investors to be 'predatory', 'externalizing machines'; not to 'protect democracy, but to manage its uncertainties and avoid the obstacles it presents', such as regulations 'that limit their freedom to exploit people and the natural environment' (Bakan, 2004, pp. 60–1, 85, 102, 107–8 and 150–2). Participation by civil society actors may appear even more 'compelling and innocuous' but it too has its dangers. Neither elected, nor acting in their own personal interests, civil society actors fall outside the social categories with which modern legal systems have traditionally associated rights and responsibilities.

The ability of foreign investors, or civil society actors, to participate in law making and implementation can only be regarded as a communal mechanism when it is balanced by opportunities for participation by others. Should efficiency result from broad participation, so much the better, but it is not the fundamental objective. As Ian Ayres and John Braithwaite explained in their highly influential *Responsive Regulation* (1992), broad, 'tripartite' participation aids effective governance. The involvement in regulation of the private sector, civil society and regulators is effective because it ensures that 'guardianship' of the public interest is 'contestable'. Regulatees may engage in potentially efficient and productive cooperation with regulators, while the presence of the 'third sector' guards against corruption (see also Morgan and Yeung, 2007, pp. 54–9). So, when government, civil society and investment actors participate in a process, their interpersonal trust may improve as a direct result. Furthermore, abuses of the legal system may fall, thereby fostering further improvements in trust.

In recent years, the World Bank has begun to emphasise the importance of participation by civil society actors in governance. The World Development Report 2005 notes that 'broad public trust' plays a part in 'nurtu[ring]' the investment climate and that '[o]pen and participatory policymaking and efforts to ensure that the benefits of a better investment climate extend widely in society can help to build that support' (World Bank, 2004b, p. 7). Elsewhere the Bank has noted that 'partnerships among governments, businesses, and civil society organizations … are increasingly seen as one of the most effective ways to reduce poverty and achieve sustainable development' (World Bank, 2003a, p. 1). In 2006 the World Bank held a conference entitled *Business, NGOs and Development: Strategic engagement to meet the Millennium Development Goals*.

A further, notable, omission in the Bank's approach has been the identification of the role played by law in participation. For example, its flagship report on

the participation in environmental regulation, *Greening Industry: New roles for communities markets and governments*, associates laws with government actors and bureaucrats – with their ability to set regulatory standards, legal liability and market-based incentives. 'Community' is identified as another regulatory pressure, but through undefined 'power', 'social norms' and 'negotiation', not law. Finally, the market, including investors and consumers, is identified as regulatory pressure, but is presented as acting through reputation and profits, not law (World Bank, 2000, ch. 3).

Both of these past failures have been greatly mitigated by the Civic Engagement Group of the Social Development Department which has devised a detailed matrix for evaluating the 'enabling environment' for civic engagement in development processes in which the law plays a significant role. It notes that civil society actors are involved in governance both indirectly, by 'building necessary social consensus for economic reforms' and promoting 'transparency and accountability of public institutions'; and by directly 'delivering social and economic services', and 'improving natural resource management and environmental protection through collective action' (Thindwa et al., 2003, pp. 2–3). The analytical framework devised by the Group is examined in detail below (see p. 86 et seq.). At this stage it is important to note that the efforts of the Civic Engagement Group to encourage and benchmark civic participation has received nowhere near as much promotion and attention as the efforts of the investment climate programme to improve participation by investors. Even their website is shabby by comparison. In truth, participation by civil society actors is an uncomfortable fit with thick, meta-regulating investment climate discourse because, more often than not, they want to open debates about liberalisation, to stray outside the playing field of a liberalised market economy.

Coordination Investment climate discourse under-emphasises the need for state law to express and coordinate between *multiple* relations of community – to 'serve the needs not only of economic communities but of other kinds of community too' (Cotterrell, 2006b, p. 153). Harilal and Babu (2002) argue that the 'overriding objective' of so-called 'second-generation reforms being initiated in countries such as India is to make the country more "investor friendly"'. The components of the investment climate are 'taken for granted as if they belong to an uncontested terrain requiring no explanation'. This 'new orientation of state policy' towards the 'investment climate', comes at the expense of more 'traditional' concerns. For example, liberalisation has put into question the control of the intellectual and biological (land, forests, water and so on) commons; and control over employment and the ability to protect small-scale industries. Even if the investment climate is important, they argue, it does not necessarily follow that it should dominate second generation reforms, or other policy goals. Account ought also to be taken of the social infrastructure necessary to support investment – such as education, labour standards, and the purchasing power of consumers.

The World Development Report of 2005 illustrates how investment climate discourse fails to honour the promise of the Comprehensive Development Framework to coordinate among multiple values and interests. A number

of comments in the 2005 World Development Report, which showcases the investment climate approach, indicate a growing acceptance that it is reasonable to expect variation in legal perceptions and expectations at least among foreign investors.[18] Encouragingly entitled *A Better Investment Climate for Everyone*, it claims to be 'about creating … a climate in which firms and entrepreneurs of all types – from farmers and micro-enterprises to local manufacturing concerns and multinationals' are willing and able to operate. It states that 'there is no single vision of an ideal investment climate'. There are references to empirical proof that experiences may vary according to the size and sector of firm; mention of differences in the ways that domestic and foreign investors experience the investment climate; a reference to the potential impact of information constraints and herding behaviour among investors; and a reference to Geert Hofstede's work on variation in attitudes across cultures. There is even the comment that 'a single individual often needs to reconcile divergent perspectives as a consumer, a worker, a tax payers and often also as an investor' (World Bank, 2004a, pp. xiii, 5, 39, 40, 47 and 51). These developments are to be warmly welcomed, not least by those who have been calling for them for some time.[19]

However, the report also adopts a very narrow interpretation of what perceptions and expectations such varied actors might have of the legal system. Because investment climate discourse is primarily concerned with what it sees as the perennial inefficiency of the public sector, it recommends regulatory formalism and limited bureaucratic discretion, hoping this will improve efficiency.[20] This emphasis on formalism is problematic for a number of reasons. First, and ironically, such a 'rigid', 'cookbook' style of regulation is particularly open to, and ill-equipped to respond to, the tactics of creative compliance (McBarnet and Whelan, 1991, pp. 848–50). Second, a wide variety of administrative styles are successfully employed in different economies. While bureaucrats in the United States may tend to aim for a relatively formalistic, rule-bound style of regulation, their counterparts in Japan, Korea and elsewhere in East Asia prefer an emphasis on cooperation and flexibility (Kagan and Axelrad, 2000, chs 2 and 3). This diversity makes a good deal of sense when one considers that in this respect as much as any other, law is an aspect of the social, and that the daily tasks of administration are guided by a combination of formal rules and social norms (Haines, 2005). Most important from a law-and-community perspective is the fact that bureaucratic discretion offers potential spaces for coordination. When it is reduced, so is the ability of the legal system to act as a communal resource.

The Report also showed distinct signs of a desire to align investment climate discourse with the Comprehensive Development Framework. It proposed that '[g]overnments and firms do not interact in a vacuum' (World Bank, 2004, p. 50). Liberalisation will only be 'feasib[le]', 'sustainable' and, therefore, 'credible' in the context of a 'social consensus in favor of creating a more productive society', coupled with 'widely held perceptions that processes and outcomes are legitimate' – that is, 'consistent with social norms, values and beliefs'. The existence of these perceptions depends upon social attitudes to both investors and governments, formed by the historical and contemporary behaviour of investors and governments, including their interactions with each other (World Bank,

2004a, p. 51). The investment climate approach 'treats as fundamental the need for policy-makers to balance the goal of encouraging productive private investment' with wider social interests. The Report also notes that there are tensions between the interests of investor and those of other actors so that 'governments must arbitrate' the differences between firms and society 'in an environment where firms, officials and other stakeholders seek to tilt the outcome to their advantage.' Indeed '[g]ood public policy is not about giving firms everything they ask for'. So 'a good investment climate' cannot be 'just about generating profits for firms – if that were the goal, the focus would be limited to minimizing costs and risks'. Firms are in many ways beneficial to society, but their interests are not identical, and 'a good investment climate' is one which 'improves outcomes for society as a whole' (World Bank, 2004a, pp. 2 and 6). This is a partial repackaging of the 'credibility' concept first discussed in relation to eastern European transition economies in the World Development Report of 1996: economic growth was best sustained in 'credible' states, that is, in those states whose governments could be believed or relied upon because their actions and policies were predictable rather than discretionary (Perry, 2001, pp. 67–8). What is new is the inclusion of the tripartite dimension: the impact of civil society-investor relations upon the credibility of government policies.

However, the diagrams with which *A Better Investment Climate for Everyone* seeks to illustrate the wider impact of investment climates reveal a muddled conception of the relationship between economic and non-economic interests (see World Bank, 2004a, pp. 20 and 37). In the end, the Report maintains no meaningful distinction between what is good for investors and what is good for 'society'. As the Report itself observes, the 'investment climate lens' continues the World Bank's tradition of placing 'firms … at the centre of the discussion' (World Bank 2004a, p. 2). Little thought is spared for the idea that the interests of investment actors, local or foreign, might be seen as wholly or partly incompatible with those of others; or, to return to the words of the Report, that there may be a 'consensus' favouring 'a more productive society', but that 'processes and outcomes' of liberalisation might not be seen as 'legitimate' or 'consistent with social norms, values and beliefs'.

In the meantime …

There is evidence to suggest that World Bank policy could accommodate elements of the law-and-community approach. But if progress is to be made in understanding the complexities of the relationship between legal systems and FDI, the Bank's nascent efforts at contextualisation and subtlety must be urgently pursued. Unfortunately, just a year after the publication of *A Better Investment Climate for Everyone*, law-as-technology was back, with the Bank estimating that if it would only adopt 'the laws and regulations of a country among the top 20' percent, India 'could add approximately 1.6 percentage points to its annual economic growth' (Word Bank, 2005b, p. 12).

The current brand of market-oriented, meta-regulating investment climate discourse seems from the theoretical outset to be at odds with a communal role of

law. First, it suggests that legal reforms ought to be guided by economic values such as efficiency and competition which are individualistic in orientation and do not sit well with communal mechanisms such as participation and coordination. Second, it treats civil society, government and other actors as variables affecting the investor's environment, rather than as important actors in their own right. Their participation in social life, and the coordination of their interests, are given relatively short, tokenistic shrift. Third, investment climate discourse implies that most interests are either indistinguishable from, or served by, those of foreign investors.

What might be the impact of this thick, market-oriented, meta-regulating investment climate discourse on the ability of host state legal systems to act as a communal resource in investor-government-civil society relations? In 1992 the Government of India, with the World Bank breathing down its neck, established a committee under the chairmanship of V. Govindarajan, a senior bureaucrat in the Department of Industrial Policy and Promotion (DIPP). This Committee became a major conduit for the transmission and development of investment climate discourse in India. Its task was unambiguous: to make recommendations 'with a view to speeding up' the investment approvals and implementation process, 'and ensuring that scarce resources are deployed effectively' (Govindarajan Committee, 2002a, p. 1). The Govindarajan Report forms part of a self-referential tangle of information, the original source for much of which is the World Bank. For example, the Report's assessment of the regulation of investments and, consequently, its recommendations for reform, relied primarily on two sources, both of which in turn relied upon, and were relied upon by, World Bank Investment Climate Assessments.[21] The influence of the Govindarajan Report and other manifestations of investment climate discourse is a key concern of the following case study of Bengaluru.

Summary

Legal reform is increasingly conducted in the 'shadow' (Morgan, 2003) of investment climate discourse and this does not seem set to change. As resistance to the dominance of economics over the field of law and development has gathered momentum, some have suggested that we may be entering a Post-Washington Consensus (Trubek and Santos, 2006). While there may be a consensus as to inadequacy of the neo-liberal approach, there is no consensus as to what might take its place. Critiques of the economic approach to law and development tend to lack common points of positive and normative reference. If the well-oiled machine of the economic approach to law and development is to be challenged, in the fields of foreign investment and beyond, a rigorous alternative analytical framework must be applied. Cotterrell's law-and-community approach offers a positive and normative foundation upon which an alternative vision of the role of law in foreign investment might be built. It encourages us to think of state law as expressing and coordinating between the social interactions, interests, values and legal needs of *multiple*, 'diverse and interacting' networks (Cotterrell, 1996, p. 322), whether they be grounded in instrumental or other forms of relationship.

For just as social life takes diverse forms, so does law. It reminds us that, while all actors – foreign investment, government and civil society – share the need for trust, this need might be fulfilled in different, sometimes conflicting, ways. Thus, the community approach strikes a delicate and essential balance between 'seeking similarity' and 'appreciating difference' (2002b, p. 49).

Law functions as a communal resource by 'approving and protecting the empirical conditions that facilitate' mutual interpersonal trust (Cotterrell, 1997, p. 88). This universally relevant role for law speaks more credibly to multiple actors than narrow, economic values such as efficiency. However, whether and how legal systems are able to act as a communal resource in foreign investment relations is likely to depend first, upon the legal strategies adopted by individual actors; and second, upon the nature and degree of influence exerted on national legal systems by investment climate discourse.

It is important not to be distracted by the question of whether a given set of interactions is or is not occurring within a network of relations of community. Trusting relationships, which might benefit from the support of law, tend to occur within relations of community; and competing interests, which might benefit from coordination by state law, tend to exist out-with relations of community. But trust can exist out-with, and competition can occur within, relations of community. So it is far more important to regard relations of community, and their essential productivity, as an aspirational reference point. Consequently, this study is not primarily concerned with determining whether existing tripartite relations in Bengaluru *are* relations of community. It is concerned with exploring how the aspiration of nurturing a sense of community – supporting trust and coordinating multiple interest and values – can act as a useful lens for critically assessing the role of legal systems in respect of investment-related interactions.

Notes

1 Some elements of an earlier draft of this chapter appear in Perry-Kessaris, 2008a.
2 Weber observed the ideal types of traditional, value-rational, affective and purpose-rational action (Cotterrell, 1997, pp. 80–81).
3 It is difficult to trace the influences of literature on the workings of an institution, but Fukuyama is cited in the World Development Report of 2005, and Tapscott was invited to speak at a World Bank conference on 'Business, NGOs and Development: Strategic engagement to met the millennium development goals' on 10–11 April, 2006.
4 For example, a 1997 study of 250 factories across eight Indian states found that 51 of them had undertaken pollution abatement in response to 'pressure' from civil society, and 102 had done so in response to complaints from neighbouring communities (Pargal et al., 1997, p. 5).
5 For perspectives on participation in a UK setting see Douglas (1999); for a review of participation in rural development in India see Mitra (1992).
6 'Anti-globalisation' activists hold a diverse range of attitudes to foreign investors. For example, 'anti-globalisation' communists entirely reject capitalism and neo-liberal globalisation and seek a powerful, centralised state. 'Autonomists' also reject capitalism,

but they prefer horizontal power structures linked through social relations. Both of these approaches imply conflict with foreign investment. By contrast, 'reformists' argue for 'a more socially inclusive form of capitalist globalisation' (Pattenden, 2005), which implies relations of conflict, but also some degree of cooperation with investors (International Forum on Globalization, 2002, pp. 13–14).

7 By contrast, Gunther Teubner (1997) argues that globalisation is a 'non-political process', resulting in the development of a 'new global living law' out of the 'internal dynamics' of a range of 'social subsystems' – 'highly technical, specialised … global networks of an economic, cultural, academic or technological nature'. This global living law does not emanate from, rely on, or refer to, the state (pp. 5–7 and 11–12). Such global living law may exist, and it may or may not be, as Teubner asserts, more important than state law in determining the day-to-day practice of business, but it is not the focus of this study.

8 It is often difficult to determine the exact impact of a given legal strategy. For example, the failure of the Cogentrix power project in Karnataka produced competing accounts among civil society actors regarding the relative significance of 'popular resistance' versus relatively elite civic action such as public interest litigation (Chettri, 2000, p. 4; *Down to Earth*, 2001a). Similarly, a 1998 proposal to build a power station in the Karnatakan city of Mangalore was reported to have been frightened off by the 'might' of the 'well-organised' fishing community who have 'vowed not to let project promoters or government officials … come close to their village' (Chettri, 2000). However, in 2005 the company's website remained upbeat about the project, describing it as 'in the final stages of negotiation' and predicting generation in the foreseeable future (Smith Cogeneration website, as at 30 September 2005). Mercifully the determination of who 'won' and by what means is not the central concern of the present project.

9 Studies collected by Kagan and Axelrad (2006) found that in more developed countries, foreign investors are not always 'able to overwhelm regulators with argument or expertise, or with political or economic leverage' (pp. 373 and 376).

10 Most must register with the Registrar of Companies under the Companies Act of 1956 thereby forming an Indian company which is subject to the laws of India as any other Indian company. For details see the website of the Ministry of Company Affairs. Operation as a foreign national is only possible for those engaged in a limited range of activities such as representing a parent company, importing and exporting, and rendering professional, consultancy or software development services (DIPP, 2005, p. 9). Activities in which branch office can engage are listed under the Foreign Exchange Management (Establishment in India of Branch Office or other place of business) Regulations, 2000.

11 Investment climate discourse has sometimes struggled to take informality seriously, continually emphasising the importance of 'formalizing the informal sector' (Upham, 2002, p. 12). But the World Development Report 2005 marks a welcome shift, with multiple references to informality – to informal firms, and informal regulation of the private sector; and the Bank has also taken on the difficult task of producing data on informality (World Bank, 2004a, pp. 5–6).

12 In a discretionary system, state (political government and bureaucrats) actors are allowed 'to set rules and enforce them without significant legal constraints'. By contrast, in a rule-based system, laws are themselves created according to specific procedures, and those laws insist upon specific procedures for rule-making and enforcement (Pistor and Wellons, 1998, p. 27).

13 For example, faced with a legal reform which would leave a pauper better off by £1, but also leave a millionaire worse off by £1, even an economist specialising in

development might dismiss the proposal as 'Pareto' inefficient. If the pauper were to gain £1 and the millionaire were to lose £1, then this would be regarded as 'Kaldor-Hicks' efficient. But so would a scenario in which the pauper lost £1 and the millionaire gained £1. And if a pauper were to gain £1 and the millionaire were to lose £2, the proposal would be regarded as inefficient under both tests.

14 So, for example, market actors will establish companies, which will sign contracts, and zoning laws might be loosened so as to ensure that private companies are able to locate their operations on the basis of market considerations (Pistor and Wellons, 1998, p. 27).

15 The liberal economic approach to law has its roots in the work of Scottish political philosophers and economists in the seventeenth century, built momentum in the 1960s thanks in large part to the work of Ronald Coase, and swept to political centre stage during the years of the 'Washington Consensus' (see Parisi and Rowley, 2005; Mercuro and Medema, 1997). Economics claims not only to enlighten our understanding of legal systems by predicting their effects, and explaining their existence (public choice), but also to offer objective, scientific criteria – in particular efficiency – for evaluating legal systems.

16 See, for example, the assertion in the 2005 World Development Report that society as a whole benefits from using the legal system components of a good investment climate (World Bank, 2004a, p. 19).

17 For this reason, there is also a need to pay close attention to interactions between Bank and government actors. Separated by a 'revolving door', they often have much in common in terms of education, and even shared career paths (Santos, 2006, p. 296). For example, India's Prime Minster Manmohan Sigh has acted as governor to both the International Monetary Fund and the Asian Development Bank.

18 The assumption that economic values and interests are essentially homogenous is not limited to investment climate discourse. For example, across Asia and elsewhere, pressure for transnational convergence in the content of law has come from engagement in, or the desire to engage in, the processes of economic globalisation (Pistor and Wellons, 1998, pp. 282–3. See also Cotterrell, 2006b, p. 154). Other examples include the Organisation for Harmonisation of Business Law in Africa (OHADA), the European Judicial Network, the International Institute for the Unification of Private Law (UNIDROIT).

19 For example, I have highlighted each of these issues in earlier work: Perry, 2000a, 2000b, 2001, 2002a and 2002a; and Perry-Kessaris, 2003.

20 Such formalistic, rule-based decision making is rarely found among regulators anywhere, despite frequent representations to the contrary. Indeed, strict formalism is impossible, since all laws are to some extent indeterminate. There is always 'scope within law to legitimate contradictory decisions', and rules are often 'used to construct post hoc accounts of decisions rather than actually constraining them'. Regulatory agents have been accused of 'rely[ing] as much on bluff and blunder as on legal powers, or ignoring legal rules all together' (McBarnet and Whelan, 1991, p. 849). This process of departing 'from official law, even by officials' has been variously described a 'legitimated interposition' (Kadish and Kadish, 1973) and 'covert anti-formalism' (McBarnet and Whelan, 1991, p. 853).

21 They were a 2002 survey of foreign investors conducted by the Federation of Indian Chambers of Commerce and Industry (FICCI), and the 2002 CII-World Bank study *Competitiveness of Indian Manufacturing* (Goswami et al., 2002). The FICCI report of 2003 is also quoted in the World Investment Report of 2003 (UNCTAD, 2003, p. 44).

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Chapter 3

Introducing Bengaluru

Those who seek an oriental refuge in which to 'find themselves' would probably be well advised to avoid the 'brash' city of Bengaluru [formerly Bangalore]. As one guidebook rather forlornly points out, many foreign tourists 'turn up in [Bengaluru] without really knowing why they've come … the city's very real advantages for Indians are two-a-penny in the West' (Abram et al., 2001, p. 221). But Bengaluru is no inept parody of a 'western' city. Bengaluru is Bengaluru – the traditional, modern, green, polluted, high-tech, low-tech capital of the southern Indian state of Karnataka.[1]

Bungalows, pubs, green spaces and centres of higher learning have historically lent a rather sedate air to the city of Bengaluru. But its laid-back demeanour has come under pressure in the last few decades. As the population has expanded – by 34.8 per cent between 1991 and 2001, according to the 2001 census – rich Bengaluru has built higher, while middle-class and poor Bengaluru have increasingly been forced to perch in settlements flung ever-farther afield. The 2001 Census reported that about 10 per cent of households in Bengaluru occupied semi-permanent or temporary housing (Office of the Registrar General and Census Commissioner website). As economic liberalisation has gathered pace, new products with global logos have gradually peppered the city's colonial, pre-colonial and post-colonial facades alike. Pizzas compete with *thalis*, *barristas* jostle with *chai wallahs*, nightclubs rest against slums.

This chapter is intended to introduce the reader to those of Bengaluru's actors and legal institutions which are especially relevant to the present study. The first section provides an overview of foreign investment, government and civil society actors in the city. The second section outlines the basic structure of the legal system. Special attention is paid to relations between members of the legal system (judges and bureaucrats) on the one hand; and investment, government and civil society actors on the other, for these may well affect the ability of the legal system to act as a communal resource.

Actors

The present study is concerned with relations between investment, government and civil society actors. The following paragraphs attempt to give a flavour, necessarily marred by generalisations and gaps, of each of these actors in the city of Bengaluru, set where appropriate in the broader contexts of Karnataka and India.

Investment actors

By the middle of 2006, the cumulative total of foreign investment inflows since the liberalisation of the Indian economy began in 1991 was US $50,124 million.[2] There is no doubt that India's ability to attract foreign investment has improved during that time. For instance, the pace of investment had, roughly speaking, doubled during that time, with about one third coming during the first decade, and two thirds during the last five years (DIPP, 2006, p. 4).[3] However, it has some way to go. For example, India's progress is constantly and unfavourably compared to that of China. In 2005, foreign direct investment flows still only accounted for 3.5 per cent of gross fixed capital formation in India, as compared to a Chinese figure of 9.2 per cent. While China is considered to be a 'front-runner' in FDI, exhibiting both 'high potential' and 'high performance', India is considered to be an underperformer, 'low' in both potential and performance (UNCTAD website).

The sectors attracting the highest foreign investment inflows to India are electrical equipment, including computer software and electronics (17.54 per cent of the cumulative total, 1991–2006), followed by financial and non-financial services (11.21 per cent), telecommunications (10.67 per cent) and transportation (9.62 per cent).[4]

The largest direct sources of cumulative FDI flows into India since liberalisation have been the United States (14.71 per cent) Japan (6.10 per cent), The Netherlands (5.95 per cent) and the UK (5.81 per cent). But the largest source of foreign investment overall is the Mauritius. Although its economy is 'less than 100th of the size of India', the Mauritius has provided 38.49 per cent of cumulative investment flows since liberalisation began (DIPP, 2006, p. 2). The combined effects of the Indo-Mauritius Double Taxation Avoidance Treaty (1983) and the Mauritanian Offshore Business Practices Act (1992) make this small island nation an attractive springboard for those, Indian and foreign, wishing to invest in India. The Treaty protects from Indian capital gains tax the sale of shares in Indian companies by investors ever-so-loosely 'resident' in Mauritius.[5] The Act allows foreign companies to register in Mauritius specifically for the purpose of investing abroad, and so to benefit from Mauritius' zero rate capital gains tax, and low dividend and income tax rates (Saran, 2000; Mauritius Board of Investment website).

Reliable statistics detailing the sector and nationality of FDI at the state level are hard to come by, even for the Government of India (DIPP, 2006; DIC website).[6] It is possible to say that, by Indian standards, the State of Karnataka has had a relatively long and successful history of attracting foreign direct investment. New Delhi and Mumbai have been the most successful, attracting 24.18 per cent and 22.16 per cent respectively of total national cumulative FDI flows since 1991 (DIPP, 2006, p. 3).[7] Karnataka comes third in the national ranking, with 7.8 per cent of the total (US $1,676.8 million; see Table A5, Appendix). The Government of Karnataka has prioritised a number of sectors, such as information technology, biotechnology, electronics and telecommunications, agro food processing, apparel, handicrafts, automobiles and banking and finance – for which it offers special

incentives. Over 500 multinational corporations and 66 global Fortune 500 companies are said to be doing businesses in the State of Karnataka. A list of individual projects approved at each meeting of the investment promotion and facilitation agency, *Karnataka Udyog Mitra*, is available on its website (DIPP, 2006; DIC website; KUM website).

But there is much more to foreign investors than statistics. Foreign investment actors in Bengaluru are extremely diverse in almost every respect: location, sector, national origin, size and so on. What follows is intended to give an impression of this diversity.

Some investors in high technology industries choose to locate in one of three technology parks in the Bengaluru region. Each offers physical advantages such as hassle-free rental and infrastructure, above and beyond the usual regulatory and financial advantages offered to investors. The International Technology Park is the most glamorous and surreal of the three. With towers of up to 13 storeys high named Challenger, Inventor and such like, it is off-limits to scooter rickshaws and power cuts. It is itself a joint venture between foreign (Singaporean) and local investors that developed from prime ministerial cooperation between the two countries. Its promotional material speaks for itself:

> Opened in 1998 as India's first work-live-play business environment, ITPB is virtually a self-contained city spread over a sprawling 28-hectare estate. The Park integrates office, retail, residential and recreational facilities in a single location, set amidst a refreshing and aesthetically appealing lush landscape … [O]ver 19,000 tech-savvy professionals work for more than 120 companies in the fields of [information technology (IT) and information technology enabled service (ITES)], bioinformatics, software development, telecommunications, electronic and other hi-tech industries. (ITP website)

By contrast, Alternativ Food Processing is a small producer of gherkins with French investment, in a more isolated location. It supplies seeds, technology and support to local farmers who produce the gherkins, and then processes them to a semi-finished level and exports them to branded companies world-wide. Its website emphasises the non-hierarchical nature of the management structure, the fact that the French manager 'now calls India home' and the close connection between the company and the farmer (Alternativ Food Processing website).

Metlife International, a US-based insurance multinational, opened its MetLife India headquarters in Bengaluru in 2002 as a joint venture with, among others, the Jammu & Kashmir Bank, and an Indian multi-industry corporation M Pallonji. Metlife is one of just a handful of foreign companies to be awarded a licence to sell insurance since the deregulation of the industry began in 1999. It uses full-time local salespeople who must, according to the Insurance Regulatory Development Agency rules, work on commission.

Some investment actors in Bengaluru are closely related to each other. For example, the UK-based Cuthberts International has two subsidiaries in Bengaluru, two of over 1,000 foreign and locally-owned garment factories in the city, employing about 500,000 people, mostly women from rural areas. The Bangalore Babywear Company was established in 1999 and produces garments

for export, (Bangalore Babywear Company website). Cuthberts Textiles (India) was established around 2006 and produces fabric for export. Similarly, Bengaluru has since 1996 been home to the headquarters of SAP India, a subsidiary of German-based business software provider SAP International. Since 1998, it also been home to SAP Labs India, one of four units owned by SAP to conduct research and development and service support worldwide.

Foreign investment in Bengaluru is a truly global affair, with input from both the west and the east. For example, Toyota has had a joint venture presence in the city since 1997, and is joined by over 30 other Japanese companies. More recently, waiters in Bengaluru's hotels can be overheard learning culinary Mandarin from breakfasting Chinese business-men. And Huawei Technology is a Chinese multinational corporation specialising in telecommunications and networking, which chose Bengaluru as the location for its largest research and development centre in 2001.

> Having invested over 100 million USD in the Indian operations, Huawei has its long-term strategy and commitment, and has embarked on strengthening its human resource base in India. [Huawei] currently employs over 1200 Indian software engineers at its 200,000 sq ft, state-of-the-art development centres in [Begaluru] Huawei plans to recruit about 1000 more Indian software engineers and has earmarked an additional investment of 100 million USD in the coming years. (Huawei website)

A further significant category of investor in Bengaluru is those who promote mega-projects. The Bengaluru-Mysore Infrastructure Project and the Cogentrix Power Project are two examples. The Cogentrix Project was an ill-fated plan for a US-based company, Cogentrix, and a Hong Kong-based company, China Light and Power International, to build a 1,000 megawatt coal-based thermal station in the environmentally sensitive coastal region of Dakshina Kannada in Northern Karnataka (see Fernandes and Saldanha, 2001).

The Bengaluru-Mysore Infrastructure Project involves the building of an expressway and townships on a build-own-operate-transfer basis between these two important Karnatakan cities. The need for an expressway to ease congestion between the Karnatakan cities of Bengaluru and Mysore has been debated for decades. The Government of Karnataka first invited tenders for the project in 1988, but no acceptable bids were made. It was eventually decided to use a 'BOOT' public-private partnership structure, under which a road and certain infrastructure would be built, owned and operated by private sector actors for a period of 30 years and eventually transferred to the State of Karnataka.[8] In 1995 a consortium of one Indian and two American companies[9] entered into a memorandum of understanding (MOU) with the Government of Karnataka to provide toll expressway of 111 kilometres and six lanes, on these BOOT terms. A number of townships were also to be built along the roadside, in order to provide the necessary customers to make the toll road aspect of the project profitable. These were to include corporate, commercial, industrial, farming, marketing, heritage, agricultural and eco-tourism centres and a professional-level golf course (Mathai et al., 2000). As the Project website notes, the rather unlikely model for

the project is Columbia, Maryland (NICE website; see also Mahesh, 2004).[10] The MOU was given political weight by the presence and signatures of the Governor of Massachusetts, as well as the then Chief Minister of Karnataka, H.D. Deve Gowda. The Project was approved by the Government of Karnataka in 1995.[11] A Framework Agreement was drafted by the private investors, now represented by the Indian-registered company Nandi Infrastructure Corridor Enterprises Ltd (hereafter 'NICE'), and signed by the Government of Karnataka and NICE in 1997 (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006, paras 4-9).[12] Since then, the Project has been the subject of numerous controversies including four strands of litigation. Matters have been vastly complicated by the fact that successive government actors have sought to distance themselves from the Project by less than straightforward means. The Project is currently in the process of slow and contentious implementation.

Government actors

Any government is a 'highly fractured entity, with different parts in alliance with different actors and interests' (Rajagopal, 2005, p. 347). Government actors 'often, or even normally, pursue competing agendas at cross-purposes with each other' (Fuller and Harriss, 2001, p. 3). The inherent plurality of government is exacerbated in India's relatively decentralised federal system of government.

Union The Government of India, based in New Delhi, is headed by the indirectly elected Prime Minister, and a supporting Cabinet.[13] The Union of India is divided into 28 states and seven union territories. The powers of Union (also termed Central) and State Governments are allocated under the Constitution, and matters relating to foreign investment are divided between them. For example, the Union is given powers including foreign affairs, ports, international and inter-state trade and commerce, incorporation of companies, banking, patents, oil and certain taxes; the states are responsible for local government, communications, mines, and certain taxes; and they are concurrently responsible for matters such as transfer of property, contracts, bankruptcy and economic and social planning (Constitution of India, Seventh Schedule and Article 246).

States The Government of India is represented at the state level by the Governor of Karnataka.[14] The most powerful government actor in the State is the Chief Minister who is the elected head of the Government of Karnataka. From 1999 to 2004, this post was held by S.M. Krishna, an American-educated former Union Minister with a reputation for energetically supporting liberalisation and foreign investment in particular. He was briefly replaced in 2004 by the relatively low profile Dharam Singh leading a Congress-Janata Dal coalition. In 2006, the mantle was taken up by H.D. Kumaraswamy, leading a BJP-Janata Dal coalition, whose support for FDI was less consistent. Kumaraswamy boasted the nickname 'grandson of the soil', but is better known as the son of H.D. Deve Gowda, himself a former Chief Minister of Karnataka (1994–1996) and Prime Minister of India (1996–1997). After just under two years Kumaraswamy's fragile coalition

government collapsed and the State was placed under President's rule in October of 2007. So it has remained with the exception of seven days of political instability under Chief Minister B.S. Yeddyurappa in November of 2007.

Districts The states of the Union of India are divided into districts, each often covering a population of about two million. The State of Karnataka has 27 districts, including, for example, Bengaluru, Bengaluru Rural and Mysore. Following the introduction of a national programme of decentralisation and democratisation of local government in the early 1990s, each rural district in Karnataka now has a three-tier elected council system known as the *panchayats*, the lowest tier of which is found in individual villages. These are responsible for creating and implementing development schemes and collecting certain taxes. They work side by side with District Collectors – bureaucrats who have represented the state at the local level since colonial times (Johnson, 2003).

Likewise, a three-tiered system of elected councils has been introduced in urban areas of Karnataka, with municipal authorities at the apex. The municipal authority in Bengaluru is known as the *Bruhat Bengaluru Mahanagara Palike* (henceforth the *Mahanagara Palike*).[15] It includes 100 wards, represented by elected councillors, and is headed by a Commissioner, who is the urban equivalent of a Collector. Its functions include cleaning and lighting streets, ensuring systematic urban growth, licensing of trade and collection of certain taxes (Chamaraj, 2005; ss. 58–9, Karnataka Municipal Corporations Act, 1976; Bengaluru Mahanagara Palike website).[16]

Civil society actors

With a literacy rate of 82.96 per cent (Office of the Registrar General and Census Commissioner website) and a vibrant and independent press, Bengaluru is home to an active body of non-governmental organisations which collaborate locally, nationally and[17] internationally. For example, research conducted in 1995 found over 50 organisations in Bengaluru having some interest in environmental issues, as well as an impressive range of public-spirited individuals independently devoting themselves to keeping the government on its toes (Perry and Anderson, 1996). What follows is an introduction to some of the groups into which some of these individuals who seek to represent the values and interests of Bengaluruans organise themselves.

Examples The Public Affairs Centre (PAC) seems to be unique among Bengaluruan civil society actors in that it concentrates on government activities per se. Founded in 1994 a former advisor to the World Bank and other international organisations, it is 'dedicated to the cause of improving the quality of governance'. It researches and supports methods of improving government services, paying particular attention to the connections between transparency, accountability and good governance. The Centre has published a series of 'report cards' on public perceptions of government services in Indian cities, including Bengaluru. Its methodology has attracted international plaudits, and its findings have been

cited in publications of the World Bank, Transparency International and United Nations (see PAC website).

The Environment Support Group (ESG) focuses on environmental and social justice campaigns using a wide range of techniques from research to public interest litigation and lobbying. Established in 1996, it is a well-connected organisation, both nationally and internationally. The ESG has been at the forefront of a number of high profile campaigns, for example, against the Bengaluru-Mysore Infrastructure Corridor Project and in favour of transparency in the review of the National Environment Policy. But it also finds time for smaller fish, such as the illegal felling of trees and school fire safety in Bengaluru (see ESG website).

The Alternate Law Forum appears to be unique among Bengaluru's NGOs in its determination to put the principles and lessons of socio-legal and critical legal studies into practice. Founded in 2000 by graduates of Bengaluru's highly-regarded National Law School, it sees itself as 'a space' committed to an interdisciplinary interrogation of the law using creative forms; in which 'alternative lawyering' is integrated with 'critical research, alternative dispute resolution' and 'pedagogic interventions'. It has, for example, conducted research into the integration of the banking sector into the global economy from a trade union perspective; offered legal services to sex workers; and published a database of patent applications (see Alternate Law Forum website).

Representation Civil society actors in India are often charged with elitism. For example, Susan Shurmer-Smith has suggested that 'virtually all' of them are 'for better or worse … masterminded by people who are part of the educational elite' who share the 'educational and social backgrounds as those who are going into corporate finance'. This is not to say that they lack revolutionary fervour. As 'inheritors of the anti-imperialist legacy of the Independence struggle', this group is 'full of contradictions'. They are at once internationally minded and technologically savvy, but also dedicated to traditional crafts, and strongly averse to ostentation. But they are not, Shurmer-Smith argues, generally formed of 'average' members of society (Shurmer-Smith, 2000, pp. 44–5). This accusation appears to hold true for the Public Affairs Centre, Environmental Support Group and Alternative Law Forum. Some such elite groups focus exclusively on the interests and needs of poorer and more marginal groups, and show a deep appreciation for the special relationships which members of those groups may have with their environment (Perry and Anderson, 1996).[18] But others do not. For example, research conducted in 1995 revealed that many environmentally oriented civil society organisations in Bengaluru regarded themselves as not only comprised of, but also generally aimed at, middle and higher income groups. They reported that this was because the appeal of their subject area was 'more cosmopolitan', and their campaigns were in English – seen as a necessity for national impact in multi-lingual India. Similarly, Bengaluru's rather sedate clubs, such as the YMCA and Rotary Club, 'helped to normalize environmental activism' making it more palatable to conservative members of the public and the government (Perry and Anderson, 1996). More recently, a report by CIVIC, a Bengaluru-based civil society organisation focusing on civil participation, concluded that 'the

most important factor facilitating a positive outcome' in their work was that its 'members came from the class of professionals, academics and people of societal standing in Bengaluru' (Prasana et al., 1999, p. 25).

Some groups claim to be representative of the 'grassroots'. For example, the International Forum on Globalization hails the 'popular resistance' to multinational corporations in India in recent years, citing in particular the work of the Karnataka State Farmers Association (IFG, 2002, p. 136). *Karnataka Raja Raitha Sangha* (KRRS) – the Karnataka State Farmers' Association – defines itself explicitly in terms of their resistance to foreign investment, and has been 'integral' to People's Global Action (PGA), the major autonomist anti-capitalism network which developed in the second half of the 1990s. The now deceased former leader of the KRRS, 'Professor' Nanjundaswamy, 'played a prominent role within the PGA process,' hosting its 1999 international conference and coordinating a range of demonstrations and 'direct actions' in India (Pattenden, 2005). For example, in 1992, the KRRS entered the Indian headquarters of multinational agribusiness Cargill in Bengaluru's MG Road, throwing filing cabinets and computers out of windows and setting them alight. The KRRS argued that the company would force India's seed producers out of business, and made the 'rather more far-fetched' accusation that Cargill 'had signed a secret agreement to set up a slaughterhouse as part of an international conspiracy designed to wipe out India's cow population'. A few months later, one of the company's factories was also destroyed. The group's second 'assertive stand against what they perceived as an invasion of foreign companies intent on wrecking Hindu culture' was against fast-food outlet Kentucky Fried Chicken (KFC). 'As customers and staff looked on in astonishment' a group of farmers smashed the restaurant's window using its own ice-cream freezer, allowing 'hundreds of rustics dressed in Gandhian homespun' to enter and destroy everything in sight. They said that they were marking the anniversary of Mahatma Gandhi's death by fighting against a new invasion, this time by multinationals (Dalrymple, 1999, pp. 158–9). But Jonathan Pattenden has discovered elitism and hierarchy even in this international poster child for grassroots anti-globalisation activism. His study of the KRRS found that 'local people' had 'little, or nothing, to do with' the international anti-globalisation movement. The much prized 'horizontality scarcely exists' because of both 'vertical politics between social movements' and the 'class, caste and gender-based inequalities within social movements'. This, he argues, is globalisation's true nature. It is revealed not in high profile 'global days of action', but in these 'less visible processes[,] … the daily interactions of domination and resistance amongst the bases of social movements' (Pattenden, 2005). So, civil society actors of all kinds are prone to being a fairly unrepresentative bunch. In this respect, civil society actors are probably much the same everywhere.

Integrity Those who describe themselves as civil society actors are the subject of a degree of scepticism in India. Research conducted in 1995 revealed that many commentators questioned the motives of civil society actors in Bengaluru, accusing them of seeking financial gain or celebrity rather than justice (Perry and Anderson, 1996). Similarly, Solomon Benjamin has noted that slum dwellers in

southern India are often sceptical of non-governmental organisations, regarding them as 'corrupt' bodies that are 'living off of the slum', and are 'aloof and untouchable'. 'The only difference between an NGO and a politician is that you don't have to fold your hands to the NGO', and that you can vote the politician out (Benjamin, 2000, fn. 35).

Civil society actors have also been accused of taking credit for the achievements of others. For example, the 1995 closure of Bengaluru's Kentucky Fried Chicken outlet is regularly attributed to the protests of a group of local farmers. But an interviewee who was a senior municipal government actor at the time insisted in 2003 that the outlet was closed down by his authorities because it had disregarded a notice indicating that it was in breach of Indian food adulteration rules regulating levels of monosodium glutamate.[19]

Legal system

The 'legal system' of relevance to the present study is the law, judiciary and bureaucracy affecting India, the State of Karnataka, and city of Bengaluru in particular. The following sections outline the key features of these components of the legal system. But 'law has no uniform way of looking at the world, no "truth" of its own'. Rather, '*people'* have 'legal understandings', and it is these diverse people and their equally diverse understandings that are the proper subject of the sociological analyses of the law (Cotterrell, 2006b, p. 4, original emphasis). So, attention is first paid to the highly complex relations between members of the legal system and the civil society, government and investment actors that are at the heart of the present study.

Trust in law

Interactions between members, targets and consumers of legal systems are, like all social interactions, affected by interpersonal trust. From a law-and-community perspective, trust is not only central to relations of community, but also determines law's ability to support a sense of community.

For example, bureaucrats and judges cannot effectively support community-like relations if they are not trusted to do so. In India, some civil society actors have historically regarded law and legal institutions as 'the oppressor' and avoided it in favour of 'reporting and documentation', or indeed, armed resistance (Khaitan, 2004, p. 3). While such views remain in certain quarters, for example among the Naxalites, there are indications that most civil society actors in India try to use the legal system – litigating, lobbying, developing alternative laws and policies and so on (Randeria, 2003, p. 307).[20] Indeed some, such as those who adopt a human rights or public interest approach to activism are 'wedded' to the paraphernalia of the legal system. Nevertheless, interviews and secondary sources suggest that a degree of 'disenchantment' with the legal system, especially the courts, has developed in recent years (Alternative Law Forum, 2003, p. 179; Khaitan, 2004, pp. 3 and 15).[21]

By the same token, bureaucrats and judges are unlikely to offer effective support for community-like relations between those whom they do not trust. For example, as Sarat and Scheingold (2007) have observed, members of legal systems 'vary widely in their receptivity to the tactics and strategies of cause lawyers' (p. 13) such as civil society actors. In India, relations between the judiciary and civil society actors have recently been characterised by spiralling distrust, most recently played out through the laws of contempt of court (see p. 52 et seq.).

Relations between government actors and members of the legal system (bureaucrats and judges) are equally complex. Although this study analyses government actors alongside investment and civil society actors as potential consumers, and targets, of the legal system, the relationship between government actors and law is unique. Specifically, government actors often take a leading role in proposing new rules – although whether those proposals come to fruition depends upon their dominance of the legislature in question. They also have an especially close relationship with bureaucrats. Indeed, the distinction between bureaucrats on the one hand and political government actors on the other is made somewhat inelegant by the fact that, in India, relatively senior bureaucrats are sometimes nearly indistinguishable from (political) government actors. Relations between many bureaucrats and government actors have been characterised in recent decades by spiralling distrust, played out through abuses of power.

Relations between foreign investment actors and members of the legal system seem to be altogether less fraught, less personal and less dynamic. This finding makes sense, in that foreign investment actors are relatively transient. They may trigger references to a cupboard full of colonial skeletons among some members of the legal system, but for the most part, investment actors seem to come to the law relatively free of social and political baggage.

Law

Indian law is created at federal, state and local levels. Union and state parliaments are authorised to legislate on matters allocated to them solely or jointly under the Constitution (see p. 39). Federal law originates in the Union of India's bicameral parliament, comprising the (predominantly) directly elected *Lok Sabha*, and indirectly elected *Rajya Sabha*. Additional laws are produced in the states' legislative assemblies. Karnataka's legislative assembly, *Vidhana Soudha*, comprises the directly elected legislative assembly, *Vidhan Sabha*, and the indirectly elected legislative council. Government actors at the federal, state and local level are also often delegated powers to produce secondary legislation such as Notifications. These powers were recently used to dramatic effect by the Union Ministry of Environment and Forests (MoEF) (see p. 104).

Bureaucracy

The Indian Civil Service is a vast undertaking, composed of three branches: the All India Service, Central Service and State Service. The branches follow the general contours of the Concurrent, State and Union lists of the Constitution

of India (see p. 39).[22] The civil servants of the Central Service deal with matters such as foreign affairs, revenue and railways, on behalf of the Union Government. The least prestigious of the three branches of the civil service is the State Service, which deals with matters of interest solely to states. The most prestigious branch of the civil service is the All India Services, which deal with issues of concurrent interest to the State and the Union Governments and are composed of the Indian Police Service, Indian Forest Service and the elite Indian Administrative Service (IAS).[23]

An IAS officer's practical experience begins at the level of the local district, perhaps as a Collector, from where he or she is transferred from post to post, generally being promoted on the way, possibly to the level of Secretary.[24] In the past, IAS officers brought a degree of coherence to governance in India, in that they moved from state to state. However they are increasingly allocated to a particular state cadre, and movements out of state are on a secondment basis. Although they receive collective training in law, management, conversation and camaraderie, there is 'little or no evidence that bureaucrats have any perceived common interest as a class' (Fuller and Harriss, 2001, p. 15). There is a growing 'unease in governing circles' that as a greater proportion of recruits are drawn from 'non-elite rural backgrounds', and the grip of the erstwhile 'Tamil-Brahmin hegemony' is loosened, the 'esprit de corps' of the IAS may be dissipating (Rajan, 2007, p. 3287).

Prestige 'The bureaucrat was for decades the hero of modern India and, until the 1970s, was depicted in Hindi films as a man of character and insight … referred to with awe and respect' (Hansen, 2001, p. 37). Once one of the most attractive jobs to which an educated Indian could aspire, the glamour and power previously associated with a career as a bureaucrat in the IAS have faded somewhat. In the 1970s, under the glare of Indira Gandhi's Emergency, bureaucrats were obliged to 'implement harsh and erratic policies'. Deep politicisation caused many to focus on 'keeping their heads down', and power was transferred to (political) government actors (Shurmer-Smith, 2000, p. 166). Liberalisation has placed further constraints on bureaucrats, and 'in this new century bureaucratic power has to be masked in deference to the commercial interest' (Rajan, 2007, p. 3287). Today, bureaucrats are somewhat 'beleaguered', and it is no longer true that 'nothing can move without [their] permission' (Shurmer-Smith, 2000, pp. 166). As one foreign investor remarked, 'when you meet [bureaucrats] individually you think "what a bright guy"', but then you 'wonder how they get up and go to work every day', because they often 'can't do a thing'. They 'are just part of a system that needs an overhaul' (Interview, 2003, FI13). However, 'the corps is in no real danger of losing its grip over the administration' (Rajan, 2007, p. 3287). The 'attitude' of bureaucrats who form the 'implementation machinery at the field level' is still highly influential in determining matters such as the investment climate (Govindarajan Committee, 2002b, p. 43).

Bureaucrats and government actors Since the 1970s, bureaucrats throughout India have been increasingly at the mercy of (political) government actors, some

of who 'delight in humiliating them to amuse the electorate', and often transfer them as punishment for causing displeasure. They are pressurised by politicians to 'grant favours and bend rules' and are sometimes paid in money, but more often with 'promises of lucrative postings or threats of punishment postings'. Sometimes, there are threats of violence (Shurmer-Smith, 2000, p. 106). At the same time, there is a widely reported divergence in the socio-economic profiles of India's increasingly uneducated pool of politicians, and the elite IAS stable. A civil society actor reported that if a bureaucrat disobeys a politician, then it is 'only a matter of time before they are going to be shunted out' (Interview, 2003, LL/LCS19).[25] A foreign investor reported that politicians 'dominate' Karnataka's High Level Clearance Committee, which is responsible for clearing large inward investments and is chaired by the Chief Minister. The interviewee told how in one case a bureaucrat and a politician each proposed a 'different solution' to a problem, and although the bureaucrat 'had the right idea', in 'the end the poor guy was out of a job' (Interview, 2003, FI15).

Those bureaucrats who are 'honest, but not confident' respond to political interference by becoming 'hesitant to take a decision'. They 'don't want to rock the boat so they just bounce files from one person to another', and seek to be accused neither of 'taking a wrong decision, nor of obstructing the project'. Others respond to political interference with active strategies for minimising interference or its effect, for example, insisting that any interference is in written form, so that blame might be placed upon the politician in the event of a public interest litigation or other probe. As one bureaucrat put it, 'public interest litigation and the right to information are an excellent shield for us against wrongful interference' (Interviews, 2003, LG08, LL/LCS19, LA06, FG16 and FI13). The most able bureaucrats are well aware that their permanence gives them an edge over the passing politician (Shurmer-Smith, 2000 pp. 167–8).

Other bureaucrats are in relatively horizontal cahoots with politicians. One interviewee described the relationship between bureaucrats and politicians as a 'division of the spoils', in which bureaucrats tell politicians 'how to make the most money in a way that will stand up to scrutiny in court' (Interview, 2003, LL/LCS01). Such equality is perhaps especially likely to exist between the politicians and the bureaucrats of the various parastatal bodies where once and future politicians operate in tandem with bureaucrats. These bodies are formed of the heads of other parastatals; senior bureaucrats from the State Government and from urban and rural local governments; and, in some cases, independent experts. Although they are essentially bureaucratic organisations, it is also widely accepted that they 'house key political functionaries who might have lost elections but who need to be kept within the system' (Benjamin, 2000, fn. 37). For example, the Central and State Pollution Control Boards are parastatal bodies constituted under the Indian Water (Prevention and Control of Pollution) Act of 1974. The Karnataka State Pollution Control Board (KSPCB) issues licences to pollute, monitors general and firm-specific pollution levels, and prosecutes them where necessary, and is responsible for organising public hearings as part of the environmental clearance process. Its members are appointed by the State Government and include non-governmental experts; the heads of other parastatals, such as the Chairman of

Bengaluru's Water Supply and Sewerage Board; and senior bureaucrats from the State Government and from urban and rural local governments, such as the Chief Executive Officer of the Mysore *Panchayat* and the Secretary to the Department of Ecology and Environment (KSPCB website).

Bureaucrats and civil society actors Trust between Karnataka's bureaucrats and civil society actors is tenuous and shifting. As a Bengaluru-based commentator put it, if bureaucrats do not 'want to help you', they 'can always find a provision in the law that will make a problem' (Interview, 2003, LC20). Echoes of this sentiment are found across the country. For example, reflecting on their interactions with bureaucrats attached to the Government of India in relation to the campaign against pesticides in soft drinks, the Centre for Science and Environment remarked that they had discovered that the system can 'easily be manipulated by the bureaucracy' (CSE, 2006a, p. 2). Hans Dembowski observed that civil society actors in Kolkata exhibited 'a striking lack of trust' in bureaucrats. He proposed that civil society might hold 'a stronger sense of trust' in bureaucrats if interactions with them were 'more reliable' (Dembowski, 1999; see also Dembowski, 2001).

It seems that some bureaucrats actively reach out to civil society actors. For example, a bureaucrat emphasised that it is important for civil society actors to keep 'demanding to know' about the implementation of law (Interview, 2003, LG18); and a civil society actor told how a bureaucrat provided documents to support a challenge to a proposed reform of the law governing factories (Interview, 2003, LL/LCS19). Similarly, Dembowski found that when 'a network of environmentally minded bureaucrats' in Kolkata became disappointed by lack of progress on protection of local wetlands, they 'briefed' civil society actors with sensitive documents and 'motivated them … to raise awareness' (Dembowski, 1999). However, the view was also expressed in Bengaluru that bureaucrats have exhibited 'a lack of willingness to penalise investors' (Interview, 2003, LL/LCS19).

Bureaucrats and foreign investment actors Bureaucrats in India, and especially in Karnataka, are regarded as increasingly 'progressive, helpful and mostly friendly' to foreign investors (Interview, 2003, LC11; see also Davies, 2004, p. 161). Many of India's most successful bureaucrats are energetic participants in the liberalization of the Indian economy, 'eagerly espousing' it and 'extending their global networks' (Shurmer-Smith, 2000 p. 168). In Karnataka, bureaucrats were described in interviews as 'on the side of business', 'very open and sincere and want [Bengaluru] to succeed,' and their 'intervention is very efficient' (Interview, 2003, FI13, FG16). Indeed relations between some investors and bureaucrats have become so close as to be problematic. For example, the Karnataka Industrial Areas Development Board (KIADB), the parastatal agency responsible for acquiring and developing land for industrial areas,[26] has gained 'strategic importance' since economic liberalisation began (Indian Institute of Management (Bengaluru), 2001) and is widely perceived to be unhealthily entangled with those of investment actors. It was given a favourable review by the independent Indian Institute of Management (Bengaluru) in 2001. But in 2002, a scandal erupted when the Board

allegedly offered 100 acres of agricultural wetlands to Indian-based software multinational Infosys. Farmers in the area were reportedly 'proud of Infosys and its achievements worldwide', but felt that it should be given dry land. At the same time, allegations were made that 'bogus' companies were acquiring wetlands either from the Board at 'throwaway prices', or directly from farmers who feared a 'forcible' acquisition by the Board. The Board denied the allegations and insisted that its compensation packages are reasonable (Indiainfo.com, 25 November and 2 December 2002). By 2003, there were an estimated 250 cases against the Board pending in the Karnataka High Court[27] and it has been negatively implicated in the ongoing Infrastructure Project saga.

On the other hand, there are reports that some bureaucrats continue deliberately to obstruct investors because they are suspicious of liberalisation (EIU, 2004, p. 7). 'There are pockets of bureaucracy' who are generally 'not helpful' to investors (Interview, 2003, LC11). An economic adviser explained that he had seen a number of instances in which investors' plans were rejected without explanation, and in one case, a potential investor was allowed to present a project three times before being told that foreigners are barred from investing in retail. 'This is a common experience' (Interview, 2003, FG16).

When bureaucrats are unhelpful or incompetent, political interference may well be of assistance. Although bureaucrats and business people do not always need politicians to facilitate their dealings, 'it is an altogether more secure deal if the classic triumvirate works together' because the politician controls the location of the bureaucrat (Shurmer-Smith, 2000, p. 168). So, although investment climate discourse insists that it is more efficient, and therefore more attractive to investors, for bureaucrats to be independent of political interference, of course matters are not so simple. Pro-investment Chief Ministers who interfered in bureaucratic decision making were described by interviewees as 'good guys'. Indeed one foreign investment actor observed that when things do not go your way, the proper response is 'obviously' to 'start to interact with a politician to put pressure on the bureaucrats' (see Perry-Kessaris, 2004, p. 183). It remains 'perfectly possible' to operate 'without that sort of influence', but 'it is still a good deal easier if you know where to go and whom to see' (Davies, 2004, p. 161). The fruits of these collusions can be dark. For example, James Manor has demonstrated how politicians connived to protect the manufacturers of poisoned illicit alcohol which killed over 300 of Bengaluru's slum dwellers in 1981, while bureaucrats entangled themselves in red tape (Manor, 1993).

Judiciary

The Indian judiciary mirrors the federal structure of government. The Karnataka High Court has existed in various forms since 1884, and is one of 18 High Courts in India. It has appellate jurisdiction over all civil and criminal cases in the State's District and Magistrates Courts (High Court Act, 1961). At the apex of the judicial system is the Supreme Court, which sits in Delhi and is headed by the Chief Justice of India. It has original jurisdiction to hear cases relating to disputes between states, and to breaches of fundamental rights. It has broad

discretion to take appellate jurisdiction over any case originating in the courts or tribunals of India. It also has appellate jurisdiction over cases certified by the various High Courts as requiring the attention of the Supreme Court, for example, to interpret the Constitution or, in civil matters, a legal question of general importance. Finally, the Supreme Court has advisory jurisdiction over matters referred to it by the President of India. The President of India appoints judges to the Karnataka High Court in consultation with the Governor of Karnataka, and members of the Supreme Court and the Karnataka High Court (Articles 32 and 136, Constitution of India; see also Supreme Court website).

Prestige Of potential concern to all consumers and targets of the judiciary, state and non-state, is the fact that the 'prestige' of the lower courts has never been so low. Its 'sad state' has been criticised by the press and by 'judges of the Supreme Court and the High Courts, retired and serving' (Noorani, 2002, p. 17). For example, former Chief Justice of India S.P. Bharucha is widely quoted as having estimated that up to 20 per cent of India's judiciary, in particular at the lower levels, might be corrupt. And as in any jurisdiction, there are some who question the quality of judicial reasoning. For example, a local lawyer remarked that he is 'often baffled' by the judiciary, which is sometimes 'not up to the mark' (Interview, 2003, LL10).[28] Concerns about the quality of junior judges have led some to call for judicial independence to be constrained. Judicial impeachment is regarded by some as an ineffective remedy, not least because it requires the support of two thirds of those present and voting in both houses of Parliament (124 and 217 of the Constitution). It has been suggested that politicians ought to have additional powers to intervene in the affairs of the judiciary (Kannabiran, 2005). In 2003 the Union Ministry of Law, Justice and Company Affairs introduced a Bill to establish a National Judicial Commission, which would make recommendations for judicial appointments in the superior courts, currently dealt with by agreement between the government and the Chief Justice of India. The Commission would also have established a code of ethics, dealt with transfers and promotions of judges, and taken disciplinary action against judges where appropriate (Constitution (98th Amendment) Bill, 2003). However, to the relief of those who felt that it would place too much power in the hands of government actors, the Bill failed to pass into law.

Delays A second issue of concern to actors who are targets and consumers of the courts is the fact that using the courts 'is like walking in treacle. It takes years' (Interview, 2003, LC20). A dizzying combined total of 23 million cases were pending in India's Supreme, High and lower courts in 2003 (Galanter and Krishnan, 2003, p. 99). Judicial inaction is also seen as partly responsible for the plight of that majority of India's prisoners that are so-called 'undertrials', languishing in prison, often for decades, before a verdict is delivered. Focusing on environmental matters, of the 248 criminal cases filed by the KSPCB between 1994 and 2004, about half (112) were still pending at the end of the period (KSPCB, 2004, p. 88; see Table A9, Appendix). It is often said in India that 'the contract isn't important'. This is 'a reference to the sheer difficulty of enforcing a contract in

India' (Davies, 2004, pp. 161–2).[29] Part of the explanation for these delays is to be found in India's low level of judges per capita,[30] and poor physical infrastructure. But Galanter and Krishnan suggest that congestion is in large part attributable to the combined effect of procedural rules that allow endless appeals and stay orders, and a judiciary too 'fearful of the bar … to discipline lawyers or even to use the available tools to expedite proceedings' (2003, pp. 99–100). If one of the parties does not attend a hearing, 'the case is adjourned to another date, and the court will issue another summons and you are free to go there or ignore it, and nothing will happen' (Interview, 2003, FG21). For example, Women's Voice, a Bengaluru NGO, reported in 1995 that it had been involved for a decade in a public interest litigation (PIL) case against the government concerning the demolition of a slum. They were demanding that those slum dwellers evicted from the site be re-housed and compensated. The case was still pending, because the government had not appeared at a single hearing (Perry and Anderson, 1996).

Whatever the cause, the result is that there is a palpable reticence among actors of all types to engage with the Indian judicial system, in large part because it is so very slow: investment actors report that they work hard to avoid the courts (Perry-Kessaris, 2004); litigation was used by just 5 per cent of the top 300 civil society organisations in India, and 25 per cent of 73 civil society actors working in the field of social policy in Delhi in 1998–2000 (Krishnan, 2003, pp. 13 and 24, citing Culshaw, 1998 and Misquitta, 1991); and the very limited evidence available suggests that, although they are often sued, government actors in Bengaluru are no more litigious than civil society actors.[31] Those cases which do find their way to court tend to be 'about control of some valued resource: land, a house, a job, government recognition, a licence'. When losing the resource in question is unthinkable, even in exchange for financial compensation, it is difficult to withdraw gracefully from the contest, and cases tend to linger (Galanter and Krishnan, 2003, p. 102).[32] In Bengaluru it was noted that 'there is a lot of litigation' between investors and government bodies 'about interpretations over who is an exporter', and therefore eligible for various concessions. The outcome is important for business 'and they are not going to give up, they will go to the highest level', and they will be resisted (Interview, 2003, LA25).

Independence Investment climate discourse places a premium upon the existence of an 'independent judiciary', that is, a judiciary free from 'any political influence'. A sharp distinction is drawn between law and politics, the former 'supposedly clean, procedurally transparent, and stable'; the latter 'dirty, procedurally opaque, and chaotic' and the root of all the 'sins of corrupt judges' (Upham, 2002, pp. 1 and 10). In India it seems that judicial independence from the executive is generally regarded as valuable and appropriate. Happily then, Indian judges were described by a broad range of interviewees as 'fiercely independent', 'unbiased', 'jealous of their autonomy', 'not influenced much by the policy of the government' and 'really very, very sensitive' to suggestions to the contrary (Interviews, 2003, LL/LCS01, LC11, LC17, LC20, FI13 and FG16). For example, when a Member of Karnataka's Legislative Assembly reportedly stated that the Supreme Court judges sitting in a case relating to the Infrastructure Project would, 'keeping in view their

retirement', be sure to decide in favour of the Project, the Court remarked that although legislators have immunity on the floor of the House, it was 'unfortunate' that they should choose to 'indulge in these activities' (Venkatesan, 2006a). The remarks were expunged from the record and Supreme Court asked counsel for the State to '[p]lease tell your government to keep politics away from some projects and also from the courts' (*Daily News and Analysis India*, 2006). Some objective evidence of judicial independence from the executive comes from Pistor and Wellons' report that non-state actors have a high success rate in challenging administrative decisions in tax (95 per cent) and land (about 60 per cent) matters (Pistor and Wellons, 1998, p. 251).[33]

However, support for, and evidence of judicial independence from the executive does not necessarily imply a resistance to, or absence of, an *independently political* judiciary – a judiciary engaged in activities of political significance. There is always politics in judicial decision-making. In the United States, 'judges are routinely elected or appointed based on their ideological views', and this 'clearly violates the requirement – embodied in the mantra "the rule of law, not men" – that the rule of law must be apolitical'. Politics is 'the lifeblood of all regimes, especially democratic ones', so it is 'iron[ic]' that advocates of neo-liberalism such as the Bank should 'advocate[] democracy while denigrating politics' (Upham, 2002, pp. 19 and 21). Indeed, in a democracy, judges have important political functions, including the protection of 'minority interests', which may not be met by a majority-centric legislature (Krishnan, 2003, p. 3). Foreign investors, upon whose perspective investment climate discourse so heavily relies, may not be in a position to distinguish between corruption and politics. But this distinction is of great significance 'if one is prescribing a formula' for judicial reform in the host state (Upham, 2002, pp. 8 and 19–20).

From a law-and-community perspective, the 'political purity' (Upham, 2002) of the judiciary is not of primary importance. What is important is the extent to which mutual trust exists between the judiciary and its potential consumers and targets.

Judges and foreign investment actors From the perspective of foreign investment actors, it seems that India's senior judges are generally trusted to be technically competent, to act with integrity, and to be reasonably predictable: 'nine times out of ten' a 'rational lawyer … will be able to guess the outcome correctly' (Interview, 2003, LL12). Furthermore, World Bank figures suggest that 71 per cent of respondent foreign investors in 2002 were 'confident that the judicial system will enforce [their] contractual and property rights in business disputes' (Enterprise Survey website).[34] However, or consequently, there remains a perception in some quarters that the courts are biased towards the powerful, including foreign investors. For example, those who resisted the construction of the Sadar Sarovar (or Narmada) Dam Project in Gujarat in 1994 were initially 'reluctant to approach' the Supreme Court which they saw as 'protectors of the powerful' (Rajagopal, 2005, p. 374). It is perhaps particularly 'disturbing' where judicial procedures are unattractive to those concerned with those minority interests that the judiciary might be better able than the legislature to protect (Krishnan, 2003, p. 3).

Judges and civil society actors It has been observed that the judiciary seems to find some public interests to be more compelling than others. Sangeetha Ahuja's extensive 1997 review of the mechanism concluded that the 'real successes' in jurisprudential terms had been cases relating to 'civic participation' and 'general public interest issues', such as development and resource rights, consumer rights and good governance. Those brought specifically in the interests of 'disadvantaged' or 'marginalised' people were less successful. As a result, 'some controversial areas' have remained 'untouched' by the courts (Ahuja 1997a, pp. 7–8, 10 and 13). Of particular interest to the present study is the reticence of the courts to consider matters involving economic policy (see p. 133 et seq.).

Judicial independence and activism, in particular the introduction of public interest litigation, were associated with an increase in trust between judges and civil society actors. Together they generated an 'intense "legalization" of social themes' (Perez, 2002, p. 2; see also Dasgupta, 2000). Judicial bias on public interest issues 'can go either way' (Interview, 2003, LG18), and there is a perception that in recent years it has worked against civil society actors. One civil society actor, who was a public interest litigation enthusiast when interviewed in 1995, said in 2003 that his 'confidence in the courts has gone down significantly in recent years'. A civil society actor alleged that the judiciary had become 'less trustworthy' in recent years, in part because of the 'push for foreign investment'. 'When it comes to environment, and when it comes to workers rights, they are very willing to compromise quite a bit'. Some civil society actors allege that the courts are willing to privilege the interests of investors over those of project-affected people, refusing to cancel projects already in progress (Perry and Anderson, 1996; Interviews, 2003, LL/LCS19 and LL/LCS02; see also Alternative Law Forum, 2003, p. 179). For example, the Supreme Court was dissuaded from undoing the compulsory purchases of land made in connection with the Infrastructure Project by the fact that the project promoters 'had invested a large amount of money and work … for more than seven years' (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006, para. 52). There is some evidence that public interest litigations generally have a low success rate. For example, figures produced by the Karnataka State Pollution Control Board show that by 2004, the Board had won 96 per cent of the 275 public interest litigations decided since it inception.

One factor working against civil society actors in particular in recent years is that the courts have reportedly been perhaps 'too ready' to believe that their petitioner is a 'busy body' (Interview, 2003, LL/LCS02). This scepticism has manifested itself in the increasingly extensive use of judicial powers of criminal contempt against those alleged to have 'scandalised' or 'lowered' the authority of the court. The publication or doing of any other act which tends to have the effect of denigrating or impeding the Courts is an act of criminal contempt, which, like civil contempt, is punishable by up to six months in prison and/or a fine of up to Rs 2000 (s. 2(c), Contempt of Courts Act, 1971). The broad drafting of the law relating to criminal contempt allows it to be 'used fairly arbitrarily by judges in the higher courts' (Kasturi, 2005, quoting former Justice of the Supreme Court, V.R. Krishna Iyer).[35] Elsewhere such provisions have 'fallen into disuse in most developed countries' (Sathe, 2002b). In India contempt provisions continue to

act as a barrier to criticism of the judiciary (Fernandes and Saldanha, 2001). Until recently, a charge of criminal contempt could be brought against a critic of the court who spoke nothing but the truth.[36] Contempt ought not to be punished unless the court is 'satisfied that it is of such a nature that it substantially interferes, or tends to substantially interfere, with the due course of justice' (s. 13(b), Contempt of Courts Act, 1971). Nonetheless, in 2002 the High Court of Karnataka, acting *suo moto*, issued notices of contempt to 56 employees of 14 newspapers and magazines. Their crime was to have published stories of an alleged sex scandal involving named High Court judges. The Editors' Guild of India urged the High Court to reconsider, but to no avail (Menon, 2005).

In another case (*Subodh Chandra Ukil and Debashis Kundu v. Hans Dembowski and others*, 2001), the Kolkota High Court found time to entertain a contempt petition concerning the publication of a PhD thesis because it reported that some interviewees perceived the Kolkota courts to be corrupt, inefficient, unpredictable, ineffective, opaque and so on. The petition was filed by two lawyers against the author, publisher Oxford University Press India (OUP), and a newspaper in which the book had been discussed. A former High Court judge reportedly described the book as containing 'stupid remarks made by a person who is out to malign the Calcutta High Court' (*The Telegraph*, 7 February 2001). But it is hard to understand how this case came to be taken seriously by the courts, not least because the book 'concludes on an optimistic note', namely 'that PIL and judicial activism' have had and will continue to have 'positive impacts on governance in India' (Gunaratne, 2001, p. 636). Dembowski's main sources were Indian authors and journalists, interviewees, and, to a lesser extent, his own observations of court proceedings. He named certain judges specifically but, with one exception, only when making an allegation which had already been the subject of legal proceedings. He took care to emphasise that some of the examples he gave were, though supported by previously published newspaper articles, 'to be very clear, … gossip', but that they provided an insight into judicial culture (Dembowski, 2001, pp. 188–9). This disclaimer, which was reproduced in the petition, and other positive words about the judiciary of Kolkata which were not so reproduced, were to no avail. The Contempt of Courts Act, 1971 allows that punishment may be waived in light of an apology (ss. 2(c) and 12), but OUP's apology was not accepted. Judgment has never been delivered in the case, and it seems to have fallen off the High Court's cause list, but the book has effectively been erased in what the author describes as 'extra-judicial censorship' (OUP India website; Calcutta High Court website; Dembowski, personal communication, 19 September 2005).[37]

A better known example came in 2002, when author Arundhati Roy was found guilty of contempt for her criticism of the Supreme Court's rulings on the highly contentious Sadar Sarovar Dam Project.[38] The Supreme Court found that Roy had 'imputed motives to specific courts' and 'accused courts of harassing her' and 'muzzling dissent' (*In re Arundhati Roy Contemner*, 2002, para. 32). It declined to regard Roy's comments as 'fair and accurate' reporting of judicial proceedings which are protected as 'fair criticism of a judicial act' (ss. 5 and 6, Contempt of Courts Act, 1971) on the grounds that she had raised irrelevant

issues in an 'uninformed' manner, thus apparently failing to meet the requirement that in order to be 'fair', a criticism must be bona fide and in the public interest (*In re Arundhati Roy Contemner*, 2002, para. 28). Conjuring up images of a holy brotherhood in a besieged fortress, Justice Sethi argued that 'confidence in the courts … cannot, in any way, be allowed to be tarnished, diminished or wiped out'. The judiciary 'is under constant threat … from within and without',[39] its 'impartiality' and 'the glory of law' must be 'protected and strengthened'. If it is to 'perform … effectively' and to be 'true to the spirit with which it is sacredly entrusted,' then its 'dignity and authority' must 'be respected and protected at all costs', lest the Constitution 'give way and with it … the rule of law and civilised life'. The only 'weapon' in the judicial 'armoury' with which it yet has a hope of 'protecting itself from the onslaught' is the 'long hand of contempt of court' which 'can reach any neck howsoever high or far away it may be' (para. 1). The court exercises these 'extraordinary powers' not 'to vindicate the dignity and honour of the individual judge who is personally attacked or scandalised, but to uphold the majesty of the law …'. In constraining itself to a sentence of one day in the notorious Tihar prison and a fine of Rs 2000, the Court was guided by a rather revealing desire to 'show the magnanimity of the law by keeping in mind that [she] … is a woman and hoping that better sense and wisdom shall dawn upon [her] in the future' (para. 34).

A few commentators agreed that criticisms such as Roy's are damaging to Indian democracy. For example, the well-respected environmental magazine *Down to Earth* (2001b) remarked that 'there is already considerable disrespect' for national and state assemblies, and 'the less said about the bureaucracy, the better'. So, it asked, do critics such as Roy '[u]nderstand what they are doing by undermining yet another institution of our democracy?' 'Social activists must remember that democracy cannot survive without its institutions' and so 'there has to be a bottom line even for those who want change'. On the other hand, eminent jurist S.P. Sathe (2002a) has pointed out that most of Roy's criticisms related not to the Court's decision, but to the abuse of the court by the lawyers who instigated the contempt proceedings, and to the priorities of the Court in putting contempt above corruption. Furthermore, she 'had no personal axe to grind' and was simply taking up 'a cause which she thought was important and needed her support'. Sathe concluded that, not least because it has 'widen[ed] its constitutional role' by introducing PIL, the judiciary must show '[g]reater tolerance of criticism … and greater understanding of the multiple strategies that social movements have to employ' (p. 23). This point was made by Roy herself when she (contemptuously) suggested that '[a]n "activist" judiciary' which choose to try and counter to 'a corrupt, dysfunctional executive' would need to be 'especially accountable,' since a 'judicial dictatorship is as fearsome a prospect as a military' one (*In re Arundhati Roy Contemner*, 2002, para. 10). Public debate about the work of the judiciary offers a way of balancing the important features of independence and accountability that are essential in a democratic system (Addo, 2000, p. 4).

The increased use of contempt provisions seems to have triggered spiralling distrust in the judiciary from all types of non-state actor. Among comments otherwise supportive of the integrity and consistency of the judiciary, a

government actor described the courts interpretation of contempt as 'inconsistent' and 'arbitrary'. A chilling effect seemed to be evident among interviewees in 2003, some of whom were reticent to vocalise their criticisms of the judiciary. Only one interviewee – a foreign government actor – expressed reticence to discuss the issue of corruption among bureaucrats: 'Honestly, I won't say much about this – it is a delicate subject. I have another year to serve here and I want to serve it'. But when interviewees were asked whether judges might be subject to political interference or corruption, a number of them, both foreign and local, became uneasy. One warned that 'judges will be most sensitive to what I have said, but it is generally known or spoken that one can influence judges'. One local lawyer remarked with a wry smile, that judges 'may' may not be entirely independent 'but that is all I am willing to say. I would not know'. Another stated that judges are morally and technically 'beyond reproach – largely – I wouldn't want to raise any specific examples which are in my mind or say anything more on this'. I was told to 'beware of contempt if you make that sort of reference to the judiciary. You shouldn't impugn motives … As long as you don't do that, then you will be OK … Read the judgement of Arundhati Roy' (Interviews, 2003, FG06, FG16, LL10, LG18, LL/LCS19 and LC22). Such concerns were in no way evident when interviews were conducted with civil society actors in 1995.

Judges and government actors The balance of power between the executive and the judiciary is a delicate affair in any nation which seeks to maintain a separation of powers and a system of checks and balances. India is no different.

One difficulty has been the tendency of government actors simply to not implement judgments and decisions of the courts. For example, in 2000 the Supreme Court reportedly fined the Ministry of Labour and the Ministry of Environment and Forests the sum of Rs 10,000 each for their joint failure, for which each had blamed the other, to supply certain information to the Court. The Court specified that the Ministries could recover the fine from those 'officers responsible for non-compliance' (*Down to Earth*, 2000).

A second issue is what has been described as a government-wide policy in India of bypassing, rather than reforming, the courts. Taking inspiration from the 'prototype' fast-tracking or leapfrogging strategy adopted by the judiciary in relation to public interest litigation, government actors have not only sung the praises of arbitration, they have actively bypassed courts (Galanter and Krishnan, 2003, p. 116).[40] Whether '[b]y neglect or design', spending on the judiciary fell as a proportion of government expenditure between the mid-1960s and the 1980s. When the underfunded courts were full, tribunals were systematically and extensively used 'to solve the problems of inefficiency as well as political incorrectness on the part of the courts' (Pistor and Wellons, 1998, p. 82). More recently, statutory backing has been given to *lok adalats*, informal dispute resolution bodies that have become increasingly popular since their spontaneous development in the 1970s.[41] Even the National Advisory Council has recently proposed the creation of various bodies to hear complaints arising out of development-related rehabilitation and displacement, which it regards as clogging up the courts (NAC, 2006; see also Saxena, 2005). And a number of

quasi-judicial bodies have been introduced, such as the National Environment Appellate Authority (see p. 104 et seq.), and tribunals for labour and consumer disputes (Galanter and Krishnan, 2003, p. 102; Moog, 2003). However, many of these solutions have suffered difficulties just as serious as those faced by the courts (see p. 105 on the failure of the National Environment Appellate Tribunal).

The jurisdiction of the courts may have been eroded as responsibility for bankruptcy and consumer issues is transferred to other agencies, but the judiciary have also made inroads into executive territory. Indeed, some worry that courts are trying 'to function as a sort of Super Parliament' and are 'sow[ing] the seeds of confrontation' with government actors (Shah, 2002, p. 32). A government actor remarked that the courts 'have a large amount of discretion … [to] interfere in issues which may not have relevance to them' (Interview, 2003, LG18).[42] What is of particular significance to the present study is that the judiciary have generally chosen not to interfere in matters relating to economic policy.

Judicial intervention in matters of economic policy has certainly been a regular by-product of the courts' battle to protect against discretionary decision-making by Indian government actors. During the interventionist first period of economic policy, from Independence to the mid-1960s, government actors pursued a state-allocative policy of land redistribution which they implemented in a discretionary fashion. The judiciary responded with a rule-based approach, using market-allocative constitutional property rights to challenge the government. As economic policy became even more interventionist during the second policy period (mid-1960s to 1980) the judiciary preserved its rule-based legal culture, attempting to strike a balance between the socialist and market-oriented themes of the Constitution, and the state-allocative and discretionary tendencies of the government,[43] striking down numerous pieces of legislation as contrary to fundamental Constitutional rights (Pistor and Wellons, 1998, p. 79–82). The Government responded by amending the Constitution to overrule some of those judicial decisions which it regarded as interfering with social and economic development, for example by downgrading the constitutional right to property from a fundamental right (Merillat, 1964, pp. 489–90).

Nonetheless, the courts have granted a 'mixed reception' to public interest litigation cases involving matters of economic policy. They have been especially 'reticent' to 'assess the correctness of a development project' (Ahuja 1997a, p. 13). As S.P. Sathe (2002a) notes, judicial language has always shown 'maximum deference' to the 'will' of government actors in relation to economic issues, whether that will be of state or market-allocative persuasion. Sathe explains this position in terms of judicial consistency. For the decades between Independence and liberalisation, the Supreme Court did not obstruct regulation in pursuance of a welfare state, including nationalisations. Therefore, 'when the new economic policy [of liberalisation] came in 1990 … the courts were bound to follow the same policy of judicial restraint (pp. 51–2).[44] So the judiciary regards itself as neither for nor against liberalisation, but as *out* of it. When petitioners challenge infrastructure projects, the higher courts have generally adopted a position of 'scrupulous non-interference' on the grounds 'that these cases raised technical issues and policy matters which are best left to expert authorities of the executive'

(Upadhyay, 2000).[45] In fact, the court has even refused to accede to requests by government actors to engage with economic issues. For example, during the 1999 Sadar Sarovar (or Narmada) Dam Project hearings, the Court was asked by the State of Gujarat 'to give a clear signal in favour of the dam' to indicate that it would 'privilege the right to security of foreign investment over the fundamental rights of its own citizens', in order 'that foreign investors would be encouraged to invest in it' (Randeria, 2003, p. 318). Instead, the court pleaded lack of jurisdiction.

As will be seen, judicial reticence to deal with 'policy and technical' matters in the economic sphere is somewhat disingenuous, standing as it does in marked contrast to the willingness of the courts to shake off such 'constraints' when addressing environmental claims (Ahuja, 1997a, p. 10). It is also a substantial obstacle to the possibility that public interest litigation might offer a space in which to coordinate the interests of investment, civil society and government actors, as the Infrastructure Project litigation illustrates (see p. 135 et seq.).

Notes

1 Views of many key formal locations in the city, including the Informational Technology Park and *Vidhana Soudha* can be seen at <www.bangalorebest.com> For a more varied vision of Bangalore, including slums, see <http://www.greatmirror.com/index.cfm?countryid=564>.

2 The distinguishing feature of FDI is the fact that the direct investor has a long term interest in the resulting enterprise, so only investments provided by the foreign direct investor into the investment enterprise are included in FDI flow statistics. These may be made directly, or through related enterprises, and may take the form of equity capital, the reinvestment of earnings or intra-company loans (see UNCTAD Definitions website).

3 Following international standard practice, this figure includes 'net inflows of investment to acquire a lasting management interest (10 per cent or more of voting stock) in an enterprise operating in an economy other than that of the investor. It is the sum of equity capital, reinvestment of earnings, other long-term capital, and short-term capital as shown in the balance of payments' (World Bank Development Indicators website).

4 For the development of the software industry see Heeks, 1996.

5 'Residence' is generously defined as the location of a company's 'effective management'. The Indian Central Board of Direct Taxes has confirmed that this may be evidenced by a certificate of residence issued by the Government of Mauritius.

6 General statistics obtained from the *Karnataka Udyog Mitra* were contradictory and therefore were set aside. It was impossible to obtain a comprehensive list of current foreign investors from KUM. A partial list was compiled using material from embassies and internet sites, but two rounds of 400 questionnaires posted to investors from those lists drew just 42 responses.

7 These figures differ from the India-wide figures because they do not include the inflows relating to the purchase of existing shares from residents (DIPP, 2006, p. 3).

8 The judgments of the Supreme Court in *Somashekar* (*N. Somashekar and others v. State of Karnataka and others*, 1997) and in Madhuswamy's case (*State of Karnataka*

and another v. All India Manufacturers Organization and others, 2006) have been relied upon as sources for the basic facts of the Infrastructure Project.

9 Vanasse Hangen Brustlin (VHB), based in Boston, USA <http://www.vhb.com>; Kalyani Group, based in Pune, India <http://www.kalyanigroup.com>; SAB Engineering and Construction, a company based in Pennsylvania, USA and started by Ashok Kheny, later managing director of NICE (*Times of India*, 2005a). The composition of the consortium has been the subject of speculation among civil society actors for years. VHB, 'the only technically competent member of the consortium', had left the project in 1995. Nevertheless, the company was listed in Government and legal documents relating to the project until 1999, and was described as lead partner on the NICE website. ESG repeatedly informed the Government of the discrepancy, but no action was taken until the State's grand flip flop in 2004 (Environment Support Group, 2002; and India Together BMIC Campaign website). Even then, *The Hindu Businessline* (2004) reported that the Kalyani Group leading the consortium NICE holds 51 per cent in the NECEL, that its financial institutions led by the ICICI Bank have 26 per cent stake, and that 'its international partners SAB International and VHB International' hold 23 per cent. In 2006, the Government of Karnataka argued that the entire Framework Agreement was void as a result of fraud and misrepresentation, in particular because of uncertainties about the strength of connection between the consortium and NICE (*The Hindu*, 2005a). The Supreme Court disagreed, judging that NICE was formed 'to serve as a corporate vehicle for the development and implementation of the Project', that the consortium assigned its rights under the 1995 MOU to NICE through a Consent and Acknowledgement Agreement in September of 1999, and that the Government had been informed in writing by the three members of the consortium that they had assigned their rights to NICE in September 1996 (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006, paras 7, 22 and 24). However, the Court did not address the matter of the composition of the consortium.

10 A detailed plan for the project, including maps and artists' impressions, can be viewed on the NICE website.

11 A High Level Committee reviewed the Project on behalf of the Government of Karnataka over a period of four months and it was approved by the Cabinet at the end of 1995, subject only to a reduction in the number of proposed townships from seven to five. A Government Order was then issued noting the broad terms of the project (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006, paras 4–9).

12 An Empowered Committee was set up to carry out the Government's obligations under the Framework Agreement, including monitoring and ensuring smooth progress of the project. It met about ten times ending in mid-2004 (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006).

13 The President is the official Head of State. Between 2002 and 2007 the post was held by A.P.J. Abdul Kalam. The first woman to hold the post, Pratibha Devisingh Patil, assumed office in 2007.

14 From 2002 to 2007 this position was held by T.N. Chaturvedi, previously a civil servant and then national parliamentarian. Rameshwar Thakur a chartered accountant and long-serving national politician, took over in 2007.

15 These changes were introduced by 1994 amendments to the Karnataka Municipal Corporation Act (1976) and Karnataka Municipalities Act (1964) in fulfilment of the 74th amendment to the Indian (Constitution (74th Amendment Act) or '*Nagarapalike*

Act', 1992. The *Mahanagara Palik*e was formerly known as the Bangalore City Corporation.

16 The Government of Karnataka's Directorate of Municipal Administration is responsible for monitoring the municipal authorities.

17 Research conducted in 1995 suggested that environmental activists tended 'to operate in their own spheres, and to concentrate on their own campaigns, without much interaction' (Perry and Anderson, 1996). However, two public interest litigations were, it is reported, launched against the Cogentrix power project, 'in tandem,' with the petitioners 'contributing to each other's research' (*Down to Earth*, 2001a). Similarly, a PIL against the location of the national games township in an ecologically sensitive area was launched by several NGOs working together (Perry and Anderson, 1996; Perry, 1998).

18 Human relationships with the Indian environment are often characterised as mystical – grounded in 'a respect which merges into reverence, for the natural world' which in turn is based on a religious and traditional vision of 'a seamless continuity from nature to culture', and the principle of non-violence. Environmental awareness and concern is said to be more prevalent among those who live in rural areas, where 'environmentalism is not just an abstract reverence for nature – it is a symbiotic relationship where livelihoods are immediately at stake' (Shurmer-Smith, 2000, pp. 147 and 152). In the same vein, Oren Perez attributes the resistance by government and private sector actors to regulation of environmental issues to the notion of *dharma*, 'which portrays the law as an instrument of reason and persuasion rather than a tool of coercion' and 'speaks of "internal regulation" rather than "external control"' (Perez, 2002, pp. 8–10). However it is unclear why each of these allegedly pan-Indian characteristics should only affect one section of the population at a time: non-violence and nature for the environmentally-sensitive goodies, and dharma for the polluting or non-regulating baddies; nor how all this is to be reconciled with the use of private interest litigation in support of environmental interests. Finally, interviews conducted in 1995 indicated that the middle classes perceive poorer members of Indian society to be apathetic towards the environment (Perry and Anderson, 1996).

19 Another example is the analysis by the International Forum on Globalization (IFG) of chemical giant DuPont's failed attempt to locate a nylon manufacturing plant in Goa. The Government of India approved Dupont's application, reportedly bypassing the local government. Protests by local civil society actors and members of the public were reportedly repressed by the police, resulting in the death of farm worker Nilesh Naik, and several casualties. The plant was destroyed (Goa Foundation website; Shurmer-Smith, 2000, p. 150). Although the IFG (2002) notes that 'the local government decided to overturn the planning permit', and that this decision was upheld by the High Court, it still describes the incident as 'a stunning demonstration of the ability of an organized community to block the entry of a powerful corporation backed by the US government'. The clear demonstration of the power of bureaucrats implementing planning law does not attract comment (pp. 135–6).

20 For example, Krishnan's (2003) study of 73 civil society actors working on social policy issues in Delhi in the period 1999–2000 found that a majority participated in the legal system through informal contact with bureaucrats and legislators (59 per cent), and a substantial minority participated formally in the legal system, for example by regularised contact with bureaucrats and legislators (40 per cent) or involvement in policy formation and government committees (33 per cent). Most were also involved in relatively informal activities such as public awareness raising (74 per cent) and demonstrations (62 per cent).

21 The fruits of these collusions can indeed be dark. For example, James Manor has demonstrated how politicians connived to protect the manufacturers of poisoned illicit alcohol which killed over 300 of Bengaluru's slum dwellers in 1981, while bureaucrats entangled themselves in red tape (Manor, 1993).

22 The State Service recruits by state-administered examination. Recruitment to both the All India Services and the Central Service is by competitive examination administered by the Union Public Service Commission (Art. 320, Constitution of India; All India Services Act, 1951; see UPSC website).

23 See the IAS website, which is wholly inward-looking and uninformative.

24 Rural District Collectors and urban Commissioners have since colonial times had responsibility for coordinating public sector development-related district-level functions of other Departments of the Government of Karnataka, such as health, agriculture, irrigation, public works and forestry, and collecting local revenue. They also represent the judicial wing of the legal system, as they are responsible for law and order and settling matters such as land disputes in their capacity as District Magistrate, so in this respect the separation between government and legal system is somewhat foggy at this level.

25 A lone voice to the contrary reported that 'the autonomy of bureaucrats here in Karnataka is remarkable. The executive gives us all their support and encouragement to decide wisely and have backed us up' (Interview, 2003, LG08).

26 This agency is owned by the Government of Karnataka and is composed of senior bureaucrats from other parastatals, such as the Chairman of the Pollution Control Board; and from the State Government, such as the Secretary to the Finance Department (ss. 5(2) and 6, Industrial Areas Act, 1966).

27 Those responsible for creating its new website expressed the hope that it would aid the 'speedy disposal … of many court cases related to acquisition of land', promote 'accuracy and transparency', so reducing litigation, improve monitoring to reduce 'leakage in revenue' and generally improve and speed up services (National Informatics Centre: Karnataka State, website at October 2006).

28 Similarly, Dembowski observed that Kolkata's judiciary was 'muddling through' with procedures that are 'slow and appear to be erratic', resulting in 'surprise' decisions which were often not implemented (Dembowski, 1999; see also Dembowski, 2001).

29 The introduction of a system of case management in 2004 is expected to speed up judicial processes for debt recovery cases, at least up to the point of judgment. However, 72 per cent of the delay (305 days) come at the stage of enforcing the judgment. 'And this assumes the debtor does not oppose the seizure' (World Bank, 2005b, p. 16).

30 India has just 10 to 16 per cent of the ratio of judges per capita found in developed common law countries (Galanter and Krishnan, 2003, p. 99).

31 Figures published by the Karnataka State Pollution Control Board (KSPCB) indicate that up to March 2004, civil society actors (or their impersonators) had filed 320 public interests litigations against the Board. By contrast, the Board had filed just 248 criminal cases against regulatees, perhaps including foreign investors.

32 Such cases often involve government actors. Indeed, Galanter and Krishnan estimate that government bodies are party to about 60 per cent of court cases, and a higher percentage of tribunal cases (Galanter and Krishnan, 2003, p. 102).

33 Although they note that this may be regarded as evidence of poor decision-making by bureaucrats, as well as judicial independence.

34 Foreign investors (71 per cent) were more likely than domestic investors (59 per cent) to have such confidence.

35 For a review of freedom of expression and the criticism of the judiciary in Europe see Addo (2000).

36 From time to time, the courts inquired into whether statements were truthful, thus suggesting that truth might be a defence, but the matter was not clear (Venkatesan, 2001; Noorani, 2002, p. 33). A legislative amendment in 2006 now ensures that the court is permitted to regard 'truth as a valid defence if it is satisfied that it is in the public interest and the request for invoking the said defence is bona fide' (s. 13(b), Contempt of Courts Act 1971 inserted by s. 2, Contempt of Courts (Amendment) Act, 2006).

37 Response to the banning of Dembowski's book appears to have been limited. Vasundharan, a Kolkata-based NGO held a meeting in December 2001 to discuss concerns over the withdrawal of the book, particularly given that it 'hampers the right of environmentalists to have access to an important legal document'. A PIL action was mooted but there is no evidence of further activity (Vasundhara website).

38 For details of the Sadar Sarovar Dam Project see Cullet (2007).

39 The Contempt of Courts Act specifically renders judges liable for contempt of court 'in the same manner as any other individual' (s. 16), but the provision is rarely if ever applied (Noorani, 2002, pp. 25–32).

40 The 'most dramatic and striking example of this mindset' was the Government of India's decision to compulsorily settle all claims for damages on behalf of the Bhopal victims, on the grounds that the formal legal system could not provide timely redress (Galanter and Krishnan, 2003, p. 116).

41 Around 270,000 cases were registered annually in the *lok adalats* in the period 1982-1993, which is about half the number of cases filed in the courts (Pistor and Wellons, p. 222). *Lok adalats* were formalised by the Legal Service Authorities Act, 1987.

42 On the other hand, government actors also use the courts to resolve politically sensitive issues, such as the bitterly, bloodily contested origins of the site in Ayodhya which housed the sixteenth-century Babri Masjid mosque until it was destroyed in 1992.

43 Sixty per cent of all civil cases during that period involved state actors, many relating to efforts to use notifications to intervene in urban land, tax, rent and so on (Pistor and Wellons, 1998, p. 82).

44 Ample legislative basis for both approached is to be found in the Constitution. The fundamental right to engage in any trade, business or profession is enshrined in Article 19(1)(g) of the Constitution. But this right is constrained by the needs of the public good. Furthermore, the Constitution enshrines the objective of a welfare state.

45 Citing *Tehri Bandh Virodhi Sangharsh Samiti v. State of UP and Others*, 1991 and *The Goa Foundation and Another v. The Konkan Railway Corporation and Others*, 1992.

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Chapter 4

Expressions of Trust

The purpose of this chapter is to explore in detail the first mechanism through which state legal systems can support productive, community-like relations: the expression of such trust as may exist between individual actors. It asks to what extent the legal system in Bengaluru performs this function in respect of investor-government-civil society relations. To answer this question requires an assessment of the extent to which those interactions are community-like.

The following sections establish that foreign investor-government-civil society relations in Bengaluru are complex and evolving. Mutual trust is present between these actors but it does not dominate the landscape, nor is it often expressed in law. Where it exists, trust seems to be restricted to bilateral, rather than trilateral, interactions.

Civil society and foreign investment actors

Foreign investment and civil society actors in Bengaluru do not appear to engage in productive, trusting, community-like relations. Their interactions are sporadic, there is evidence of concern on both sides that their interests and values are incompatible, and there is little evidence of mutual interpersonal trust.

Relations between civil society and foreign investment actors can be better understood when placed in the context of relations between foreign investment actors and those members of the Indian public whose interests civil society actors seek to represent. It seems that a broad range of middle class and affluent Indians have come to terms with the idea of foreign investment. When liberalisation began in earnest in 1991, 'the forms and rhetoric of globalization' first 'invaded the everyday consciousness … of the elites', and then 'gradually of a wider educated population'. Much of 'middle India believed that [liberalisation] would pave the way for Western lifestyles and standards of living for themselves' (Shurmer-Smith, 2000, pp. 22 and 172). They are often 'the biggest beneficiaries' in terms of jobs and access to consumer goods, and so tend to be 'the most apathetic about globalisation' (Interview, 2003, LL/LCS19). The CEO of a subsidiary of a multinational reported that when the government considered allowing foreign companies to acquire 100 per cent of their Indian subsidiaries in 1995, 'maybe 30 percent of people were in favour and the rest were opposed. Today about 90 percent have no doubt that it is fine' except in a few sectors. 'In the late 1980s, just having Coca Cola here was a big issue … Now people are not thinking like this' (Interview, 2003, LL12).

Bengaluruans have been at the forefront of Indian cosmopolitan consumerism, often serving as a test bed for new products introduced by foreign companies. Bengaluru is perhaps the 'one place' where one would '*not* expect to find' a demonstration of the 'understandable fondness for protectionist isolationism' held in India since Independence. After all, it 'was the one town which never removed the British statutes from its parks' (Dalrymple, 1999, pp. 159–60). These attitudes are mirrored by some civil society actors who adopt a generally neutral or even positive stance with respect to the private sector in general, or foreign investors in particular. For example, the Public Affairs Centre has produced a report bluntly entitled *Wanted: An enabling industrial environment in Bangalore*, in which it identifies obstacles to private investment in the State, and recommends strategies for their removal (Paul et al., 2000). Furthermore, several other civil society actors in Bengaluru reported in 1995 that they were funded in part by donations from corporations (Perry and Anderson, 1996). Finally, campaigns that are directed against foreign investments are not necessarily prompted by, or focused, on the target's foreign status (see, for example, CSE, 2006a, p. 2). However, foreign investment is by no means regarded as mundane by civil society actors or those whom they seek to represent.

Historical suspicion

Experience has caused a widespread, although not total or insurmountable, scepticism among some Bengaluruans as to whether foreign investors are to be trusted. Interviewees reported that 'academics and the people that they influence will tell you that foreign investment and globalisation is nothing but neo-colonialism', that 'our economy and our lives are once again taken over by foreigners. This is because of our history.' The East India Company was an investor for trade 'which developed political aspirations to protect its economic interests, and eventually colonised the country.' So, at Independence India 'was very hostile to foreign investment'. In post-Independence India it was commonly felt that foreign investors should 'Indianise' over time, and traces of this attitude remain (Interview, 2003, LC22). One interviewee proposed that 'if you want to be a foreign investor, you behave like Hindustan Lever'. This subsidiary of the multinational corporation Unilever 'has entrenched itself in India. Everybody knows it is a multinational, but people don't see it as one.' The reason, he argued, is that it has a reputation for not being 'a fly by night investor'. It is perceived to offer 'good value for money to consumers', it is 'always associated with professionalism [and] … legitimacy'; and it is still 'one of the most prosperous companies'. It helps that it has been in India since Independence, 'but you can make it happen during a short period also' (Interview, 2003, LC17).

Any post-colonial ameliorations to the image of foreign investors suffered a significant set-back as a result of the callous behaviour of Union Carbide in respect of the disaster in Bhopal.[1] The International Forum on Globalization (2002) overstated the case when it suggested that ever since the Bhopal disaster, 'there has been a strong resolve on the part of the country's citizens to resist and expel unwanted corporate intruders' (p. 136). But Bhopal is certainly 'still a very

bitter subject in India' (Interview, 2003, LC22). Nor is Union Carbide alone in behaving badly. For example, in 1999 the US-based NGO Human Rights Watch accused the Government of Maharastra, the Dabhol Power Corporation and its parent company Enron of violating human rights by engaging in a 'systematic pattern of suppression of freedom of expression and peaceful assembly', as well as 'arbitrary detention' and the use of 'excessive force' and 'threats' (Human Rights Watch, 1999, p. 3). And one civil society actor in Bengaluru reported: 'I wouldn't say that every investment is a bad investment' but in some cases 'they engage in such a very crass level of even dividing families – brother against brother' or 'work on local politics very substantially' in such a way as to 'distort the agenda' (Interview, 2003, LL/LCS19).

Conflicting values

There are concerns that the values which investment actors present conflict those of other actors in India. Foreign investment involves predominantly instrumental interactions, revolving around the processes of, for example, manufacturing, transporting and selling. Instrumental interactions tend to be 'limited in scope' and duration, and to require equally instrumental, limited 'unproblematic' law (Cotterrell, 2005, p. 11). The activities of civil society actors are also predominantly instrumental – debating, organising and so on. But civil society actors often seek, or claim to seek, to represent interests and values which may be grounded in non-instrumental relations of tradition, affection or belief (see Cotterrell, 2006b, p. 105). Conflicts are bound to arise.

Conflicts between the values of foreign investment actors and those of even middle class and wealthy Indians are cited, for example, in the disruption that is caused to affective relations when young people spend their nights in call centres, assisting foreign customers with their computing or travel needs; in the riot that broke out in April 2006 when Microsoft failed to shut down for a day to mark the death of local film hero Rajkumar; in pressure from religious groups for the imposition of an 11:00 pm curfew on dancing in the city's many bars; and in the fear that an increasing emphasis on consumerism is at odds with Indian values.

Conflicting interests

Some suspect that many foreign investment actors are self-serving malingerers, whose contribution to India is limited – an image that does not sit well alongside grinding poverty. Some see India's liberalisation as the fruit of a dark conspiracy by international organisations which used 'debt as a crowbar' with which to 'wrench open' the economy, and implement uniform economic policies regardless of the individual country context. There has been disappointment that the amount of FDI flowing after liberalisation was less than expected, and that it was more often in the form of mergers and takeovers aimed at serving the local market rather than 'genuinely new enterprise or export-oriented industry' (Shurmer-Smith, 2000, pp. 20–28). Investors are perceived as having 'nothing really to lose'. They are protected by international and home state investment guarantee agencies

such as MIGA and the US Overseas Private Investment Corporation and 'they don't bring their own money'. 'The joke' in many large scale projects is 'that there is no foreign investment' because most 'of the money comes from Indian financial institutions' (Interview, 2003, LL/LCS19). For example, it is alleged that in deciding to fund the Infrastructure Project, Indian bank ICCI relied upon guarantees from the State Government, rather than the internal financial validity of the Project. This was, it is alleged, in direct contravention of a Reserve Bank of India circular (ESG, 2006b).[2]

Given that they are perceived by some to bring little to India, it is no surprise that investment actors are begrudged what booty they are able to take away in the form of tax holidays and other concessions. For example, all manner of comforts have been provided to the investors in the Infrastructure Project. It has reportedly been awarded, by special amendment of planning laws, an exemption from certain town planning taxes worth Rs 580 million in the first instance, and has attempted to negotiate its way out of a new 10 per cent stamp duty payable on mortgages in Karnataka (*Economic Times*, 2003). The question is often put: if the private sector is so capable, why does it need so much help?

Particular consternation has also been caused in recent years by the tendency of state actors to compulsorily purchase land on behalf of foreign investors (see p. 76 et seq.). 'There are few more important aspects to the life of any society than land.' Its ownership 'has, throughout the ages and in all societies, been a major factor in determining' not only economic, but also social and political outcomes (McAuslan, 2003, pp. 3–4). Land ownership in India is heavily concentrated, and landlessness is closely associated with poverty (World Bank, 1997, p. 11), but in Bengaluru, rapid population growth has lead to an acute land shortage across the social spectrum.[3] Property prices rival those in Manhattan, and illegal settlements of poor and relatively wealthy residents are widespread (Alternative Law Forum, 2003, pp. 50–3 and 104–5). Land is, therefore, the focus of many complex conflicts in the city.

Where is the trickle down?

Finally, there is concern that those in the lower-middle and poor income brackets may not be benefiting from the proceeds of liberalisation and globalisation. Fifty-four per cent of India's population continues to live on less than US $5.40 a day and, as Prime Minister Manmohan Singh recently observed, 'rising income and wealth inequalities, if not matched by a corresponding rise of incomes across the nation, can lead to social unrest' (Johnson, 2007). Many Indians remain 'trapped in the local – grounded, consuming local products, speaking a local language', shielded from the benefits of globalisation (Shurmer-Smith, 2000, p. 22). Others feel themselves to be vastly over-exposed to globalisation's harsher realities. For example, *Beej Bachao Andolan* (Save the Seeds Movement) is a world-renowned grassroots movement begun by farmers in the State of Uttaranchal to keep hold of traditional seeds and farming practices in the face of ever-growing dominance of the high-yield variety crops and attendant fertilisers often produced by multinational corporations such as Monsanto. The strategy of the Movement

has been to refuse to comply with restrictive provisions in technology agreements which often accompany such genetically modified seeds and which typically bar purchasers from saving seeds from year to year. This strategy was adopted in Karnataka by 'Professor' Nanjundaswamy's *Karnataka Raja Raitha Sangha* (see p. 42).

The response of investment actors

There seems to be a preference among some investors for keeping a generally low profile.[4] One foreign government-appointed adviser in Bengaluru reported that 'the more invisible you are the better', and another said that he refuses to acknowledge the existence of investors from his home state to Indian regulators (Interviews, 2003, FG03 and FG27). In a country where less than 10 per cent of employees work in the formal sector and of those, 70 per cent work for Government departments and agencies (World Bank, 2004b, pp. 13–14), keeping a low profile is the norm.[5] However, in joining what may be common practice among Indians, foreign investment actors risk attracting an unduly shady image. They 'outsource liaison activities', thereby at once 'maintaining a distance from the bureaucratic machinery of India' and creatively complying with any codes of conduct issued by their parent companies (Ace Global, 2000, p. 48). They use 'consultants' – 'people who know how to get in and out of these offices' – as a 'buffer', to ensure 'minimal interaction with the legal system' and no 'direct contact' with bureaucrats, especially the junior ranks (Interviews, 2003, LA25 and LA06).[6] These methods can leave them appearing both aloof and uncouth. A foreign government representative observed that 'foreigners are at a disadvantage in finding the non-monetary drivers, because they are strangers'. So they 'just pay money' which 'is like skipping the dinner and conversation, and going straight to bed' (Interview, 2003, FG03; see Perry-Kessaris, 2007).

Foreign investment actors rarely appear to seek out direct relations with civil society actors. Yet the actions of civil society actors are of more than peripheral relevance to foreign investment actors. For example, the Economist Intelligence Unit bothered to note in its guide to India that '[n]on-government organisations and individual activists often file legal petitions against projects or the government on environmental grounds' (EIU, 2004, p. 25). Similarly, interviews revealed that the nature and significance of public interest litigation is well understood among foreign investors in Bengaluru and those who advise them. And foreign investors and their advocates regularly indicate that they are not enamoured of civil society actors. For example, *The Economist* (2006) quoted a senior American trade official as warning that the campaign by the Centre for Science and Environment to eradicate pesticides from soft drinks was a 'setback' for the Indian economy, and that 'it would be unfortunate if the discussions were dominated by those who did not want to treat foreign companies fairly'.

One method by which investment actors have been known to interact with civil society actors in India is through Strategic Law Suits against Public Participation (SLAPPs), a particularly unsavoury legal trick developed in the US. So named by George W. Pring and Penelope Canan (1996), SLAPPs are attempts by 'economic

interests' to stifle dissent to projects using apparently unrelated court procedures. For example, activists who object to the building of a factory on the grounds that it will pollute the environment might find themselves sued for defamation. Upendra Baxi predicts that the '[g]lobalization of legal technique' ensures that activists everywhere will be 'confronted by its "chilling" potential' (2006, pp. 260–61). Sure enough, the Delhi-based Centre for Science and Environment (CSE) perceived itself to be the victim of such an attack from the pesticide industry following the CSE's investigation into the existence of pesticide residue in soft drinks (see pp. 88–9). The CSE reported in August of 2006 that the industry had made several threats to bring litigation against CSE and others. It described the behaviour as a SLAPP, and declared it 'wholly wrong', intended 'to stifle research, free speech and the public voice by threatening people with unfounded legal notices and prosecution' (CSE, 2006b).

A similar pattern of relations has emerged between civil society actors and the garment industry in Bengaluru. Civil society groups allege that employers rarely adhere to the daily wage (Rs 88.75), working hours (eight hours) or safety standards stipulated by Karnataka's Department of Labour, and that requests for leave often result in dismissal (see India Together website). In 2005, local civil society groups, including the Garment and Textile Workers Union, Civil Initiatives in Development and Peace and the Women Garment Workers Front, began to investigate and campaign against labour practices of Indian jeans manufacturer Fibre and Fabrics International, and its subsidiary Jeans Knits Pvt. Ltd., which supplies clothing for sale under well-known international brand names. The companies responded in the summer of 2006 by initiating a charge of criminal defamation against the groups and successfully obtaining a temporary restraining order from the Bengaluru City Court to prevent the groups from spreading the results of their investigations abroad on the grounds that it might damage the companies' reputations. Two Dutch groups, the Clean Clothes Campaign and the Indian Committee of the Netherlands, took up the battle on behalf of the local groups, and were repaid with similar charges of criminal defamation as well as cyber crime, and acts of a racist and xenophobic nature. Their internet service providers were also so charged. International arrest warrants were issued requiring that seven Netherlands-based activists appear in the Bengaluru City Court. The incident attracted international criticism from organisations such as Amnesty International and the European Parliament. Several international companies have ended their relationships with Fibre and Fabrics International and Jean Knits. The Dutch groups filed a complaint against a Dutch customer of the Indian companies with the Dutch National Contact Point for the OECD Guidelines for Multinational Enterprises. The trial of the activists and the internet providers is pending (Clean Clothes Campaign website).

Similar problems have been experienced by the Coordinator of the Environment Support Group (ESG), Leo Saldhana, who has recently alleged that he has been the subject of a SLAPP. Saldhana and his wife had been the subject of a series of peculiar criminal charges relating to the 'misuse of sandalwood' and 'encroachment of forest land' surrounding the Bengaluru Rural-based Valley School. The two were immediately granted anticipatory bail by a

judge who declared himself convinced that there were 'no reasonable grounds to believe that the petitioners are guilty of the various offences invoked against them'. This comment seems to have been ignored by a number of newspapers, which continued to report that the two defendants were guilty. The defendants' lawyer issued a statement alleging that the 'trial by media' was instigated by 'various vested interests that are bearing the brunt' of the ESG's public interest campaigns (ESG, 2008). In a separate incident, when the ESG took a group of local and foreign students and academics to view part of the controversial Bengaluru-Mysore Infrastructure Project, they were allegedly attacked by the head of security of the Project investors, NICE, in the presence of the company's Chairman (ESG website).[7]

When investment actors do reach out, it tends to be to the general population, and in the language of corporate social responsibility. Social conscience has a long history in Indian business. The website of the Federation of Indian Chambers of Commerce and Industry (FIICI) quotes Mahatma Gandhi who, speaking in 1927, remarked that members of the private sector must regard themselves as 'trustees and servants of the poor' whose 'commerce must be regulated for the benefit of the toiling millions' (FICCI website). Today, Paul Davies, former managing director of Bengaluru-based multinational Infosys suggests that foreign investors have an economic and moral 'obligation' to consider 'being part of the development of the country … If nothing else, the most cynical mind will be able to see that higher prosperity will be good for political stability in India, which in turn is good for global stability and international commerce.' However, he warns that 'social' investments should be sustainable beyond the duration of their business and recipients-driven (Davies, 2004, pp. 217 and 219). One Bengaluru-based consultant to investors said that his frequent advice to investors is that 'if you can access the "victims"' whom civil society actors 'are supposed to represent, and make them your constituents, the job is done. For instance if you are putting up a power plant … you can [afford to] provide some sort of investment to take care of them' (Interview, 2003, LC17). So, when multinational Dupont had its fingers – and factory – burnt in Goa, it launched what it describes as a 'community dialogue process or risk resolution process'. This has culminated in it supporting a number of community projects in Tamil Nadu, its new home (Dupont India Community Projects website; CENEAR, 1998). In Bengaluru, the International Technology Park holds annual blood donation drives and sports days for poor children, and has donated an ambulance and a police jeep to the local area (see International Technology Park website). Even Alternativ Food Process, a relatively small Bengaluru-based gherkin producer with French investment, maintains a web page on 'social responsibility' on which it emphasises its good labour practices (see Alternativ Food Process website).

And there are also examples of entirely cynical manipulation of the notion of corporate social responsibility. For example, when political love for the Infrastructure Project began to cool (see p. 80 et seq.), the promoters of the Project, NICE, 'switched' their persuasive efforts 'from politicians in *khadi* to swamis in saffron'. They renovated a temple located next to the Expressway, which was then opened and blessed by a *swami* (holy man) whose land had been compulsorily

acquired for the Project. Managing Director Ashok Kheny reportedly praised the *swami*'s dedication in giving his land over to development, and promised to build a community hall next to the temple, to 'highlight Karnataka's rich cultural heritage', as well as 26 other temples along the route. He also reached out to wider society, promising to build three local schools and declaring that '[t]here is so much love given to us from local villagers. This is why I am still committed to the Project despite the obstacles created by the Government.' It was reported that 'huge crowds' attended the ceremony, which included folk entertainment and food, and that the temple was 'bedecked with exquisite flower arrangements' (*Deccan Herald*, 2006g).

Whatever the intentions of the investment actor in question, reliance on corporate social responsibility discourse is problematic for several reasons. First, corporate social responsibility is 'illegal – at least when it is genuine', because directors have a legal duty to serve shareholder interests alone, and to privilege those interests above all else. Consequently, some regard the notion of companies 'busily crafting images of themselves as benevolent and socially responsible' as absurd and even repulsive (Bakan, 2004, p. 16; see also Corporate Watch, 2006). Indeed civil society's distrust of corporations is sometimes a measure of the distance between an investor's grand statements of social responsibility on the one hand, and its utterly calculated acts of social irresponsibility on the other. Second, and relatedly, corporations are in truth rather insular creatures. Responding to a survey by John Ruggie, Special Representative of the Secretary-General of the United Nations on the issue of human rights and transnational corporations and other business enterprises, Fortune Global 500 companies indicated that their human rights policies and practices were directed towards employees (99 per cent), suppliers and others in the value chain (92.5 per cent), and finally, their communities (71 per cent) and countries (63 per cent) of operation' (Ruggie, 2007, para. 68).[8] Third, from a law-and-community perspective, real 'responsibility is created dialectically, *between* individual and community' (Cotterrell, 2006b, conclusion). So the employment of the prefabricated language of corporate social responsibility does not itself achieve anything. The development of genuine, meaningful responsibility on the part of investment actors requires not just action but *inter*action.

Foreign investment and government actors

The activities undertaken by government actors – being elected, advancing policies, ensuring their implementation and so on – are predominantly instrumental. But they seek, or ought in a democracy to seek, to negotiate the values of constituencies ranging from the businessperson to the unemployed and beyond. The values and interests represented in the operations of foreign investment sometimes conflict with those of the government actors' constituencies. There is, therefore, scope for a good deal of conflict in government-foreign investment relations. In India, these conflicts have been played out in three phases of economic

policy since Independence, with law playing an important role in each (Pistor and Wellons, 1998).

Liberalisation

In the first period (Independence to the mid-1960s), the Government of India adopted a somewhat interventionist economic policy. Emphasis was placed on the development of domestic, basic industries and infrastructure, to the exclusion of foreign investment and trade. Market-allocative rules such as the laws protecting private property and contracts were retained. But they were overlaid with state-allocative rules, and their effectiveness was delimited by the discretionary behaviour of state actors – that is, politicians and bureaucrats (Pistor and Wellons, 1998, pp. 79–81).

The second period (mid-1960s to 1980), saw a more interventionist, socialist, economic policy. During this period, the overlaying of market-allocative with state-allocative rules 'accelerated'. Foreign investment was further constrained, freedom of contract was limited, ownership of agricultural land was regulated, ceilings were placed on the size of certain industrial units, and the right to property was downgraded, no longer a fundamental constitutional right (Pistor and Wellons, 1998, p. 80). A string of nationalisations ensured that, although the private sector continued to exist, a substantial proportion of financial and consumer goods was produced exclusively by or through the state. '[B]y the 1980s, India had dislodged multinationals from domestic industries they had previously dominated, as the nation achieved an uncommon level of bargaining success' (Encarnation, 1988, p. 5). The economy slowed down considerably. All the while, the discretionary behaviour of state actors increased. The use by government actors of emergency powers increased, and the Official Secrets Act (1923) was extended to protect the government's ever-increasing economic activities from public scrutiny. Many of the new economic rules were made through notifications – so, by government actors, for government actors and bureaucrats – to the exclusion of the legislature (Pistor and Wellons, 1998, p. 81).

The third economic policy period (1980 to the present day), has been characterised by slow but steady liberalisation. The state-allocative rules imposed over the preceding decades, such as licensing requirements, have been gradually stripped back to reveal the underlying market-allocative rules. At the same time, rule-based procedures began to replace discretionary ones. The process of liberalisation gained real momentum in 1991 when, prompted by a foreign exchange crisis, the decision was made to officially discard India's inward-looking and highly regulated economic policy in favour of a strategy of integration with the global economy. Under what came to be known as the New Economic Policy (NEP) a range of measures were taken to liberalise and streamline economic activity. Foreign investment was allowed in certain areas of the economy, import restrictions were lifted and so on (Saez, 2002, p. 139). Restrictions on private participation in many areas of the economy, as well as foreign trade and investment, were lifted. Economic growth increased, running at above six per cent annually (Pistor and Wellons, 1998, pp. 79–81).

A decade into the liberalisation process, licensing of investments had been 'virtually abolished'[9] and policies dictating the location of investments had been abandoned (Govindarajan Committee, 2002b, p. 8). Industries still requiring a licence[10] were normally given approval within four to six weeks of applying.[11] Many investments could be made by following the simple Automatic Approval route under powers delegated to the Reserve Bank of India (RBI). This merely requires that the Bank be notified within 30 days of the issue of shares to a foreign investor. Such projects will still need to obtain the relevant environmental, power and factories clearances detailed below. More controversial or complex foreign investments must follow the Foreign Investment Promotion Board (FIPB) or 'specific approval' route.[12] These include investments which need an industrial licence,[13] a matter determined by a range of factors such as the sector of the industry.[14] Firms not requiring a licence must merely submit an Industrial Entrepreneur's Memorandum to the Secretariat for Industrial Approvals (SIA) so that it may monitor economic trends (Govindarajan Committee, 2002b, p. 8; DIPP, 2005, pp. 1 and 6–7). By 2004, it was possible for foreigners to hold 100 per cent equity in most sectors of the Indian economy, although foreign ownership continued to be capped in some sectors, such as civil aviation, banking and the mining of precious stones; and banned in others, such as agriculture, real estate and retail trading (EIU, 2004, pp. 29–39). The liberalisation process continues, and current policies are published regularly by the Department of Industrial Policy and Promotion (DIPP website).

Since 1991, government and foreign investment actors in India have engaged in increasingly productive and stable interactions. The liberalisation process has been gradual, by political, legal and economic necessity. Most of the liberalisation programme in India has occurred in the context of coalition governments. One foreign investor actor proposed that this may have lead to a 'greater sense of accountability and transparency' in the development of the policy, and so its broad acceptability. There is now a broad 'continuity' of support for liberalisation among state and Union government actors (Interviews, 2003, FI13 and FG21). Support for liberalisation may be less than fervent: 'Nothing in the national debate has any strong conviction. On the right, a vague belief in foreign investment; on the left, a vague and poorly articulated fear of it' (Mehta, 2004, p. 84). Nonetheless, the passage of time has allowed a 'multi-partisan political consensus', from communists to Hindu nationalists, to developed in favour of the process (Saez, 2002, pp. 139–40). The liberalisation agenda in India appears to be secure – a point underscored by the fact that Manmohan Singh, Minister of Finance responsible for ushering in the policy in 1991, was welcomed as Prime Minister of the country in 2004, albeit on a socially-motivated platform, and in a coalition with the Communist Party. The result was a slowing of the only recently energised privatisation process (EIU, 2004, pp. 11–12). However, there are no signs of a reversal of the liberalisation process.

Government actors seem to feel increasingly confident about liberal economic policy, and trusting of foreign investors. There is a growing belief that foreign investment is 'generally good for the country', and also 'that if something goes wrong, [government actors] can correct it'. In Bengaluru, one government actor

declared: 'Our main question is how do we get to attract foreign investment.' 'It used to be "I don't want you" now it is all "please come".' Economic liberalisation is associated with 'less micro-management' of all aspects of the economy including foreign investment, and 'more selective and strategic' regulation. So it is perhaps the relaxation of both rules and attitudes that caused another government actor in Bengaluru to report that to date, foreign investors 'have all been very assiduous in performing their duties' under both private and public law. 'I cannot think of any situation where we have had to chase them. They are more than zealous in doing their work' (Interviews, 2003, LCS04, LG14, LC20 and LG08).

The warmth of the welcome extended by government actors has been noted by investors, who also seem increasingly to trust government actors in Karnataka. For example, surveys conducted by the FICCI have repeatedly suggested that foreign investors already in India find Karnataka to be one of the top five most attractive of all the states to invest in the country (FICCI, 2003, 2005, 2005). A representative of the State's investment promotion and facilitation agency, *Karnataka Udyog Mitra*, was at pains to point out that the State's conversion of 85 per cent of projects approved into projects implemented is impressive. For example, it was observed by one foreign investment actor that political attitudes to foreign investment in some Indian states, including Karnataka, 'are better now … more forward-looking … [I]n the last 10 years the entire demeanour of the government, central and state has changed.' For example, it is 'a new phenomenon to see the Chief Minister have an interactive session with us to ask how they can make things better for us … We have an opportunity to really give our input' (Interviews, 2003, LG26 and FI13).

Balance of power

Some commentators go so far as to suggest that, after years of liberalisation, India's government actors are powerless in the face of foreign investors. It seems that many Indian government actors are beholden to business, finding it 'virtually impossible to gain or retain … power without the[ir] financial backing.' These relations are suspect not because business is financing politics, which is commonplace the world over, but because donations are made 'to individual politicians to fight individual seats and … are not subject to public scrutiny' (Shurmer-Smith, 2000, p. 106). It was suggested by one civil society actor that India's fractured party politics and frequent elections ensure that 'it cannot but be the agenda of the politician to make the maximum amount of money in the minimum amount of time …' (Interview, 2003, LL/LCS01). This relationship may be one of mutual dependence. There is no legal requirement that investment and (political) government actors interact. In fact, they 'should use the bureaucrats'. But 'in practice' they 'engage politicians to support' them, 'to push for [the] project in exchange for locating within their constituency' or in an economic sector that is their responsibility. The process 'may be … more sordid and seedy … than it is elsewhere', but it is not unique to India (Interview, 2003, FG03).

And it is clear that sometimes government actors do not have the skills to track and constrain investment actors, even if they wanted to. One foreign

government official reported that during negotiations he witnessed between government actors and a foreign investor, the government actors 'didn't know what they were doing. They didn't understand what it is about' (Interview, 2003, FG16). Similarly, a government actor explained to me that he was consulting with a UK-based international law firm about creating India's first legal framework for infrastructure projects, which was to 'include the balancing of [government] and foreign investor responsibilities'. But he asked me to explain to him how this balance was achieved elsewhere, so that he might not be outwitted by his own lawyers (Interview, 2003, LG08).

On the other hand, a lawyer describing his experience of negotiating with the Government of Karnataka on behalf of a foreign investor explained that he and his colleagues 'were stunned' by the extent to which the Government 'investigated the various clauses, and their willingness to challenge' them. For example, they rejected a confidentiality clause on the grounds that 'any document signed by the Government has the possibility of going before Parliament', and a non-discrimination clause, on the grounds that this would interfere with Karnataka's affirmative action ('reservation') schemes. 'The clauses were scrapped', and the lawyers 'were terribly impressed by the government's scrutiny of the contract. They were basically looking at it with the eyes of the opposition' (Interview, 2003, LL12).[15]

Liberalisation has undoubtedly secured a reduction in the paraphernalia of state intervention in the affairs of investors. But after more than a decade of economic liberalisation, the Government in India remains 'inordinately powerful' (Varma, 1998, p. 50), and 'continues to monitor almost every aspect of business and the economy' (EIU, 2004, p. 7). For example, one European government representative in Bengaluru expressed exasperation over the fact that participation in the privatisation of air baggage handling is open only to the three state-owned companies, and their foreign joint venture partners. Private airlines in India are excluded. 'If this is privatisation, it is unbelievable. The government wants privatisation and to attract foreign investment, but they still … want to keep control of the decision making'. And with respect to 'more detailed issues such as fiscal matters, they have such an unbelievable imagination to protect their own industry or agriculture' (Interview, 2003, FG16). And there have also been some specific instances in which government-investor relations have emphatically not been cooperative, causing an erosion of trust by investors in government. Perhaps the best known example is the Government of Maharastra's withdrawal from Enron's Dabhol power project. A Karnatakan example of government-investor conflict is the Bengaluru-Mysore Infrastructure Project, on which, more later (see p. 80 et seq.). So it would be a mistake to think of government actors as giddy supplicants to foreign investors in India. Matters are not so simple.

Trust expressed in law?

The growing trust between investment and government actors has been both caused by, and expressed in, a range of legal instruments affecting the approval and operation of foreign investments. The development of these laws has been heavily influenced by external pressure from the World Bank and its investment climate

discourse. The Govindarajan Report, which was a direct response to investment climate discourse, has been particularly influential. Various departments have responded to its exhortations by attempting to change their day-to-day operations. For example, in 2005 the Department of Industrial Policy and Promotion (DIPP) published on its website a list of action taken in response to the Report. As the following paragraphs explain, the Report has been used to justify radical reforms to investment laws at the state level. In respect of the issue of access to land, the Report has justified, and perhaps even emboldened and energised, pre-existing legal expressions of support for the interests of those engaged in instrumental economic relations, at the expense of the interests of those engaged in other forms of relations. The effects of such legal expressions can be traced through to the specific case of the Bengaluru-Mysore Infrastructure Project. The impact of the Report on environmental law at the national level is discussed elsewhere (see p. 103 et seq. and p. 121 et seq.).

Investment facilitation laws Karnataka was the first state in India to introduce legislation 'to ease the environment for doing business' as part of a wider Karnataka Economic Restructuring Programme, 2000 (*Karnataka Udyog Mitra* website). The World Bank was involved in these reforms from an 'early' stage (Dasgupta, 2006, p. 7).[16] The resulting Industries (Facilitation) Act of 2002 was intended to promote and facilitate 'industrial development' and 'new investments', 'to simplify the regulatory framework … and to provide for an investor friendly environment in the State of Karnataka'.[17] It introduces a range of procedural and institutional reforms, all of which were recommended by the contemporaneous Govindarajan Reports (Govindarajan Committee, 2002b, pp. 17, 35, 37–9). The details of the Act and the extent to which they mirror the Govindarajan recommendations are addressed at a number of points in the present study (see p. 122 et seq.). At this stage it suffices to give one such example.

The Committee proposed that investors ought to be left to self-regulate in respect of activities posing a threat of 'minor third-party impacts, which are easily remediable/compensable'. Regulation of investments threatening only 'significant' and 'remediable' or 'compensable' damage to third parties, with no 'proximate danger to life or serious injury' might be outsourced to non-government bodies. Intensive, case-by-case, bureaucratic regulation ought to be reserved for investments involving 'high risks of serious third-party impacts or long-term damage to key natural resources or cultural assets' (Govindarajan Committee, 2002a, pp. 15–17). Under the Industries (Facilitation) Act, 2002, investors may self-certify that they will 'comply with the applicable provisions of the relevant Acts and the Rules made there under',[18] and such self-certification 'shall be accepted' by the various departments and authorities in the granting of clearances 'and giving other benefits to the entrepreneur'.[19] During the operational phase, inspections are now conducted 'jointly' by a number of bodies such as the Labour Commission, State Pollution Control Board and so on, under the coordination of the Directorate of Factories and Boilers. They will occur only annually, and only on a randomly selected sample of investors.[20] There is also always the possibility of a further reduction in inspections since 'other laws or rules as may

be specified by the State Government from time to time shall be waived and self certification shall be accepted' (ss. 15–19, Industries (Facilitation) Act, 2002 and Rule 9, Industries (Facilitation) Rules, 2004).[21]

By 2003, the effect of investment climate discourse was clearly visible in an investment promotion presentation produced by Karnataka's investment promotion board *Karnataka Udyog Mitra*. After an introduction to Karnataka's 'illustrious' cultural, educational and scientific achievements, the State was described as a 'comprehensively de-regulated environment' for investment. No further mention was made of the legal system.

Access to land Access to land is at the heart of many conflicts in Karnataka (see p. 66). The World Bank has identified Karnataka as one of five Indian states in which investors perceive land availability to be 'a problem' (World Bank, 2004b, p. 32). Titles to land are often contested, and land is under-valued in official documentation – at as little as 25 per cent of its transacted value – in order to reduce tax liabilities (Ace Global, 2000, p. 89).[22] '[I]t is very complicated process to purchase a piece of land, to be sure that there is no case against it' (Interview FI15, 2003).[23] The Govindarajan Committee highlighted the need to seek local authority approval for building plans as a particular annoyance that ought to be dispensed with or constrained using outsourcing, time limits and deemed approvals. It also criticised the fact that it took between 18 months and two years to acquire land in India (Govindarajan Committee, 2002b, p. 20).[24]

Investment actors, domestic and foreign, are able to circumnavigate the often uncharted waters of Bengaluru's land market using the powers of compulsory purchase. State actors have been empowered to compulsorily purchase land for use by the private sector for a public purpose since 1894 (ss. 6 and 40aa, Land Acquisition Act, 1894).[25] Like many other Indian states, Karnataka introduced legislation, the Industrial Areas Development Act, 1966, specifically directed towards extending compulsory purchase powers to include the 'public purpose' of developing industrial areas.[26] Judicial decisions over the years have ensured that the public purpose requirement of compulsory purchase legislation is so easily fulfilled as to be nearly worthless (Perry-Kessaris, 2007, p. 78). For example, the High Court of Karnataka has confirmed that for the purposes of the Industrial Areas Development Act, 1966, the industrial area for which land is compulsorily acquired need not even be intended for the benefit of more than one industrial unit (High Court of Karnataka, *N. Somashekar and others v. State of Karnataka and others*, 1997, p. 410 ff). The compulsory acquisition of land is a common enough feature of economic development, whatever the political banner under which it occurs. Public purpose creep is mirrored in the United States, where the Supreme Court of the United States recently confirmed that the compulsory acquisition of land for the purpose of economic development by a private investor may constitute 'public use' where such development forms part of a government's comprehensive development plan. As Justice O'Connor remarked in her dissenting opinion, such a capacious conception of the public suggests that 'all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded' – that is, 'given to an owner who will use it in a way that the

legislature deems more beneficial to the public – in the process'. The effect 'is to wash out any distinction between private and public use of property – and thereby effectively to delete the words "for public use" from the Takings Clause' (*Kelo et al. v. City of New London et al*., 2005, p. 1). In India, powers of compulsory acquisition override law relating to planning and land conversion (*N. Somashekar and others v. State of Karnataka and others*, 1997), both of which involve public participation and, as the Govindarajan Committee put it, 'considerably delays' investments.[27] So it would be of no consequence that compulsorily land might, as in the case of the Infrastructure Project, be designated as green belt under the Bengaluru's Comprehensive Development Plan, a document based on public participation (Alternative Law Forum, 2003, pp. 17 and 106; Sharma, 2002).

From a law-and-community perspective, the laws of compulsory purchase are an expression of trust by government in investment actors, foreign and domestic. The National Advisory Council to the Government of India has argued that it is necessary to 'ensure quick but peaceful acquisition and faster access to land required for large projects for speedier development'. But it also suggested that the process of compulsory acquisition be made 'more people-oriented and consensual' (NAC, 2006, Annexure).[28] From a law-and-community perspective, the Council can be said to have been arguing for the laws of compulsory purchase to express trust in land-losers.

However, such hopes seem somewhat vain in the shadow of investment climate discourse. The Govindarajan Committee (2002b) regretted that the process of prising compulsorily purchased land from hands of land-losers was 'cumbersome,' that compulsory acquisitions were often the subject of disputes over compensation and rehabilitation, and in particular that 'project affected persons insist[ed] on employment' (pp. 19–20). True, the process is not easy. But ought it to be? The World Bank has worried that foreign investors around the world 'are often particularly vulnerable' to being the victims of expropriation because foreigner-bashing may be politically expedient, and 'local courts may be reluctant to rule against the host government' (World Bank, 2004a, p. 92). Yet data from its 2002 Enterprise Survey reveal that, at least in India, foreign investors (8 per cent) were less likely than domestic respondent investors (24 per cent) to report that access to land was a major or severe obstacle to doing business in India (see Table A11, Appendix). In any case, of more pressing human concern is the fact that the processes by which agricultural and residential land is expropriated for development by the private sector, including foreign investors, sometimes appear to be unduly biased against the land-loser (see Perry-Kessaris, 2007, pp. 76–80). For example, land vests in the Government of Karnataka even before compensation has been paid to the land-loser, who thus shoulders the additional burden of involuntary creditorship (s. 28, Industrial Areas Development Act, 1966).

The World Bank and the Govindarajan Committee are not responsible for the long-standing state of the law relating to compulsory acquisition of law. It has always been the case, in India and elsewhere, that the powers of compulsory purchase have been applied to allow instrumental economic relations to override relations of tradition, belief and affection. But investment climate discourse may

well impede efforts to better coordinate the interests of investment actors and land-losers.

Infrastructure Project framework agreement Government actors and investment actors occupy unequal positions in relation to regulatory law. For this reason there are few examples of the expression of *mutual* trust. However, such mutual trust can be fund in contractual arrangements such as the Framework Agreement for the Bengaluru-Mysore Infrastructure Project. Furthermore, this Agreement has itself generated expressions of trust by government in foreign investment actors.

The 1997 Framework Agreement for the Project bound the Government of Karnataka to supply the investors, NICE, with the land required for the Project. It specified that a total of 20,193 acres of land was needed for the Project, including the road and townships and 'other connected developmental activities', such as the construction of truck terminals. Of that total, 6,956 acres was to come from government land and the remaining 13,237 acres was to be compulsorily acquired by the Karnataka Industrial Areas Development Board (KIADB) from private owners (Schedule 1).[29] The 1997 Framework Agreement specified that the Government would compensate land-losers (Clause 5.1.1.1, quoted in *State of Karnataka and another v. All India Manufacturers Organization and others*, 2006, para. 56), but in 2004 it was reported that many land-losers had yet to be compensated (ESG, 2004).

The Framework Agreement also bound the Government to make the necessary legislative amendments so that the Project, including compulsory acquisitions, could be carried out in a timely fashion. In 1997, the Government of Karnataka duly amended the Industrial Areas Development Act, 1966, so that the Board might acquire land not only for industrial areas, but also for 'industrial infrastructural facilities'. These 'facilities' were defined broadly as those which contribute:

> to the development of industries established in industrial areas such as research and development, communication, transport, banking … technology parks and townships for the purpose of establishing trade and tourism centre; and any other facilities as the State Government may by notification specify to be an industrial infrastructural facility for the purpose of this Act. (s. 7(a), Industrial Areas Development Act, 1966)

The Statement of Objects and Reasons of the amending Act explains that since liberalisation began in 1991 'increased emphasis' has been placed on private investment in industry and infrastructure, resulting in 'a number of proposals both from indigenous and foreign companies' wishing to make 'considerable investments' in infrastructure projects such 'power projects, express highways, ports, airports, townships, industrial parks etc. These projects need [a] considerable extent of land for implementation' (Industrial Areas Development (Amending) Act, 1997). Indeed. NICE predicts that 200,000 people will be affected by its Project, including more than 1500 farming families who will be directly displaced. The majority, who are landless labourers will receive no compensation at all (ESG, 2004).

The compulsory acquisition of land under the Framework Agreement has been the subject of widespread criticism both in and out of court. Specifically,

it has been suggested that the law of compulsory acquisition has been abused by government and investment actors. First, it has been argued that NICE has been allocated land over and above the 20,193 acres set down in the Agreement. According to original documents obtained by the ESG, NICE actually requested 28,286 acres (an increase of 8,093 acres or about 40 per cent on the original amount in the Framework Agreement) in 1999, and by 2004 NICE had requested a total of 29,258 acres (an overall increase of 9,065 acres or 45 per cent).[30] The KIADB duly notified these amounts of land for compulsory acquisition (where privately-owned) or transfer (where government-owned). By the Board's own admission in a letter to NICE, these notifications were 'based on the requirement indicated by the promoter company and not on … any technical drawings/maps as approved by the Government … or the project work'. This directly contradicts the Government's vigorous arguments convincing the High and Supreme Courts of the 'scientific' nature of the allocation process. Furthermore, according to the ESG, NICE was in actual possession of 423 acres of such excess land by 2006 (ESG, 2006a and website). It is reportedly 'beyond doubt' that NICE was 'engaged in real estate business'. For a start, a letter shows its director offering compulsorily acquired land at the 'most competitive price of Rs 27.50 lakh per acre' – about four times the amount paid to the land-losing farmers (Bhanutej, 2004).

Second, it has been suggested that the location of the compulsorily acquired land lacks legitimacy. Some allocated land is located far from the 'actual alignment of the road and periphery'. So, 'even if the implementation of the Project is assumed to be for a public purpose', the allocation of land 'far away' from the Project site 'would not amount to a public purpose nor would it be covered by the provisions of the [Industrial Areas Development Act, 1966]' (*State of Karnataka and another v. All India Manufacturers Organization and others*, para. 13). The acquisition of land for the project has been described as 'whimsical', demonstrating that the Industrial Areas Development Board is 'not aware of the road's alignment'. In 2003 the residents of Madavara village found that 38 acres of their land, much of it 'nowhere near the proposed road' and in an area set aside as green belt in Bengaluru's Comprehensive Development Plan, had been fenced off for the construction of the peripheral road component of the Project. In fact, less than half that amount was needed for the road. The fencing was done not by the Government, nor by NICE, but by the Indian Machine Tool Manufacturers Association, to whom NICE had sold the land at roughly five times the price it paid to the land-losers (Bhanutej, 2005). In another case a landowner had 'his lands notified, then dropped and then recommended for notification again. The last two decisions took place within two months of each other' in 2003 (Sharma, 2004b). It has also been alleged that no regard has been had to the need to protect environmental considerations, with forest, wetland and agricultural land all being notified.[31]

Third, critics object to the fact that only around 13 per cent of the 20,193 acres of land to be supplied to NICE under the Framework Agreement is required specifically to build the expressway. The remainder is to be turned into townships. The real estate profits were required 'to offset the certain losses from the expressway,' so that the Project 'has more to do with real estate than highways'.

It has been argued that this allows 'NICE to become a developer' earning 'huge profits', and that this cannot be a public purpose within the legislation governing compulsory acquisition of land (Sharma, 2002).[32]

Threading through these criticisms are allegations of abuse of power.[33] There are reports that the KIADB notified excess lands so that 'a few politicians and officials [could] make a fast buck by de-notifying lands for a fee' (Sharma, 2006).[34] As one reporter put it:

> Land-grabbing has been elevated to the level of art in Karnataka. A handful of politicians, supported by some bureaucrats, have twisted rules and regulations to feed the appetite of land-grabbers masquerading as infrastructure developers. Making the most of the real estate boom … they acquired lands for a pittance in the name of the [Infrastructure Project] and sold them off at astronomical sums to others. In effect, the state played the role of a real estate broker in the transaction. (Bhanutej, 2005)[35]

Many of these arguments were raised in 1997, when H.T. Somashekar Reddy, a retired chief engineer of the State's Public Works Department, filed a public interest petition against the Government of Karnataka and NICE (*N. Somashekar and others v. State of Karnataka and others*, 1997). By March 1999, the High Court and the Supreme Court had both found against Somashekar (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006, paras 11–16). While the *Somashekar* proceedings were in progress, land continued to be acquired for the Project. These acquisitions were challenged by land owners and their supporters in nearly 100 petitions brought together before a single judge, Mr Justice Chandrashekaraiah, of the High Court of Karnataka.[36] The State of Karnataka stood by NICE during those proceedings.

In the second Infrastructure Project litigation, the so-called *Land Acquisition Matters* (2003), Mr Justice Chandrashekaraiah declared invalid the allocation of that portion of the land (40 per cent) which was destined 'for development of townships and convention centres'. His reason was technical: that the notification issued as part of the acquisition process referred to 'the establishment of industries by the Karnataka Industrial Areas Board' and made no mention of the townships (India Together BMIC Campaign website; *The Hindu*, 2003a). It is the only time that the judiciary has stood in the way of the Project.[37] It is also the last time that the State of Karnataka stood in support of the Project. For, as the following section demonstrates, the Infrastructure Project may be a good example of trust between investment and government actors, but as the following subsection explains, it also offers excellent examples of law being (ab)used to express *dis*trust between those very same parties.

Expressions of distrust

In late 2003, the Infrastructure Project became the focus of substantial political attention. Former Chief Minister H.D. Deve Gowda (Janata Dal Party), original patron of the Project, accused then Chief Minister S.M. Krishna (Congress Party) of 'corrupt practices in promoting' the Project. The central allegation was that the

Chief Minister had 'strictly directed' successive chairmen of the KIADB to allow land allocated to the Project to be sold on 'to private parties for huge amounts', and that when they had refused to comply, the officials had been transferred.[38] By early 2004 a full scale political battle was in progress.[39]

When the appeals against Mr Justice Chandrashekaraiah's 2003 judgment came to be heard by the Division Bench of the High Court, the Government of Karnataka itself 'appeared to have second thoughts about the Project and felt that the land acquisitions were far in excess of the Project's requirements'. It 'would appear that the change of mind' … came about, co-incidentally or otherwise, with a change of Government in Karnataka in 2004' (Srikrishna, J., Supreme Court, *State of Karnataka and another v. All India Manufacturers Organization and others*, 2006, para. 63). The May 2004 election had brought a new Chief Minister to Karnataka, Dharam Singh (Congress Party), leading a Janata Dal-Congress coalition government. The new administration immediately rounded on the Infrastructure Project. The Supreme Court summarised the events as follows:

> [A] note was written by the new Minister, Public Works Department, Mr H.D. Revanna, who is none other than the son of Mr Deve Gowda, to the Principal Secretary, Public Works Department. The note in terms stated that land acquisition by the State Government for the Project was to cease till the allegation that [NICE] was carrying out a real estate business was enquired into. With this, the State Government suddenly halted/slowed all ongoing activities for smooth implementation of the Project. (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006, para. 28)

An Expert Committee was duly established to investigate allegations that land had been allocated to the Project in excess of the Project needs. The Committee was headed by one Mr K.C. Reddy who was, as the Supreme Court put it, the 'same gentleman who has scrutinised the Project threadbare and had given it the green signal' as a member of the High Level Committee which had originally approved the Project in 1997. As chair of the 2004 Committee, Mr Reddy was 'surprisingly … all willing to find faults and flaws in the Project and the [Agreement]' (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006).[40] The Reddy Committee recommended that a jurisdiction clause in favour of a Bengaluru-based arbitration be inserted in the Framework Agreement; that 'excess land' should be disposed of; and that use of land for commercial and residential, rather than road-related, purposes should be reduced (Sharma, 2006).

The new government then withdrew its appeal to the Division Bench of the High Court, lodged by its predecessor and NICE, against the 2003 decision of Justice Chandrashekariah. The Division Bench of the High Court considered the matter in February of 2005 and found in favour of the investors, NICE. It rejected the appeals of the land-losers, and the entire land acquisition was upheld.[41] A further appeal was then made to the Supreme Court which considered the 'Land Acquisition Matters' together with an appeal from a public interest litigation filed in the High Court 2004 by two Members of Karnataka's Legislative Assembly and a 'social worker' – Mr J.C. Madhuswamy and others – against the Infrastructure

Project. The latter cases were heard together in *State of Karnataka and another v. All India Manufacturers Organization and others*, 2006.

In a judgment delivered in April of 2006, the Supreme Court ordered the specific performance of the Framework Agreement 'in letter and in spirit' (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006, para. 59). As will be seen below, in finding in favour of the Project, the court was strongly influenced by the behaviour of the Government of Karnataka, in particular its attempt to join the proceedings in the guise of a public interest litigant (see p. 132).

By early June 2006, a new coalition government was in place, this time headed by Chief Minister H.D. Kumaraswamy, another of Deve Gowda's fortuitously located sons. Its intention to do away with the Project was unambiguous and, it seems, popular. '[T]reading carefully in light of the thrashing it had recently received from the Supreme Court', government actors hoped that the Project could be nationalised, and then completely remodelled, with any 'excess' land being returned to the land-losers, without attracting a charge of contempt (*Times of India*, 2006b).[42] But cracks began to appear in the coalition Government, with Kumaraswamy's party (Janata Dal-Secular Party) seeking nationalisation plus de-notification, and its partner party (Bhartiya Janta Party) supporting only de-notification. It was reported that the issue threatened to destroy the coalition and bring down the Government. Kumaraswamy dropped the idea of legislation and decided to pursue the issue in the courts instead (*Times of India*, 2006c, 2006d and 2006f).

The Government of Karnataka's attitude to the Infrastructure Project in recent years has been that of a 'cunning' state. It has presented itself as weak in the face of globalisation, despite the fact that it is an 'active agent' in the process, and it has 'capitaliz[ed]' on its 'perceived weakness' so as to 'render [itself] unaccountable … to [its] citizens …' (Randeria, 2003, p. 306). For example, Chief Minister Kumaraswamy avoided the opening ceremony of the peripheral road component of the Infrastructure Project, spending the day opening an art complex. There, he reportedly announced to the gathered intellectuals that 'NICE was "too big" and he "too small"' to prevent the road from opening (*Times of India*, 2006e). In a perfect example of the disingenuous, cunning, government actor, he reportedly went on to lament that:

> No-one has checked the road quality. The company is so big that we don't even have the rights to check the quality. They have full control over the road and the area. It is a bad issue, let us not discuss it further. (*Times of India*, 2006e)

In the same discussion, the Chief Minister is also reported to have accused NICE of being 'no better than the erstwhile East India Company which not only looted the country, it also made Indians slaves', and to have referred to the Framework Agreement as 'draconian', alleging that under its terms the government had relinquished its right to hear the complaints of land-losers. Finally, he was reported to have been considering 'prosecuting [the] politicians and bureaucrats responsible for coming up with [this] "anti-people" and "anti-state" deal' (*Indian Express*, 2006). Meanwhile bureaucrats in the Public Works

Department were proving more assertive, reportedly insisting in person and by post, that NICE 'furnish the detailed completion report of the project' before opening the road to traffic. Their protestations appear to have been ineffective and the road was opened (*Indian Express*, 2006; *Times of India*, 2006e).

On 10 July, 2006 the State instituted a Commission of Inquiry under Justice B.C. Patel to investigate the Infrastructure Project (*Deccan Herald*, 2006b). The chairman of NICE responded with a petition of contempt against the government and a letter-petition to the Supreme Court asking for the proceedings of the Commission to be stayed, alleging a breach of his constitutional right to 'adequate means of livelihood' (Article 39). Remarkably, the Supreme Court agreed to hear the case as relating to a breach of fundamental rights under Article 32, once again opening the project to judicial assessment (personal communication). The Government volunteered to disband the Commission just before the Court insisted that it do so (*The Hindu*, 2006b). But the litigation continues.[43]

Government and civil society actors

Relations between civil society and government actors tend to be complex and 'dynamic', their roles so often 'symbiotic', and yet 'contradictory' (Reuben, 2003, p. 1). Naturally, much is determined by degree to which government and civil society actors trust each other.

In post-Independence India, government actors 'enjoyed legitimacy' in large part 'because it had widely-respected leaders at the helm' and it 'was *expected* to deliver on its promises'. However 'this faith was … excessive, and that would have its own backlash in the years to come' (Varma, 1998, p. 64). Trust in individual politicians, and government generally, has fallen somewhat since those times. Pavan Varma (1998) locates an 'End of Innocence' in Indian politics during the years following the death of the first Prime Minister, Jawaharlal Nehru. At this point, he argues, there was a 'visible retreat of ideology from public life' and a 'corresponding transparency of the quest for power as an end in itself' (p. 70). The suspension of individual freedoms in honour of Indira Gandhi's Emergency in the 1970s prompted the forceful emergence of the civil liberties movement 'to keep [government actors] in check' (Khaitan, 2004, p. 5).

In recent decades the nation-wide decentralisation of governance to local *panchayats* (see pp. 40 and 105–6) has somewhat reduced the gap between government and civil society, offering the potential for improved levels of trust between the two sets of actors. But at the same time, liberalisation has caused civil society actors to question the willingness and ability of government actors to uphold the public interest over those of private investors. For example, one civil society actor alleged that government actors 'look increasingly shaky in the face of the pressure to attract foreign investment' (Interview, 2003, LL/LCS19). Another reported that the disaster at Bhopal sent a message to foreign investors that they 'can use their power to get a policy which is suitable to them.' Enclosed in that message 'was a reflection on the failure of the government to protect the

public interest.' This type of failure 'leads to a lot of resentment' (Interview, 2003, LC22). And to a loss of trust.

It is by now 'a politically correct cliché … to say that there are two Indias'. The 'shining' India of 'glitter and privilege' is a debutante, gliding on the strong arm of foreign investment, poised for her entrance to the developed world. The other India, desperate and furious, has received no invitation to the ball, and expects none in the post. Mediating between those two Indias are government actors who, it is alleged, are knowingly 'deepening … the absolute poverty and misery of poor India' (Bhaduri, 2007, p. 552). There is in Bengaluru an 'emphasis on mega-investments, bordering on a fetish, to promote a hi-tech vision', which 'seems perverse when we consider the scale and depth of poverty in the city' (Benjamin, 2000, p. 38). There is a severe tension between the need to better service the basic requirements – land water, sewage, shelter and employment – of Bengaluru's poor and middle income population; and the desire of some government actors to fulfil the vastly more lavish wants of large scale local and foreign business – flyovers, high-rise buildings and fibre-optic cable. Many question why, not least in the context of a liberal economic policy, it should so often be deemed necessary to use public powers, such as eminent domain, in favour of the private sector. Similarly, the generosity of the terms awarded to investors from Mauritius has led some to question whether India is losing more in forgone tax than it is gaining in investment from Mauritius (*India Today*, 2000; see p. 36).[44]

Government actors may adopt a range of strategies with respect to civil society actors, from *laissez faire* to strategic alliances and conflicts, total repression, or proactive engagement (Manor, 1993). These strategies may be implemented on a case-by-case basis as the need arises, or applied systematically, as part of a general policy towards civil society. As the first subsection below explains, where these policies are transformed into law, they can be read as expressions of trust – or distrust in civil society actors.

Civil society actors tend to focus a substantial proportion of their attentions on government actors,[45] adopting strategies ranging from 'confrontation', to 'selective collaboration' or 'full endorsement' (Reuben, 2003, pp. 1–2). For example, the head of the Delhi-based Centre for Science and Environment described her organisation 'in permanent opposition' to the government (*The Economist*, 2006, p. 55).[46] By contrast, CIVIC, a Bengaluru-based NGO, has conducted a campaign within the Government of Karnataka to encourage its departments to publish annual reports; and campaigned against what it sees as a government favouritism of the private sector (CIVIC website).[47] Similarly, the Public Affairs Centre worked against government actors when it used public interest litigation to try to force electoral candidates to reveal information about their background including criminal convictions.[48] But the Centre worked with government actors when it audited the implementation of Karnataka's Right to Information Act, 2000, in the period 2002 to 2003 (PAC Right to Information website as at July 2006).

Partners in resistance

Sometimes civil society actors face 'a dilemma' in that government actors are both 'an ally and an adversary' in relation to a single issue (Randeria, 2003, p. 323). For example, when tests by the Centre for Science and Environment in 2006 revealed that pesticide levels in Coca Cola and PepsiCo products had not changed since its initial tests of three years earlier (CSE, 2006a, pp. 5–7), bureaucrats in the Union Ministry for Health refuted the results. But in Karnataka, the State Minister for Health, issued a notice banning the sale of Coca Cola and PepsiCo products in schools and hospitals, and total or partial bans were issued in five other states. Karnataka's Minister also announced that a case had been filed against Coca Cola in the small claims court in respect of an alleged breach of India's Prevention of Food Adulteration Act, 1954 that had been discovered during tests conducted by the Government (*The Hindu*, 2006d; *The Times of India*, 2006h).

Such variety also characterised government-civil society relations in respect of the Bengaluru-Mysore Infrastructure Project. The Environment Support Group (ESG) has sought for many years to convince the Government of Karnataka to turn its back on the Infrastructure Project. When Mr. Justice Chandrashekaraiah partially quashed the Infrastructure Project land acquisition in 2004, the ESG and other civil society actors urged the Government of Karnataka to take the opportunity to withdraw from what was now, they argued, a frustrated Project (*The Hindu*, 2004b; India Together BMIC website; Mahesh, 2004).[49]

When the Government of Karnataka eventually decided to reject the Project, the ESG adopted a strategy of assisting the government. For example, it supported the idea of nationalisation by pointing out that the Supreme Court itself had stated that 'the Legislature in its wisdom can even nullify an agreement already entered into', so the new government would have the 'full backing' of the superior judiciary to take over the project by special legislation (ESG, 2006a). Similarly, in mid-June of 2006, the ESG wrote a public letter to the Chief Minister, setting out what it described as evidence of 'significant violations' on the part of government actors, bureaucrats and NICE, 'in the implementation of the project'. Appended to the letter was a report by NICE to UTI Bank in which the acquisition of excess land and the intention to profit from its sale or rental were revealed (ESG, 2006b).

In July of 2006, the KIADB and the Government of Karnataka joined the land-losers to ask the Division Bench of the Supreme Court to review the recent decision of the three-judge Supreme Court bench in the third Infrastructure Project case, *State of Karnataka and another v. All India Manufacturers Organization and others*, 2006 (Madhuswamy's case). The Government of Karnataka and the KIADB reportedly focused on the claim, long advanced by the ESG, that NICE had been allocated land above and beyond the 20,193 acres set down in the Agreement. They argued that the courts should have considered the issue of excess land in full, and should not have cast aspersions on those who were responsible for identifying the excess land (*Deccan Herald*, 2006c). They presented the UTI Bank letter as 'new material' which demonstrated that the bargain into which the State had entered in 1997 was 'unconscionable' and so could not rightly be the subject of an order of specific performance (*Indian Express,* 2006).[50]

Trust expressed in law?

The extent to which existing trust between government and civil society actors is expressed in Indian law can be effectively analysed using the ARVIN matrix devised by the Civic Engagement Group of the World Bank (Thindwa et al., 2003, p. 2). The Group proposes that the 'health' of an 'enabling environment' for civic engagement in development processes is dependant upon 'the legal and regulatory framework, the political and governance context; socio-cultural characteristics, and economic conditions'. These external factors affect the enabling environment by 'influenc[ing] specific "*enabling elements*" that are essential to the effectiveness of civil society' – namely:

> The freedom of citizens to associate (A); their ability to mobilize financial resources to fulfil the objectives of their organizations (R); their ability to formulate, articulate and convey opinion (V.); their access to information (necessary for their ability to exercise voice, engage in negotiation and gain access to resources) (I); and the existence of spaces and rules of engagement for negotiation and public debate (N). (p. 4)

In the following paragraphs, the ARVIN framework is used to search the Indian legal system for expressions of trust by government actors in civil society actors. Again, the unequal positions occupied by government and civil society actors with respect to regulatory law ensure that if is difficult to find examples of the expression in law of *mutual* trust. Furthermore, although there are some examples of expression of trust, state law has also been used to constrain civil society actors, to express *dis*trust in them.

Association State law 'sanctif[ies] and legitimat[es]', or not, 'the identities and strategies that movements deploy' and it 'shap[es] the political opportunity structures' available to civil society actors (Rajagopal, 2005, p. 384). The association of civil society actors in India is facilitated by the constitutional right to form an association or union (Article 19(4)). Various legal forms may be adopted by civil society actors – for example, the Environment Support Group is registered as a trust, while many others choose to register as a society, and relatively few as unions or cooperatives. However, the choice of legal form affects the nature and degree of state intervention in an organisation's affairs – such as whether they will benefit from tax exemptions, and whether they may raise funds abroad (Thukral, 2006, p. 5). Furthermore, the right to associate is subject to such 'reasonable restrictions' as may be imposed in the interests of India's 'sovereignty' and 'integrity', or 'public order or morality' (Article 19(4)). There is a sense among civil society actors in the India that the state holds excessive powers to intervene in their affairs, for instance by requesting regular reports on their activities. For example, some Gandhian civil society organisations were the subject of a five-year inquiry in the 1980's. The seven reports resulting from the inquiry delved into what many regard as trivial and harmless activities, and it recommendations were regarded by many as unduly harsh (Thukral, 2006, pp. 6–11 and 21). Finally, the specific activities of associating civil society actors are also heavily regulated. For

Table 4.1 The ARVIN framework for the analysis of the enabling environment for civil society actors

	Law	Politics	Sociology	Economics
Association	Freedom of association.	Recognition, accreditation.	Social capital, gender barriers, literacy.	Cost of registration, meeting.
Resources	Tax breaks, fund raising regulations.	Government grants, private funds, contracting,	Culture of giving and self-help.	Size, growth, unemployment.
Voice	Freedom of expression, law relating to communication.	Political control of media.	Use of media by different social groups.	Advertising and publishing costs.
Information	Freedom of information, right to information.	Information disclosure practices, opacity of public policy and budgets.	Information networks, literacy.	Costs of access to information
Negotiation	Legally established dialogue spaces such as referendums, lobbying regulations and so on.	Political will. Dialogue and accountability mechanisms.	Social values.	Bargaining power and autonomy.

Source: Adapted from Thindwa et al., 2003.

example, a meeting of five or more people gathered for the purpose of, among other things, resisting 'the execution of any law, or of any legal process' is classed as an 'unlawful assembly' punishable by six months imprisonment and/or a fine (ss. 141 and 143 Indian Penal Code, 1860). Furthermore, District Magistrates have wide-ranging powers to control demonstrations using the Code of Criminal Procedure. Specific individuals, residents of entire areas, or the public as a whole when visiting a particular area, can be directed to 'abstain from a certain act' in order to prevent events as serious as riots and dangers to human life; or as innocuous as a mere 'obstruction', 'annoyance' or 'disturbance of the public tranquillity' (ss. 144(1) and (4), Code of Criminal Procedure, 1973).

Resources Civil society actors are provided with some assistance in respect of resources. Under Indian law they (like foreign investors) are eligible for various tax breaks. The Government of India is the largest funder of Indian non-governmental organisations, but its resources tend to be project-specific and to be directed away from those who seek to challenge it. Furthermore, bureaucratic delays in respect of project approvals and funding are a serious drain on civil society resources (Thukral, 2006, pp. 16 and 18–19).[51]

Voice Civil society actors are guaranteed voice through the right to freedom of expression (Article 19 (1)(a), Constitution of India). That right is energetically exercised by the Indian press, which engages in investigative journalism and tackles issues uncomfortable to governments and private sector. The city of Bengaluru alone offers dozens of weekly, monthly, and quarterly publications; and around 20 daily papers in Kannada, Tamil, Urdu and English (Perry and Anderson, 1996). The internet provides civil society actors with a further vibrant forum for discussion, as the bibliography of the present study demonstrates.

Nevertheless, in *Killing the Messenger* the International News Safety Institute (2007) reported that in the last decade, 45 Indian journalists have been killed 'trying to report the news', making the Indian newsgathering process the sixth bloodiest in the world. The voice of Indian civil society is further constrained by the fact that the Indian media is controlled by the state, with private FM radio station owners banned from airing the news, and foreign TV station owners requiring an Indian majority shareholder (EIU, 2004, p. 7). Furthermore, India's academic journals have been adjudged not 'even remotely comparable' to those available in countries such as the United Kingdom (Noorani, 2002, p. 35).

Moreover, freedom of expression is subject to certain constitutional limitations. In particular, Article 19(2) of the Constitution authorises the making of a law governing contempt of court which 'imposes reasonable restrictions on the exercise of the right' to freedom of expression (Constitution of India; see p. 52 et seq.).

Finally, civil society actors in India risk being arrested during protests, subjected to SLAPPs (see p. 67 et seq.) and so on. Individual activists must take a high profile and controversial role. One independent civil society actor in Bengaluru warned, 'you may be subjected to personal attacks … Very few people are willing to come to the forefront …' (Interview, 2003, LL/LCS01). Even relatively large civil society actors can find their task daunting, as the Centre for

Science and Environment (CSE) found when it took on soft drink manufacturers PepsiCo and Coca Cola. In 2003, the CSE reported that it had found unsafe levels of pesticide residue, including DDT, in soft drinks produced by PepsiCo and Coca Cola (CSE, 2006a, p. 5).[52] The CSE reported that during the course of the controversy,[53]

> Coca-Cola and PepsiCo…questioned [our] data analysis, … capabilities, [and] … equipment and then as it got nastier, they resorted to personalised attacks on us and our integrity. Their favourite ploy was to dismiss us as a pawn in a conspiracy hatched by Europe (because we get funds from multilateral and bilateral agencies) … We heard rumours of phone calls from [then US Secretary of State] Colin Powell … to the [Indian Prime Minister]. We heard of Washington DC-based … lobbyists … flying down to cajole the powers here[,] … of intense activity in corridors in which we have no place. We had visits from the grey-clad men from the Intelligence Bureau[;] … were asked to submit to the Government data on 20 years of accounts [and] … detail on every staff member who has worked with us. (CSE, 2006a, pp. 1–2)

The CSE reflected that 'fights go with the territory', but they 'had not anticipated … the sheer power and the virulence of the attack' which was launched against them by government and foreign investment actors. The CSE concluded its report of the events as follows: 'As we write this, we don't know how we will be attacked this time. We are sure, given past experience, that it will be vituperative and powerful. We don't know if we will survive' (CSE, 2006a, pp. 1–2).

Information In the absence of 'a minimum of … transparency … there can be no effective public sphere' (Dembowski, 1999). Where good information is inaccessible, challenges made in the public interest can be 'half-hearted and inadequate' (Interview, 2003, LL/LCS01). If they are unable to determine either what breaches of regulation have occurred, or what action has been taken in respect of those breaches, civil society actors are powerless.

Interviews conducted in 1995 revealed that in Bengaluru, 'public participation has been rendered a farce' because bureaucrats were 'polite but substantively unhelpful'. 'You have to really bash them.' One bureaucrat confessed: 'most of us are very opaque'. Partly as a consequence, access to information was seen to be 'very difficult', with even annual reports 'treated as internal documents not readily accessible to the public'. Civil society actors were, therefore, 'at the total mercy' of bureaucrats (Perry and Anderson, 1996).

Today, access to information in Bengaluru is protected by both Union and State law. These laws can be regarded as rare expressions of trust by government actors in civil society actors. The Government of Karnataka introduced a Right to Information Act in 2000, followed in 2005 by a central Right to Information Act.[54] The Karnatakan Act and its accompanying Rules stipulate that information must be supplied in timely fashion following a request by a member of the public.[55] It also imposes a duty on public officials to publish certain information about their organisation of their own volition – so called *suo moto* disclosures (PAC website).

The Public Affairs Center audited the implementation of the Karnatakan Right to Information Act, 2000, during the period 2002 to 2003. It asked volunteers to make 100 applications for information from 20 public bodies in Karnataka over a six month period.[56] The bodies were then rated as 'responsive' (five bodies, including the Development Authority), 'tentative' (four bodies) or 'inactive' (12 bodies, including the *Mahanagara Palike* and the Pollution Control Board). Faced with evidence of their failures, some government actors gave undertakings to improve implementation of the Act. A follow-up audit of the *Mahanagara Palike* revealed significant improvements in responsiveness, but nagging doubts as to the accuracy of the information provided. The PAC study found that awareness among public bodies of their duties under the Act is low, albeit showing signs of improvement, and there are some technical hitches and grey areas in the operation of the Act. For example, an application to obtain information from the *Mahanagara Palike* regarding invitations to bid for public works was rejected first, because it required 'secret' information, and later because it was 'too general'. An appeal to the Karnataka Appellate Tribunal was rebuffed on the grounds that appeals must be filed by a lawyer (s. 7(2)) and that, in any case, appeals must relate to orders of the Tribunal, there being no recourse if the Tribunal should (as it usually does) choose to remain silent. Systemic problems relate to the scope of appeals, the excessive costs borne by those who request information, and the limits to the kind of information provided in *suo moto* disclosure. Nonetheless, the PAC study concludes that the Act 'does provide reasonable scope to set in place a system through which citizens can access information that they want from the government' (PAC website). A local commentator agreed, observing that the Act makes matters 'fairly transparent' and that it is 'not difficult to get hold of documents' (Interview, 2003, LC17). Furthermore, Government of Karnataka websites now sport a link to the text of the Act, thus ensuring that at least those who have the technological capacity to know also know that they have the right to do so.

Negotiation The ARVIN Framework suggests that a legal system may contribute to the enabling environment for engagement between civil society and government actors by securing opportunities for negotiation. In the terminology of the present study, negotiation requires, or corresponds with the second and third communal mechanisms: gateways to participation, and spaces for coordination. These mechanisms may be present in the processes of adjudication and administration.[57] Their operation is explored in more detail in the following two chapters.

Where these mechanisms are introduced by government actors as opposed to members of the judiciary, they may be regarded as expressions of trust by government in civil society actors. An example can be found in the 2004 creation of the National Advisory Council (NAC). The NAC was established by the Government of India to serve 'as an interface with Civil Society'. It is composed of 'distinguished professionals drawn from diverse fields of development activity who serve in their individual capacities'. It 'makes detailed recommendations to the Government of India in the areas of priority identified in the [cross-party National Common Minimum Programme for Development] and to provide

independent feedback on the impact of action initiated in various sectors' (NAC website). Another is the introduction of Public Hearing into the environmental clearance process (see p. 99 et seq.). However, as will be seen, such examples are both rare and vanishing.

Notes

1 Those who would question whether callous is the right word to use will perhaps be swayed by the original version of Union Carbide's 'Bhopal Information Site'. For several years the site introduced the Bhopal disaster as follows: 'The Bhopal sabotage tragedy, caused by the actions of a disgruntled Indian employee, continues to be a source of anguish for Union Carbide.' So, none of the blame, all of the pain. By November of 2006 the site had been treated to a PR makeover and instead read 'The 1984 gas leak in Bhopal was a terrible tragedy which understandably continues to evoke strong emotions even 21 years later'. For an insight into how the tragedy might have affected the residents of Bhopal see the Indra Sinha's account of a similar tragedy in his fictional work *Animal's People*.

2 The circular in question was circular IECD No. /08.12.01/2001–02 of 20 February, 2002. The Reserve Bank of India declined to investigate the complaint in any detail, so no more light was shed upon the matter (ESG, 2002).

3 In 1901, the city of Bengaluru was 29 km^2 and housed 5621 people per km^2. By 1997, the city had grown seventeenfold to 482 km^2 and population density had doubled to 10,809 people per km^2 (BWSSB website). By 2008, an estimated 6.8 million were living in the city (*Mahanagara Palika* website).

4 Certainly it was impossible to obtain a full list of foreign investors in the State of Karnataka, either from regulators, or from those advising foreign investors. This contrasts sharply with my experience in Sri Lanka, where a government official readily handed over a neatly bound list of names, addresses, sectors and nationalities of all foreign investors in the country (Perry, 2001).

5 The original wording is somewhat opaque: Industry had 'adjusted itself beyond the reach of the law through its choices of lines of activity and scales of operation', and the 'misallocation effect' of labour law had become 'invisible' in the process (World Bank, 2004b, pp. 13–14).

6 Interviewees also noted that 'consultants' are employed to do the dirty work of the private sector, such as recovering debts and implementing 'strong arm tactics' (Interviews, 2003, LL/LCS01, LL/LCS19 and LC22).

7 Photos and the First Instance Report issued to the police with details of the incident can be viewed on the ESG website.

8 'The only significant variations are that the extractive sector ranks communities ahead of suppliers, while US and Japanese firms place communities and countries of operations far lower than European companies' (Ruggie, 2007, para. 68).

9 Except for a few industries that are reserved for the public sector, and six other industries where licensing is retained because the proposed enterprise seeks either to operate in a sector which is reserved, for strategic reasons, for small-scale industries; or to locate in a place which is contrary to industrial policy (Govindarajan Committee, 2002b, p. 8).

10 For example, for large firms investing in sectors reserved for small-scale industries, and for the brewing of alcoholic drinks; and the location of the firm within 25 km

of India's larger cities, except where the industry concerned is 'non-polluting', such as software, or the location is a designated industrial area.

11 Investors promising to export are eligible for special customs duty schemes and for location in export processing zones. Incentives are generally available to companies incorporated in India, whether their shareholders are foreign or domestic (DIPP website).

12 The FIPB operates out of the Department of Economic Affairs in the Ministry of Finance and it is empowered to negotiate the terms under which investments can be made (EIU, 2004, pp. 11–19). Projects of up to Rs 600 crores are assessed by the Union Commerce and Industry Minister, and larger projects are decided by the Cabinet Committee on Economic Affairs (Govindarajan Committee, 2002b, p. 2). Whether Special and Export Processing Zones must follow the automatic or specific approval routes depends upon the same criteria as other projects, but specific conditions and criteria are applied in FIPB approvals of these Zones (DIPP, 2005, p. 12).

13 Other investments which must follow the FIPB route are those involving the take-over of an existing Indian company, or a sensitive sector of the economy, or a foreign equity share of above the usual cap (DIPP, 2005, p. 1).

14 The procedures for setting up an investment in Karnataka are set out on the website of the State's Directorate of Industries and Commerce.

15 A similar incident has been reported in Maharastra (Mehta, 2004, pp. 108–9)

16 The Public Affairs Centre contributed a survey of business perceptions.

17 The Act came into force in October of 2003.

18 This is to be done at the point of filing the Combined Application Form and then once in a year thereafter.

19 Breach of the self-certification by the investor is punishable by a fine of up to Rs 5000 for the first offence, and up to Rs 10,000 thereafter.

20 As of April 2006, the database for random sampling of factories for inspection had not been set up (Dasgupta, 2006, p. 14).

21 However, the new rules do not affect pollution and safety inspections mandated under other legislation, which will continue as normal, and where there is a specific complaint, a separate inspection can be arranged with the permission of the head of the relevant department or authority.

22 The tendency to 'grossly under-declare the real value of land' also makes it difficult to use land as collateral in order to finance construction (World Bank, 2004b, p. 21).

23 The Government of Karnataka responded in 2002 by beginning the computerisation of land records in the State under the international award-winning Bhoomi programme (see Bhoomi website).

24 Foreign companies may acquire or hold immovable property in India for business purposes, but they must notify the Reserve Bank of India (RBI) of the transaction, they must fund the purchase by foreign exchange brought in for the purpose, and they may not remit profits from the sale of land or rental without the permission of the RBI (EIU, 2004, p. 26).

25 The right to property was originally included as a fundamental right under Article 32 of the Constitution of India. It was downgraded by the 44th Amendment in 1978, under which Article 32 was deleted and Article 300-A was inserted. It reads 'No person shall be deprived of his property save by authority of law'.

26 This was in response to an effort by the Supreme Court to restrict the ability of State governments to acquire land under the Acquisition Act in *R.L. Arora v. State of Uttar Pradesh*, 1962 (Alternative Law Forum, 2003, p. 172).

27 It relied on s. 47 of the Industrial Areas Act, 1966.

28 For example, it argued for participation by displaced persons in planning their displacement, and in the benefits of the projects by which they are displaced, on the same scale as the direct beneficiaries of the project. The Council also proposed that rehabilitation policy ought to be linked to the Land Acquisition Act, thus making it justiciable and creating a new gateway for participation (NAC, 2006, Annexure).

29 The state-owned land is reportedly being leased to NICE for just Rs 10 per acre per year for a 30 year period – less than yielded as farmland (Mathai et al., 2000; *The Hindu Businessline*, 2002).

30 The managing director of NICE, Ashok Kheny, is reported to have countered that excess land had been notified because noone was sure exactly how much land the Project would require. This is odd since the requisite amount of land was very specifically set out when it was technically approved by the Empowered Committee and that amount was confirmed by the Supreme Court (Sharma, 2006).

31 For photographs of the affected land see the ESG website.

32 Even then Minister for Public Works (later Chief Minister) Dharam Singh was reported to have said 'we are more interested in the road' but 'townships form a part of the project proposal' and 'if the promoters insist on them, we have to let go' (*Times of India*, 2002).

33 These issues are often referred to collectively, and confusingly, as 'the excess land issue'.

34 It is reported that some land has been removed from the acquisition list for a fee of Rs 2.5 lakhs per acre, and that these 'deletions have to be signed by the Industries Minister' (Sharma, 2004b).

35 Indeed, there are reports that up to ten bureaucrats from the Karnataka Industrial Areas Development Board were employed by NICE'almost immediately after retirement' (Sharma, 2004b).

36 Some of the petitioners argued that they had not been given notice of the acquisition, others that they had not been heard as required by Section 28 (1) and (4) of the Industrial Areas Act, 1966.

37 The judgment, delivered in October 2003, was overruled in the third Infrastructure Project litigation, *State of Karnataka and another v. All India Manufacturers Organization and others*, first by a full bench of the High Court of Karnataka and then by the Supreme Court in 2006.

38 The company denied the allegation, saying that 'not a single piece of land had been sold, since very little had come into their possession' (*Times of India*, 2003).

39 For example, an opposition party member reportedly alleged that 'land is being acquired at a nominal price and being vested with the private promoter for real estate development or for direct sale to other parties' (*The Hindu*, 2004a).

40 The Supreme Court remarked that 'the constitution and functioning of this Committee … illustrates the mala fides with which the State Government has approached the Project' (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006).

41 The Managing Director of NICE reportedly greeted the judicial decisions of 2005 with open arms, praising the Indian judiciary as the 'best in the world', and 'delighted' by the verdict both 'because it went in the company's favour,' and also because it 'created a ray of hope that "no amount of malicious misinformation by people with vested interests, bureaucrats and land mafia … will hurt the … project"'. He also reportedly threatened to launch unspecified legal actions against various politicians and bureaucrats for their part in a 'malicious information campaign' (*Deccan Herald*, 2005).

42 The government argued its position on the grounds of the welfare of the people and the honouring of the Framework Agreement. Some alleged that its plan was motivated by a desire on the part of some politicians who owned land in the area to avoid compulsory purchase, and thus to personally benefit from rising land prices; others that the Government was 'trying intimidation' by legislation and adjudication to force NICE to accept de-notification (*Times of India*, 2006b).

43 Meanwhile, the media has been used by both sides to pursue a range arguments, some of which verge on the absurd. For example, NICE reportedly claims that it has not been supplied with adequate land to complete certain aspects of the Project on time. It argues that although it has been given possession by the KIADB of certain land, the land owners have refused to vacate it because they hope to get 'mileage out of political developments on the issue' (*Deccan Herald*, 2006e). The KIADB reportedly retorted that work on certain buildings had not yet started because NICE has not submitted technical drawings. NICE replied that this allegation was 'misleading': the Government had not yet transferred the *khatha* certificate relating to the land in NICE's possession into NICE's name, without which NICE could not seek the necessary approvals from the Bangalore Mysore Infrastructure Corridor Area Planning Authority (*Deccan Herald*, 2006f). In one television interview NICE Managing Director reportedly confirmed that 41 km of peripheral road would be ready by December – a remarkable achievement given that he had just claimed to have received just two of the 20,000 acres NICE had paid for (*Deccan Herald*, 2006h).

44 In 2000, a public interest litigation challenged the decision of Finance Minister Yashwant Sinha to prevent the tax authorities from questioning the entitlement of Mauritius-based investors to avoid capital gains tax. The Petitioner, a Bengaluru-based civil society activist, alleged that the decision had been made in order to protect an investment fund run by the Minister's daughter in law (*India Today*, 2000).

45 For example, Krishnan's study of civil society actors in Delhi revealed that as many as 71 per cent of respondents were involved in monitoring government activity (Krishnan, 2003).

46 *The Economist* (2006) notes that the Centre for Environment and Science has an 'impressive record of accuracy and probity' which make it 'a force to be reckoned with, by government and multinationals alike'.

47 For example, CIVIC alleges that the government has 'built layouts, flyovers and ring roads for preferred sectors such as Information Technology … and Bio-technology … with no assessment of their impact on the people living in these areas' (CIVIC website).

48 The petition was upheld by both the Delhi High Court and the Supreme Court. The Government of India responded with an ordinance to make disclosure non-mandatory which was passed with a huge majority in just 45 days – a 'speed which would not have been achieved for anything else!' The Supreme Court eventually struck down the ordinance (Interview, 2003).

49 Clause 7.1 of the Framework Agreement between the State and NICE reportedly notes that 'the industrial and commercial development of the townships by the company is an integral part of the infrastructure corridor project'. The ESG pointed out that NICE had claimed in an affidavit submitted during Madhuswamy's case (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006) that it would be 'impossible to construct the project; technically, commercially and economically' if it was not allowed to possess and then sell on land beyond the amount set down in the Framework Agreement (India Together BMIC website; Mahesh, 2004).

50 It appears that the Courts in the Madhuswamy case (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006) were presented with the documentary evidence of the allocations over and above the amounts set down the Framework Agreement, but 'chose not to refer to it' (personal communication).

51 The Krishnaswamy Committee reported in 1988 that processes must be streamlined but there was no discernable improvement by 2002 (Planning Commission, 2002, Annexure VI).

52 Within months of the CSE report on the pesticide levels in soft drinks, a number of campaigns against Coca Cola and PepsiCo sprang up all over India. In 2005, Coca Cola was forced by the Kerala State Pollution Control Board to close its bottling plant which was alleged to be depleting groundwater and causing pollution, and efforts have been underway to achieve a similar result in Uttar Pradesh. The high profile of the targets of the campaign have ensured global attention and support, and parallels have been drawn with water depletion by Coca Cola in Colombia (India Resource Centre Coca Cola Campaign website). The story inspired a Bollywood movie 'Corporate' in which characters actors 'mocked' the CSE study (CSE, 2006a, p. 2).

53 Three years of reports, meetings and negotiations culminated in a meeting in the spring of 2006 at the Bureau of Indian Standards, at which pesticide standards were to be approved. However, the meeting was cancelled at the last minute by Union Ministry of Health and Welfare and the standards were never established (India Resource Centre Coca Cola Campaign website).

54 The Central Right to Information Act, 2005 provides for the establishment of state level Information Commissions, such as the Karnataka Information Commission, to monitor and resolve complaints relating to requests for information (Article 15). However, there has been no explanation of how the Indian Act is to co-exist with existing state legislation such as Karnataka's. Experts in the field, speaking at a symposium on 'Making the Right to Information Work in Karnataka' in 2004, have argued that, although the Karnataka Act may be preferable from the perspective of civil society, a Union Act will always dominate in practice (PAC Right to Information website as at July 2006).

55 This came into effect when the Karnataka Right to Information Rules (2002) were notified.

56 The nature and target for the applications were entirely dependant on the genuine needs of the individual applicant, so the sample emulated real life usage rather than emphasising even coverage of institutions (PAC Right to Information website as at July 2006).

57 They might also be secured in legislative processes, but these are beyond the scope of the present study.

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Chapter 5

Gateways to Participation

This chapter explores the second mechanism through which state legal systems can support productive, community-like relations: ensuring broad participation in 'collective life'. It is through such participation that the mutual interpersonal trust which binds actors together is 'stabilised' and 'reinforced' (Cotterrell, 1996, pp. 299–301). The processes of administration and adjudication can facilitate such participation in two ways.

First, the legal system can protect the general security and autonomy of individual actors. The general orientation of the post-Independence India has been towards what is commonly known as the rule of law – an experience of 'power neither exerted nor suffered but kept in balance' (Cotterrell, 1996, p. 5). India's rule of law has had its ups and downs, the ignominious low-point having been the rule *by* law which characterised Prime Minister Indira Gandhi's State of Emergency in the 1970s. Furthermore, the degree to which the rule of law shines unevenly among individuals depending on factors such as their location – in militarised Kashmir, or rumbustious Bihar; or their characteristics – gender, age, caste, income and so on – is undeniable and often shocking to both Indians and foreigners.[1] Although the Indian legal system retains a relatively discretionary and state-allocative legal system as compared to its Asian counterparts, it does so, equally unusually, whilst retaining rule-based characteristics, such as an independent judiciary and the protection of fundamental rights (Pistor and Wellons, 1998, p. 89).[2] These rights are the basis for the umbrella, albeit somewhat scrappy, of legal guarantees of association, resources, voice, and access to information from which foreign investment and civil society actors benefit, and which facilitate their participation in collective social life (see p. 86 et seq.). In sum, the rule of law in India is solid and widespread enough to provide most people with the kind of 'unfocused experience of general security' (Cotterrell, 1996, p. 5) which facilitates participation in daily social interactions.

Second, the legal system can facilitate specific instances of participation by creating and maintaining gateways, administrative and adjudicative, through which it can occur. The specific gateways to participation in the processes of adjudication and administration available to actors in Bengaluru are the subject of the present chapter. Because government actors occupy a privileged position in respect of the legal system, the focus is predominantly on gauging the ability of non-state (investment and civil society) actors to participate.

Administration

Foreign investors seem to benefit from ever more substantial and regular opportunities to participate in administration. For example, the website of the US-India Business Council reveals a constant dialogue between bureaucrats, (political) government actors and members of the organisation, including actors representing US investments. Most significantly, the Govindarajan Committee loudly and proudly relied exclusively on the perceptions of foreign investors and their proponents. The resulting reports in turn served as inspiration for dramatic reforms to the environmental clearance process, which had been the source of the most significant gateways to administrative participation. As trust between government and foreign investment actors has deepened, so gateways have opened for foreign investment actors to participate in their own regulation, with no concomitant gateway participation by civil society actors. For example, the Industries (Facilitation) Act, 2002, seeks to increase the participation of investment actors in their own regulation using tools such as self-certification and membership of the new Single Window Clearance Committees responsible for approving investments. Membership of these Committees also includes representatives from *Panchayats*; but there is no provision for participation by civil society actors (ss. 9–11, Industries (Facilitation) Act, 2002; Rules 5 and 6, Industries (Facilitation) Rules, 2004).

The formal, systematic involvement of Indian civil society actors in policy creation was first discussed during the 1980s in the context of rural development. At that time, the Planning Commission noted the need for mutual trust between civil society and government actors, and that trust might be improved by participation – for example, by creating a forum in which civil society actors might be able to 'explain their positions and defend themselves or bring field problems to the notice of the State Governments' (Thukral, 2006, pp. 18–21). There is an appetite for tripartite participation among civil society actors. For example, one civil society actor suggested that the 'only way' to 'cut through' a foreign investor's hype is 'to make them really understand and appreciate what a wonderful array of opportunities' exists for them to engage with other actors 'even in the administrative decision-making process' (Interview, 2003, LL/LCS19). The National Advisory Council (NAC) is one instance in which civil society actors have been invited to participate in developing rules that may have some impact upon foreign investment (see p. 90). But interviewees suggested that government actors often restrict themselves to 'a charade' of inviting participation, that in reality governance 'is a very closed process' (Interviews, 2003, LL/LCS19 and LL/LCS01).

There has even been a tendency to claim that there has been participation when there has not. For example, the National Environmental Policy of 2005 suggests that it was 'prepared through a process of extensive [and documented] consultation with experts', including 'well known' civil society actors, and with 'diverse stakeholders' (MoEF, 2005, pp. 3, 45–6). But even some civil society actors who were specifically listed as having been consulted reportedly deny that this is the case. In August of 2005, a collection of civil society actors announced

that the Ministry of Environment and Forests (MoEF) had 'finalised a draft of the National Environment Policy and submitted it for clearance to the Cabinet'. The draft had not been published and was 'reportedly marked "secret"' (Acharya, 2004; ESG, 2005c).

The following sections outline those gateways to participation which have the greatest potential to support stable, trusting and productive community-like relations. Attention is also paid to the fact that, in the absence of many such opportunities for communal participation, individualistic participation is common.

The environmental clearance process

Potentially the most significant gateway for broad participation in administrative processes surrounding the approval and operation of foreign direct investment occur within the environmental clearance process. This process was introduced when the Ministry of Environment and Forests issued a Notification on Environmental Impact Assessments in 1994. This bound investment actors, domestic and foreign, who promote certain large or otherwise sensitive projects to obtain special environmental clearance prior to establishment or operation.[3] A 1997 amendment to this Notification stipulated that environmental clearances must be based, *inter alia*, on the proceedings of a public hearing, to be conducted by the State Pollution Control Boards.[4] These hearings 'bring together local communities, project affected people, government agencies, project proponents, planners, consultants and NGOs' (Kohli and Menon, 2005, p. 8). Civil society actors regard them as a 'crucial legal platform' for their participation in shaping development projects, including foreign investment (Vagholikar, 2005, p. 41). However, a number of factors, structural and behavioural, appear to have tipped the process in favour of investment actors.

Information The first constraint on effective participation by civil society actors in public hearings is information – one of the key ARVIN criteria for assessing the enabling environment for participation. The environmental clearance process has only ever made limited and ill-conceived demands on investment actors for information. Investors are not required to furnish certain crucial information, such as the relative modernity of technology that they propose to use. They need only produce a Rapid environmental impact assessment (EIA) for the hearing, the full version being protected from public scrutiny until after the hearing is complete. Where required, EIAs are commissioned and funded by investment actors, and some feel that there is a high risk that they may be biased. As Souparno Lahiri of the Delhi Forum reportedly put it, 'when someone pays you to prepare a report, will you give a verdict against them?' In one example, reportedly provided by Himanshu Thakkar of the South Asia Network on Dams, Rivers and People, a consultant noted in an EIA that it had organised an information campaign to 'dispel misgivings about the project' and to 'overcome … non-acceptability'. As Thakkar argued, such activities are 'precisely not the role of an EIA agency' (*Down to Earth*, 2005; see also Kohli and Menon, 2005, pp. 9 and 10).

There is clear evidence that investment actors have disrupted the process of coordination by introducing inaccurate information into the clearance process. Even the Govindarajan Committee criticised investors for submitting 'incomplete' and 'poor quality' impact assessments and management plans (Govindarajan Committee, 2002b, p. 25). According to Kohli and Menon, data are often inaccurate, 'unscientific and unauthenticated', and the conclusions they drawn in EIAs often overreach the evidence (Kohli and Menon, 2005, p. 9). A remarkable Karnatakan example was revealed in 2000 in relation to the proposal by the Murdeshwar Power Corporation to place a hydroelectric dam across the Kali river near Dandeli, in Uttara Kannada District. The proposed project had been controversial from the outset due to the threat it may pose to local flora and fauna. It seemed to be in violation of a Government of Karnataka Order[5] restricting development in the area, as well as being contrary to the recommendation of the official responsible for conserving forest in the area. Civil society and project affected persons were even less inclined to welcome the project when the Environment Support Group (ESG) revealed that Ernst and Young, the international consulting firm commissioned by Murdeshwar to produce an EIA of the proposed project, had cut and pasted much of it from an assessment made by another consultant in relation to a totally different project – the Tattihalla Augmentation Scheme. The head of Ernst and Young in India reportedly first 'defended the report' and then, echoing Union Carbide in Bhopal, blamed it on a 'mischievous employee who has been fired' (Interview, 2003). The Karnataka State Pollution Control Board conducted a public hearing on the basis of that patently inaccurate EIA in August 2000. The issue attracted national and international media coverage and the Government of Karnataka was forced to order a fresh EIA. Tata Energy Research Institute (TERI) took just one month, during a time when the Dandeli area is largely inaccessible due to heavy rain, to produce the new EIA. A new public hearing was held in October at which it was determined that this second EIA was fraudulent, since it was founded on environmental and ecological information which did not correspond to the location of the dam. In September of 2003, the Industries Minister of Karnataka announced that the project would be abandoned as a result of the outcome of the public hearings (Sharma, 2003; ESG, 2003b, 2003c and website).

In the post-clearance period, participation by civil society actors and others has been hampered by the fact that the conditions according to which a clearance is awarded are not published. These conditions may relate to the employment of local people, environmental improvements, and the provision of health, education and other civic facilities. The MoEF has responsibility for monitoring the fulfilment of these conditions, *inter alia* through six-monthly progress reports submitted by the investor. However, it is reported that investors often supply inaccurate information, and the MoEF has a poor record of monitoring. Civil society actors, who would otherwise be well-placed to ensure compliance with many of these conditions, are unable to participate effectively in monitoring their fulfilment because they do not know what they are (Kohli and Menon, 2005, p. 27; *Down to Earth*, 2005; MoEF Notification, 1994).

The MoEF has always been empowered to punish abuses such as the provision of false information, but it has reportedly never done so. Even blatant cases of inaccuracy have failed to attract meaningful responses. This may be due in part to the absence in practice of technical expertise provided for in the 1994 Notification (Kohli and Menon, 2005, pp. 8, 28–32 and 59). The Govindarajan Committee proposed that the problem be addressed by creating a 'data centre, which could serve as a one-stop source for obtaining reliable and validated data' (2002b, p. 23). The Right to Information may yet play a significant role in improving the ability of civil society actors to participate in established procedures such as the clearance process, including public hearings, which is currently constrained by the failure of foreign investors to supply accurate information (see p. 99).

Procedures Second, the clearance process has always been undermined by weak and poorly implemented procedures to safeguard the balance and effectiveness of the process. No rules exist on a range of crucial issues, such as the manner in which proceedings are to be recorded and the relative weight to be given to the various viewpoints expressed. Furthermore, it is alleged that existing guidelines for the conduct of hearings are often 'violated' with impunity. Even government actors have sometimes failed to obtain clearances, as in the case of the expansion of an airport in Mangalore (see p. 112). State Pollution Control Boards reportedly fail regularly in their duty to publicise hearings to interested parties, for 'fear that they will hinder the … process and oppose the project'. There are indications that hearings are 'manipulated' by government and investors 'to suit their own ends', and some are held in an atmosphere of intimidation and secrecy (Kohli and Menon, 2005, pp. 9 and 31–3). One civil society actor who has taken a detailed and long-term interest in a number of investment projects described foreign investors as 'work[ing] on local politics very substantially'. He spoke with disgust of how they 'influence', 'hijack' and 'distort the agenda' and 'ridicule local processes of engagement' such as public hearings by 'throw[ing] garbage into the decision making process' (Interview, 2003, LL/LCS19).

It has been suggested that foreign investors regard the whole clearance process simply as a 'hurdle' and seek to avoid the process altogether where possible (*Down to Earth*, 2005). For example, in 2001, when an amendment to the 1994 Environmental Impact Assessments Notification exempted mining projects of up to 25 hectares from the need for a public hearing. Investors in mines of 100 hectares creatively complied by applying for four leases of 25 hectares.

From a law-and-community perspective, the avoidance and abuse of the environmental clearance processes undermines trust between investment and civil society actors. It also undermines the potential of the clearance process, a legal mechanism, to act in support of stable, trusting, community-like relations.

The public is 'heard' in the infrastructure project Once again, the Infrastructure Project can be called upon to testify to much that is wrong with investment-government-civil society relations in Karnataka, for a lack of information and procedures rendered the public hearing for the Project farcical.

The hearing for the Infrastructure Project was convened in March 2000. No documents at all were made available to the public in advance of the hearing, nor when the hearing reconvened in July 2000. Of course, 'holding a public hearing without making any information available is meaningless' (*Down to Earth*, 2005). The terms of the Framework Agreement governing the Infrastructure Project had been kept largely secret from opposition politicians and civil society actors because the courts have repeatedly confirmed its status as a confidential commercial document (Ranganathan, 2004; ESG, 2002; Mahesh, 2004). A 'socio-economic assessment' submitted as part of the clearance process 'asked just three questions: the name of the respondent, the address of the respondent and the name of the surveyor'. Another assessment 'was based on faulty statistical sampling' (ESG, 2002).

Photos of the public hearing for the Bengaluru-Mysore Infrastructure Project show a line of police acting as a buffer between the panel of investment and government actors on the one hand, and members of the public on the other. It is alleged that 'anyone questioning the project was arrested by police by order of the Deputy Commissioner, [Bengaluru] Urban District' (ESG website; see also Mahesh, 2004; Sharma, 2002). Vocal but peaceful protesters were reportedly dragged out of the auditorium, with some kicked and thrown to the ground (PUCL Bulletin, September 2000). The case is currently under consideration by the National Human Rights Council of India.[6]

Environmental clearance was awarded to the Infrastructure Project by the Karnataka State Pollution Control Board (KSPCB) in 2000 and by the MoEF in 2001. As of January 2004, certain construction projects including 'new townships' and 'industrial townships' must obtain an environmental clearance and produce an impact assessment. Importantly, the change affects projects already under construction, so long as construction has not come up to plinth level (MoEF Notification, 2004). As the Environment Support Group and the MoEF have pointed out, this amendment requires the promoters of the Infrastructure Project to obtain fresh environmental clearance (ESG, 2004). It seems that no such application has been forthcoming to date. Other conditions included in the original MoEF clearance, and alleged to have been breached, were that the hydrological structure of the area be preserved, that the established plan for the rehabilitation of land-losers be adhered to, and that half-yearly progress reports be made to the MoEF and KSPCB (ESG, 2006b).

In June of 2006, the Environment Support Group observed that the increase in, and change in the location of, land used for the Bengaluru-Mysore Infrastructure Project were so dramatic as to require fresh applications for environmental clearances to be made to the State Pollution Control Board and the MoEF. The State Board duly withdrew its 'no-objection' certificate for the Project, but when the ESG then submitted a Right to Information request to the MoEF asking what action it would take in light of the Board's revocation, the MoEF replied that it had no plans to revoke its clearance (ESG, 2006a and 2006d; *The Hindu*, 2006f).[7]

Reduction Civil society actors have long argued that the clearance process as a whole ought to be improved: procedures for hearings should be strengthened, and the matter of who should pay for the process ought to be examined, particularly in respect of relatively small investments. But their central recommendation was that the regime ought to be extended. For example, the National Advisory Council advocates broader, multidisciplinary expert participation in environmental clearances and other processes which are currently dominated by engineers and economists (NAC, 2006; see also Saxena, 2005).

Instead, a series of amendments have substantially reduced the scope and depth of the clearance process over the years. Some activities have been exempted from part of the process. For example, a 2002 amendment rather bizarrely exempted pipeline projects from the need to produce an environmental impact assessment, but retained the need for a public hearing. Other activities, such as the building of units within Export Processing Zones, have been exempted from the process entirely (Kohli and Menon, 2005, pp. 8, 22–5, 41 and 58–9; *Down to Earth*, 2005; Vagholikar, 2005, p. 45). And some improvements to the process have been made only to be undone. For example, at one point it became mandatory for the full text of EIAs to be published in advance of public hearings. But the 2006 MoEF Notification on Environmental Impact Assessments has once again ensured that only a Rapid EIA need be made available in advance (Kohli and Menon, 2005, p. 16).

In 2002, the environmental clearance process caught the eye of the Govindarajan Committee, which criticised the already diluted process primarily for being lengthy, secondarily for being inaccurate, and implicitly for being largely irrelevant. It described the process as 'cumbersome', noting that it was longest stage in the implementation of a project, taking up to 28 months for a power project (Govindarajan Committee, 2002b, pp. 23–5).[8] Foreign investment and government actors – both those responsible for the private sector, such as the Department of Industrial Policy and Promotion, and those responsible for the environment, such as the Ministry of Environment and Forests (MoEF) – had lost patience with the process (Vagholikar, 2005, p. 44). Using World Bank funding, the MoEF accordingly commissioned a Dutch consultancy firm to examine how to make the clearance process 'more effective and time bound' in light of the Govindarajan Reports (MoEF, 2004). In 2004 the MoEF circulated a draft of proposed reforms to a limited audience, including industry. The proposed reforms were based on a report by the Dutch consultants, who, the document noted, had 'held extensive consultations with representatives of the industry, central ministries and state governments'. There was no mention of local communities and civil society groups. Nor were many knowledgeable groups invited, or even allowed in, to the November 2004 launch of the review. Nor did the report refer to a decade of research by those with direct experience of the EIA process, some funded or produced by the MoEF itself (Kohli and Menon, 2005, pp. 57–8). The proposed reforms were finally published in November of 2005, but only in English, and only on the Ministry's website. Civil society actors joined Members of the Indian Parliament in calling for the implementation of the Notification to be stayed until proper consultation had taken place (ESG, 2006c).[9] The Chair of the national

Parliamentary Standing Committee on Science, Technology, Environment and Forests, P.G. Narayan, and a number of other Members of Parliament wrote to Prime Minister Singh voicing their concerns. It was felt that it was inappropriate to use a 'mere Notification' to deal with a matter of such importance to states and to the Union. It was noted that only industry associations had been involved in the redrafting process. The Parliamentary Committee had not been consulted, or even made aware that the Notification was being amended. Nor had the states been consulted (ESG, 2006c).

The resulting amendments, introduced through the 2006 MoEF Notification on Environmental Impact Assessments, have substantially reduced the participatory elements of the environmental clearance process. State Pollution Control Boards are given a new discretion to cancel a public hearing where they consider that 'owing to the local situation, it is not possible to conduct the public hearing in a manner which will enable the views of the concerned local persons to be freely expressed'. This is ominous because hearings only began to occur when they were made mandatory in 1997. Not one bureaucrat exercised their discretion to hold a hearing anywhere in India under the 1994 MoEF Notification on Environmental Impact Assessments (ESG, 2006c; see MoEF, 2006, Appendix IV).

If it had addressed the problem of poor information quality in its 2004–2006 review of the process then the MoEF could, Kohli and Menon argue, have removed a genuine cause of delays in the clearance process (2005, p. 9). However, it declined to do so. In fact, at one point in the process of drafting the 2006 Notification on Environmental Impact Assessments the MoEF proposed that investment actors should themselves be responsible for organising hearings (MoEF, 2004, p. 4). To hand over such a central part of the clearance process to the investor would have been 'an unprecedented step anywhere in the world' and, some argue, 'clearly indicates the extent to which MoEF is willing to ally with industry rather than communities' (Gene Campaign-ESG, 2004). The Ministry relented and the Pollution Control Boards retain responsibility for hearings under the 2006 Notification.

From a law-and-community perspective, the continuous erosion of public participation in the environmental clearance process constitutes a reduction in opportunities for widespread participation in social life. It can also be read as an expression of declining trust by government actors in civil society actors.

National Environment Appellate Authority

A further potentially important, but ultimately disappointing, administrative participation mechanism is the Delhi-based National Environment Appellate Authority, which was created in 1997 as a forum in which environmental clearances could be challenged. It is to be chaired by a retired judge and populated by environmentally qualified former bureaucrats and technical staff. The Authority could have offered an improvement on traditional methods of legal protest, because it is bound to act according to the flexible principles of natural justice, rather than normal rules of court procedure (ss. 4, 5 and 12(1) National Environment Appellate Authority Act, 1997). The rules of *locus standi*

are broad and claims may be brought by affected individuals, civil society actors or government bodies.

However, by 2005 it had been without a head for five years and without any technical members for last two years. It had heard just 15 cases since its creation (*Down to Earth*, 2005). The Authority has also failed to build up a body of substantive case law because it has dismissed so many cases on technical grounds such as a lack of jurisdiction, or presentation of the case in an incorrect format. Technical failures are made more likely by the fact that the awarding of an environmental clearance is only publicised on the MoEF website, and only then after significant delays. This makes it 'virtually impossible' for such decisions to be challenged in the Authority within the time limit of 30 days (Kohli and Menon, 2005, p. 33).

In one case, a clearance was reportedly given on 31 March, 2005 but the notice was not published in the local newspaper until on 18 April, 2005, leaving 'the affected people with just 12 days to prepare a brief, contact a lawyer, come to Delhi and file the case. Impossible' (*Down to Earth*, 2005). In *NESPON v. Union of India and others* (2003), an NGO petitioned the Authority in respect of environmental clearances given for the construction of a hydro-electricity project in West Bengal. The grounds for the petition were defects in the public hearing process and in the EIA, not least the failure to take account of a Geological Survey of India Report indicating that the proposed site was prone to seismic activity. The grounds for rejection of the petition by the Authority were that it was submitted on the 90th (i.e. last possible) day after environmental clearance had been awarded. The project is currently under construction.

Despairing of success in the Authority, many civil society representatives have instead taken action in the courts using public interest litigation (Kohli and Menon, 2005, pp. 50–51; Interview, 2003, LL/LCS19). The Law Commission has described the Authority as 'non-functional', existing 'only in paper' and suggested that it, and with the equally moribund National Environment Tribunal, could be disbanded and incorporated into new State Environmental Courts (Law Commission of India, 2003, pp. 6 and 168).[10] From a law-and-community perspective, the Authority represents an unfulfilled opportunity to support the development of stable, productive, trusting, community-like relations.

Panchayats

Karnataka's early and enthusiastic adherence to the nation-wide plan to decentralise government powers to local *panchayat*s seemed to offer the potential for improved participation by all non-state actors in administration.[11] For example, in 1999 the MoEF responded to public pressure and began to require that projects involving the diversion of forest land must be endorsed by local governments such as *panchayats* and tribal authorities (Vagholikar, 2005, p. 44). And *panchayats* may play a direct role in investment-related decision making by acting as members of Single Window Clearance Committees (ss. 9–11, Industries (Facilitation) Act, 2002; Rules 5–6, Facilitation Rules, 2004); and

initiating litigation (see p. 114 et seq.). But the promise of *panchayati raj* has been undermined by a range of factors.

A key feature of these elected local government bodies is the 'reservation' of a proportion of seats for women and officially 'Scheduled Castes and Tribes'. This ought to improve gateways to participation by socially excluded groups and those civil society actors who seek to represent them. But a 2002 Government of Karnataka report concluded that 'despite' the efforts of government and civil society, the new bodies suffered from the same problems of 'elite capture and corruption' as the state-level political system, and their effectiveness had been undermined by poor funding and the continuation of fractious relations between the state and the Centre (Panchayat Raj Act, 1993; Constitution (73rd Amendment) Act 1992; Government of Karnataka, 2002, p. 1).

A further development which seems to be stifling the potential impact of decentralisation on participation is the expanding influence of parastatal bodies, which are staffed by unelected bureaucrats and pausing politicians and are alleged regularly to 'bypass elected local bodies … and communities' living in the areas which they develop (CIVIC website).[12] For example, the Bangalore Development Authority[13] is primarily responsible for planning and developing new areas of the city and the general governance of those 'new' areas until such time as they are passed to the *Mahanagara Palike*. It has been accused of hanging on to such lands even after development is complete, so that residents of the outer ring of newer Bengaluru are deprived of a voice in local government (Perry and Anderson, 1996; Bangalore Development Authority Act of 1976. See Bangalore Development Authority website). Since 2003, the state has also been empowered to appoint Industrial Areas Authorities, where it seems appropriate due to the size and nature of a development. These exercise municipal powers in the industrial area similar to those of the *Mahanagara Palike* in Bengaluru (ss. 364(A) and (B) Karnataka Municipalities Act, 1964). One example of this kind of long-term obstacle to public input is the introduction of the Bengaluru-Mysore Infrastructure Corridor Area Authority. The 177 village *panchayats* in the area have 'lost their sovereignty' and must apply to that Authority for permission before undertaking any development (*Newindpress.com*, 2001).

Public-private partnerships

A further potential gateway for broad participation in India has been built on the notion of public-private partnership, a format which has been gaining global prominence since the early 1990s. For example, the 2005 National Environmental Policy of the Ministry of Environment and Forests, which is heavily reliant on the Govindarajan Reports, explicitly 'seeks to stimulate partnerships' between 'different stakeholders' in environmental monitoring and enforcement processes. These include government actors, 'the investment community' and civil society actors, as well as 'local communities' and 'international development partners'. Each is regarded as having 'resources and strengths for environmental management' (MoEF, 2005, p. 3). The document sets out a range of 'possible partnerships', including between 'public agencies and local communities' to manage resources

such as forests; 'public-private partnerships' in which specific functions such as monitoring are contracted out to the private sector; partnerships between public, community and private sector or voluntary organisations, in which partners share responsibility for an activity such as reforestation, environmental awareness or running a sewage treatment plant (MoEF, 2005, pp. 17 and 42).[14]

There is some evidence of this policy bearing fruit. For example, the World Bank announced support in 2007 for the management of water tanks to be further devolved to community groups in Karnataka (World Bank, 2007). However, some civil society actors have been unimpressed by the Policy, remarking that whilst it 'tosses up lofty ideals like greater legal standing to local community based organizations to undertake monitoring of environmental compliance', it 'says explicitly nothing' about public hearings or their erosion (Sharma, 2004; see p. 103).

The public-private partnership format has also found favour in local government. Bengaluru's *Mahanagara Palike* has since 2000 invited non-state actors to work 'with the government on a pro bono basis' in 'a new era of urban governance', which it declares to be 'a fundamental re-orientation of citizen attitude' (*Mahanagara Palike* website). The main outcome of this process has been the creation of the Bangalore Agenda Task Force (BATF), which is composed of 'members' drawn primarily from the private sector. The function of the BATF is to identify and facilitate opportunities for corporations to be involved on a private-public-partnership basis in the projects of various public sector 'stakeholders' such as the municipal authorities and the police (BATF website). While this gateway may have improved trust in government-foreign investor interactions, it has had the reverse effect on government-civil society interactions. Concerns have been expressed that the BATF has been awarded an excessively 'central, nodal and directive role … in shaping [Bengaluru's] development' (Alternative Law Forum, 2003, p. 166), and that it has tried to establish itself as a 'parallel body' to the elected *Mahanagara Palike* (Chamaraj, 2005). One interviewee remarked that it is:

> unaccountable to anybody but the Chief Minister, and it comprises some people who are basically managing directors of this and that company … Who dictates planning now? It's not anymore the democratic dialogue which the elected representatives are supposed to promote. (Interview, 2003, LL/LCS19)

A superficial examination of the Task Force membership does suggest that it is a rather elite, isolated and self-referential group. One member of the Task Force is the owners of an investment firm based in Mauritius. Another is the founder of the Public Affairs Centre (PAC), the same organisation which made a plea for *An Enabling Industrial Environment for Karnataka* (BATF website). Substantively, the Task Force has been criticised for focusing too much on 'cosmetic changes … ignoring basic needs, social justice and social sector development' (Chamaraj, 2005). Household surveys conducted by the PAC do, however, suggest that the increased private participation in local government, including the work of the

Task Force, has been associated with dramatic improvement in public perceptions of public services (PAC, 2003, pp. 4 and 8).[15]

Individualistic participation

With few communal gateways to participation by non-state actors in the creation of investment-related law in India, the desire of non-state actors to influence policy is played out through the 'ancient', individualistic 'art' of lobbying (World Bank, 2004a, pp. 20 and 40).[16] Sometimes matters descend into corruption. Individualistic participation may promote the need of one actor or group of actors, but it does little to support productive relations of community. Indeed, it may actively undermine such relations, in particular where such participation is perceived to be oiled with corruption.

Lobbying It has been observed that '[s]ocial policy advocates, in particular, who work on behalf of such groups as the poor, lower castes, women, the ill, and/or religious minorities, often have not found the legislature to be responsive to their needs' (Krishnan, 2003, p. 3). However, civil society actors do sometimes lobby effectively. For example, some lobby opposition politicians to stimulate action in legislative assemblies. Debating the content of laws is something that the legislative assemblies 'are still good at'. These are not, one civil society actor assured me, 'forums where people are capable of just lying and getting away with it'. So 'one needs to … participate actively' in the legislature. 'That is a weapon.' For example, the Environment Support Group was involved in the efforts of elected representatives to challenge the Power Purchase Agreement signed by the Government of Karnataka for the Cogentrix Power Project. The agreement 'was a bone of contention' between 1994 and 1997 because it sought to protect the investor from any liability for damage to 'human health and environment'. The clause was challenged first in a district *panchayat*, which passed a resolution rejecting the project. In the end 'the clause was struck out' in the State legislative assembly (Interview, 2003).

There are cases, albeit rare, in which civil society actors are regarded as having excessive influence over the public sphere. In a 2003 interview, a local commentator in Karnataka remarked that 'in their zeal for their objectives', civil society actors 'sometimes lose … their sense of objectivity' (LC17). Referring to the efforts of Delhi-based Centre for Science and Environment to eradicate pesticides from soft drinks, one commentator concluded that it was 'really worrisome' that regulators were 'blindly relying on the findings of a private initiative', albeit the initiative of a 'celebrated and professional' civil society actor. In so doing government actors 'failed in [their] fundamental duty of functioning as the ultimate arbiter of what is right and good for its citizenry' (*The Hindu Businessline*, 2006). The Kerala High Court agreed, ruling that the ban was 'harsh, unjust and arbitrary' (BBC News Online, 2006).[17] Even the CSE itself regretted that the regulators 'abdicated [their] role' (CSE, 2006a, p. 2). Another commentator notes that 'Coke and Pepsi … are a thousand times less dangerous than the water', and 'less infected by pesticide than Indian rice, milk or vegetables'. Nevertheless, 'one little NGO declares them

unfit for human consumption and there is mass hysteria inspired by people with political rather than health concerns' (Singh, 2006). Indian watchdog group Toxic Links reportedly suggested that the problem of pesticide residue extends far beyond soft drinks, touching all food products and even breast milk. 'But "if you target multinational corporations, you get more publicity"' (Sappenfield, 2006).

Examples of foreign investors seeking to influence government actors are more common. Sometimes such influence is exercised by investors acting within local business groups such as the local Chamber of Commerce and Industry, the Federation of Karnataka Chambers of Commerce and Industry, the Indo-German Chamber of Commerce, or the American Chamber of Commerce; or national bodies such as the Federation of Indian Chambers of Commerce and Industry and the Association of Chambers of Commerce and Industry. Alternatively, an investment actor may prefer to act independently. For example, an interviewee from a software subsidiary reported that his company secured changes in, among other things, the law relating to stock options, and landing rights at the local airport. Another interviewee from a financial services subsidiary reported that it joined with others in the industry to secure the withdrawal of a new tax on the sector, and further that its tax bill was reduced so that it would not fulfil its threat to move to a neighbouring state (Interviews, 2003, FI13 and FI15; see Perry-Kessaris, 2004, pp. 183–4). In another example, the commercial advisor from a European consulate told how a company wanted to establish a factory in an agricultural zone, necessitating a conversion from agricultural to industrial land use. For a time, 'the situation was a quite hopeless', but when the advisor lobbied the relevant bureaucrat on the investor's behalf the problem mentioned 'was solved within two weeks'. In another case the government gave an investor the title to a piece of land, after which it was revealed that a High Court stay existed against building on the land. The problem 'ended when the owner was convinced by the government to drop his case' (Interviews, 2003, FI15 and FG16; see Perry-Kessaris, 2004, p. 183).

Corruption According to a 2005 Transparency International survey of over 14,000 members of the Indian public, corruption among bureaucrats (revenue and local government) and the lower courts ensures that Karnataka is the fourth most corrupt state (TI/CMS, 2005, p. 6). India's private sector generally 'does not profess to a code of ethics' and 'tax evasion and speed money are accepted business practices' (Ace Global, 2000, p. 48; see also Perry-Kessaris, 2004, pp. 185–7). When asked if bureaucratic decision-making is predictable, one investor responded wryly that [y]ou can always bribe your way through to get the decision you expected' (Interview, 2003, FI15).[18] Corrupt regulators and regulatees can manipulate administrative procedures to the detriment of other actors and of stable, productive community-like relations (see Ayres and Braithwaite, 1992, cited in Morgan and Yeung, 2007, pp. 54–9).[19] In Bengaluru, as in Sri Lanka[20] and elsewhere, 'regulated firms have a long history of trying to win favourable treatment from their regulators' (World Bank, 2004a, p. 40). As one civil society actor remarked, India 'is no banana republic, but we are really, really not serious about the conduct of our institutions' (Interview, 2003,

LL/LCS19). An 'element of corruption is built into all transaction costs in India' (Interview, 2003, LL/LCS02).

The independent Central Vigilance Commission (CVC), established in 1964, monitors and advises on the anti-corruption activities of the Government of India, and conducts inquiries either of its own volition, or in response to complaints made by bureaucrats, or by members of the public. Perhaps highlighting the potential downsides of enthusiastic public participation, only four percent of the 11,397 public complaints received by the CVC in 2003 were found to warrant further action. The remainder was rejected as vague, anonymous or beyond the CVC's jurisdiction. A far higher proportion of internally instigated cases were found to warrant further investigation. Public participation was, nevertheless, welcomed by the Commission in 2004 when it was moved to express the hope, in bold type, that bureaucrats, judges, civil society and the general public would 'be able to work harmoniously towards fulfilment of [their] expectations' to improve public 'probity and integrity'. It urged government actors and bureaucrats not to see anti-corruption 'initiatives' as an 'encroachment of their powers' (CVC, 2004, pp. 6, 8 and 29; see also CVC website). Government actors had reportedly ignored or contravened the advice of the Central Vigilance Commission in about five percent of cases in 2003, for example by exonerating an officer proven to be guilty (CVC, 2004, p. 18).

A similar story of government truculence emerges at the state level. The Government of Karnataka deals with corruption among its middle and junior level officials using a *lokayukta* or 'people's watchdog'. The *lokayukta* is reported to have received and acted on 526 complaints under the Prevention of Corruption Act, 1988, and 34,613 under the Lokayuktya Act, 1984, between 2001 and 2005. Justice Venkatachala, Karnataka's *lokayukta* between 2002 and 2006, reportedly 'galvanised the institution' forcing it to 'proactively' implement its powers. To the delight of the media, he took a number of dramatic steps to catch his prey, including entrapping bureaucrats into demanding bribes, and noting the names of medical staff marked present but in fact absent from hospitals during a surprise visit. But while the *lokayukta* can make arrests, the Government of Karnataka must approve prosecutions. Mirroring the experience of the national CVC, it is reported that government approval 'is not always forthcoming'. The Government has reportedly refused to prosecute officials in 36 cases involving the Prevention of Corruption Act, 1988 (Menon, 2005; see also Karnataka Lokayukta website). It seems that there is a role for broad participation, for example by civil society actors, to balance out any defects in the behaviour of government actors at both the state and national levels.

Adjudication

The second type of gateway for participation is adjudication. Like other fundamentally adversarial systems, the Indian courts are predominantly full of actors pursuing individual goals. However, by developing the tool of public

interest litigation the judiciary has introduced a communal element to some of its proceedings.

Public Interest Litigation

As in many other countries, executive power in India has always been checked and balanced with powers of judicial review. The Constitution of India provides that a judicial review of the behaviour of state actors may be launched by writ petition. A wide interpretation of the 'state' under Article 12 of the Constitution has ensured that any government body can be challenged in a judicial review. Although the action must initially be filed against a public body, a private party may be added as a respondent, so both government actors and foreign investors may be the subject of such a petition. Cases in which the behaviour of state actors is alleged to have resulted in a breach of general constitutional rights can be heard in the High Court and cases involving an alleged breach of a fundamental right can be heard directly in the Supreme Court (Articles 226 and 32). Many fundamental rights have been interpreted widely, including the right to life (Article 21), which has been interpreted to include a right to a healthy and pollution-free environment.

In the 1980s, the judiciary relaxed its rules of *locus standi* and began to allow individuals and groups to bring such writ petitions in the public, rather than their individual, interest. By 1981 the Supreme Court was able to report that it was

> …well established that where there is a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in the case of any breach of any fundamental right of such person or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons. (*S.P. Gupta v. Union of India*, 1981, p. 210, para. 17)

Broad participation was further aided by the fact that the courts began to actively reach out to petitioners, accepting petitions even when there was an alternative forum, or where facts remained in dispute, or despite the late or informal filing of petitions. During the proceedings they further assisted petitioners by adopting an inquisitorial role; for example, by arranging for the collection of data to support the petition (Ahuja, 1997a, p. 6). The courts have the power to award compensatory and exemplary damages and, for example, the Supreme Court has caused shockwaves among domestic investors by closing factories which it regarded as unacceptably filthy (*M.C. Mehta v. Kamal Nath*, 1996; see Sawhney, 2003).

In this time of 'heightened legal enthusiasm', civil society actors began 'to use law systematically and continuously to promote the interests of various constituencies' (Galanter and Krishnan, 2003, p. 106). Initially, public interest litigation was used to address civil liberties. Later, cases were also brought in the field of socio-economic rights. Eventually, public interest litigation was being applied to a wide range of problems. For example, public interest litigation has been used to challenge the procedures according to which public hearings for environmental clearances have been conducted. Indeed, the High Court of Gujarat once made an order in which it specified in great detail the nature of the venue, issuing of notices, date, membership of panel and recording of proceedings for the project in questions. Public interest litigation can also be used to challenge projects on the grounds of failure to obtain environmental clearance, or of a breach of the conditions subject to which clearance has been given. For example, the failure to obtain environmental clearances for the extension of Bajpe Airport outside the Karnataka city of Mangalore has been challenged in two public interest litigations (*Arthur J. Pereira and others v. Union of India and Others*, 1997 and 2002; *Environment Support Group and others v. Union of India*, 2003). Government actors had allegedly allowed construction work to begin without obtaining environmental clearance.[21] Although not successful, the cases did elicit a clear instruction from the Supreme Court that 'the Government shall comply with all applicable laws and also with environmental norms' in implementing the project (Kohli and Menon, 2005, pp. 36 and 50–54; ESG, 2003a). In another example, the *Samatha* judgement of 1997, the Supreme Court nullified mining leases affecting tribal areas in the state of Andhra Pradesh and required that local *panchayats* be involved in the negotiation of future leases.[22]

In another case, when tests conducted by the Centre for Science and Environment in 2006 allegedly revealed the presence of pesticide in Coca Cola and PepsiCo products, the Delhi Centre for Public Interest Litigations lodged a petition in the Supreme Court. The Court demanded that ingredients and chemical composition of the products be revealed (*The Hindu*, 2006d; *Times of India*, 2006h). A further example is Somashekar's case against the Bengaluru-Mysore Infrastructure Project (*N. Somashekar and others v. State of Karnataka and others*, 1997; see pp. 80 and 136–7).

From a law-and-community perspective, public interest litigation is a quintessentially communal activity. Indeed, a person's claim to be a public interest petitioner is stronger where he or she has no individual interest in the case (Sathe, 1997, p. xliii). The decision to give citizens 'direct access to the higher judiciary' has been described as 'electrifying' and '[o]ne of the glories of the Indian legal system' (Galanter and Krishnan, 2003, pp. 96 and 106). A senior bureaucrat remarked that 'public interest litigation is always on our minds' and the added transparency provided by right to information legislation means that 'we have to be doubly careful, document everything correctly and get all our facts right to ensure that the danger of a public interest litigation is minimised' (Interview, 2003, LG08). The Indian judiciary has created the only formal gateway – legislative, administrative or judicial – for participation in investment-related activities in which civil society actors may be in the driving seat from the outset. The creation

of public interest litigation has also bolstered the general legitimacy of civil society actors. In addition to facilitating individual instances of social activism, the existence of this gateway prompted the development of an 'informal nexus' among the judiciary, lawyers, social activists and the media. Furthermore, by widening participation and allowing a greater range of 'voice[s]' to be 'heard' in the judicial system, public interest litigation has subjected the very 'terms of legal argument' to challenges from within and outside the judiciary (Ahuja, 1997a, pp. 1 and 5).

Not enough participation? Supporters of public interest litigation argue that its language of rights has been 'the most important weapon wielded by activist lawyers in India' (Khaitan, 2004, p. 15), and has contributed in tangible and positive ways to the lives of some individuals hitherto unaccustomed to seeing their interests as protected by or even aligned with, law. Justice Krishna Iyer has argued that a good deal of public unrest has been channelled into, and so 'constrain[ed]' by, public interest litigation (quoted in Ahuja, 1997a, p. 5).

However, despite being relatively cheap and quick, public interest litigation still requires funds. These can be reclaimed as costs, but only in the event that the petitioner wins the case. Unsurprisingly, Krishnan's study (2003) of 73 social policy groups in Delhi found that richer social policy organisations were more likely (47 per cent) than poorer organizations (10 per cent) to report that they use litigation as a tactic.[23]

It is also significant that certain aspects of public interest litigation are ill-suited to the needs of civil society actors. First, the 'language of social movements is explicitly oriented towards communicative action', often involving the media. But once an issue has been submitted to the courts and thus rendered *sub judice*, the ability of activists to discuss it is constrained by the laws of contempt fired by a judicial reluctance to be treated as a mere staging post. Second, there is a 'tension between the logic of judicial decision-making and movement politics'. Social movements 'do not easily accept finality', and 'courts find the duration and continuity of social movements hard to fit into their adversarial mode of resolving disputes' (Rajagopal, 2005, pp. 352–3 and 385). In Bengaluru, one civil society actor explained that his organisation prefers to use the courts only as a last resort 'because there are so many other mechanisms in participatory decision-making'. He suggested that he and his colleagues 'don't relate' to what he saw as an essentially 'Western' 'strategy … of just putting it all together in a volume and rushing to the courts to get relief'. They found it cheaper, more predictable and altogether preferable to work with the affected community and the investor using administrative processes (Interview, 2003, LL/LCS19).

In the beginning 'it was a very important movement' which 'threw open a lot of things. But it's a little dubious at the moment – I would term it as hit or miss jurisprudence … You pray – literally – the prayers in the brief are not only prayers' and sometimes public interest cases 'really backfire' (Interview, 2003, LL/LCS02). For example, when the Supreme Court upheld the Sadar Sarovar (or Narmada) Dam Project after six torturous years of judicial procedures, allowing 'the drowning of hundreds of … villages for the construction of a big dam', some

argued that it offered a 'legitimating voice' to government excess (Khaitan, 2004, pp. 15–16; *Narmada Bachao Andolan v. Union of India*, 2000). This support, and the 'criticism' of who fought against the dam, 'dealt major blows to the … legitimacy and moral capital' of the campaign (Rajagopal, 2005, p. 374). Finally, some have suggested that those litigations which are successful produce merely 'symbolic results' (Galanter and Krishnan, 2003, p. 107).

It is true that public interest litigation is in many ways inaccessible to the poor and the marginalised, and that it 'relies on the bountiful intervention of high-status actors' and the determination of transitory social groups. The '[j]udicially orchestrated' mechanism has 'proved a flawed vessel for empowering' the truly disadvantaged (Galanter and Krishnan, 2003, p. 199).[24] There is a good deal of room for Indian law to be further 'demystified and informalized' so that 'social alienation from the regime of law' might be reduced (Sathe, 1997, p. xlvi). Nevertheless, it remains a gateway that has been, and will continue to be, meaningful for the civil society actors with whom the present study is concerned.

Civil contempt proceedings

A less dramatic, but nonetheless effective, form of adjudicative participation is civil contempt proceedings. Actors of all types regularly ignore the decisions of Indian courts (Sawhney, 2003; Khaitan, 2004, p. 15). The 'wilful disobedience' of a decision of a court, or 'wilful breach of an undertaking given to a court' constitutes an act of civil contempt, punishable by up to six months in prison and/or a fine of up to Rs 2000 under the Contempt of Courts Act, 1971 (s. 2(b)). The court may take action *suo moto* – on its own motion (s. 14), or contempt proceedings can be initiated by, or with the consent of, the Advocate General of the state concerned or the Union (s. 15). It is a facility that has proved enormously popular with all types of actor.

For example, over the years, government, civil society and foreign investment actors have all used civil contempt actions as a weapon in respect of the Infrastructure Project. In 1999, a government actor, the Gottigere Village *Panchayat*, petitioned the High Court to quash a decision by the Government of Karnataka to reroute the Infrastructure Project through the 500-year-old, ecologically live, Gottigere tank. The High Court found in favour of the *Panchayat*, ordering that the road must pass over the tank. In 2004, investment actors NICE built the road around the tank, in violation of the order. The *Panchayat* responded with a 2005 contempt petition against NICE and the Government of Karnataka. The High Court dismissed the action, on the basis of Government assurances that it would implement the Court's 1999 order. However, the order was not implemented, so the Court began framing contempt charges against the Secretary of Urban Development of Karnataka (Sharma, 2004b; Venkatesan, 2006a; personal communication, 2007).

In 2006, a former Mayor of Mysore filed a contempt petition in the Supreme Court against the State of Karnataka and NICE in respect of their alleged failure to implement the project according to the Framework Agreement, as ordered

by the Supreme Court in Madhuswamy's case (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006; Venkatesan, 2006b). The case continues. In the same month, NICE filed a petition alleging that the decision of the Government of Karnataka to institute a Commission of Inquiry into the Project constituted an act of contempt of the Supreme Court's order in *Somaskekar* and in Madhuswamy's case to complete the project in timely fashion. The company reportedly described the creation of the Commission as a political act and a 'raw abuse of executive power by the State Government aimed at non-implementation of court orders and a delay in project work' (*Deccan Herald*, 2006b; 2006h).

Notes

1 Local chapters of the People's Union for Civil Liberties regularly report on injustices to India's marginal social groups. In one relatively innocuous example, *dalit* villagers in Karnataka breached a social taboo by drinking water from local tanks, and their higher caste neighbours boycotted them, refusing even to pay wages owed. The government and police took little action (PUCL Karnataka, 2006).

2 As compared to Taiwan, Malaysia, Japan, China and Korea (Pistor and Wellons, 1998).

3 The Bhopal disaster provoked the introduction of the Environmental Protection Act of 1986, which in turn underwrote the introduction of environmental clearances in 1994. Clearances are required for 'large' investments (above one billion rupees) in 29 categories of industrial development (such as petroleum refineries, cement, thermal power plants and dyes), and for all investments in particularly sensitive industries such as asbestos and pesticides. Additional procedures apply to investments in designated sensitive areas such as Dahanu in Karnataka (DIPP, 2005, p. 7; see also MoEF website).

4 Forthcoming public hearings in Karnataka, including executive summaries and rapid environmental impact assessments of each project, are listed on the Karnataka Pollution Control Board website.

5 No. FFD 242 FGL 83, Bangalore, 19 May 1987.

6 The Council requested further information from the Bengaluru's Police Commissioner and from the Karnataka State Pollution Control Board in late 2002. The Police Commissioner replied that the matter was still under investigation. The Pollution Control Board did not respond. A further request for information to be provided within four weeks was made in November of 2006. No response has been received at the time of publication (Case number 242/10/2000–2001. NHRC website as at February 2008).

7 The fallout from the rerouting of the Infrastructure Project could be severe. The rerouting is alleged to have occurred before financing for the Project was secured, so that if the new route is deemed unacceptable, the financing of the Project will fall through. Furthermore, there are serious questions as to whether the land through which the Project has been rerouted has actually been supplied by the KIADB to NICE. Finally, it seems that the 1320 families identified by the Revenue Department as project affected persons are not in fact affected at all. The truly affected persons have not been duly notified, which throws the legality of the compulsory acquisitions into doubt (*The Hindu*, 2006g).

8 *Down to Earth* (2005) made similar findings, reporting that the process takes 14 to 19 months with a Rapid EIA and 21–28 months with a Comprehensive EIA.

9 Letters from the MPs can be read on the ESG website.

10 Legislation introduced in 1995 required the creation of a National Environment Tribunal for the award of claims for compensation for personal injury or environmental damage resulting from accidents involving hazardous substances. Under the legislation, claims can be brought by affected individuals, NGOs or government bodies. Like the National Environment Appellate Authority, the Tribunal could offer an improvement on traditional methods of legal protest because it is bound to act according to the flexible principles of natural justice, rather than normal rules of court procedure (Section 5(4) National Environment Tribunal Act, 1995). However, as of 2003, the legislation remained unnotified, so no Tribunal had been constituted. The Law Commission has proposed that both the Tribunal and the Authority be removed and replaced by system of Environment Courts in each state which will have original jurisdiction over environmental issues and appellate jurisdiction over challenges to the decisions of authorities under the various environment acts (Law Commission, 2003, pp. 6 and 141–5).

11 Karnataka is one of only two states to have transferred to *panchayats* the powers and financial responsibility relating to all 29 subjects envisaged when the system was introduced in the 73rd amendment to the Constitution of India in 1992.

12 Under the decentralisation amendments to the Constitution (Article 243ZE, Constitution of India), a Metropolitan Planning Committee should have been introduced to coordinate between the development plans of the various local government bodies affecting Bengaluru. However, this has not happened (CIVIC website).

13 The Authority has not yet changed its name to reflect the city's transformation to Bengaluru.

14 The Policy also commends civil law over criminal law on the grounds that the former is more flexible and has a lower evidentiary burden, while the latter is 'rarely fruitful' and promotes corruption. A 'judicious mix' is planned, with civil law to 'govern most situations of non-compliance' and criminal law reserved for 'serious' infringements (MoEF, 2005, p. 14). Galanter and Krishnan agree that tort law is preferable to state regulation because it is essentially self-propelling and 'does not depend on continuing inputs from government or external actors' (2003, p. 122). From a law-and-community perspective, developments in tort law might be a welcome gateway to civil society participation. But it ought not to be at the expense of state regulation, for tripartite, broad participation is essential to stable, trusting and productive investor-government-civil society relations. For an analysis of criminal and civil gateways to environmental justice see Perry and Anderson (1996) and Perry (1998, 2000c).

15 For example, only 5 per cent of the 807 Bengaluru households surveyed in 1993 were 'satisfied' or 'very satisfied' with the Mahanagara Palike, but by 2003, 73 per cent of the over 1,700 respondents were satisfied or very satisfied. Similar improvements were found for the Development Authority, with a satisfaction rating of 1 per cent in 1994 rising to 85 per cent in 2003 (Public Affairs Centre, 2003, p. 4)

16 The literature of political economy is prodigious. For influential economic accounts of how the content of law is decided, see Mueller (2006) on public choice, and Dixit (2000) for a transaction costs analysis.

17 The ban was also overturned on the grounds that the Constitution assigns the jurisdiction to impose a ban on food products to the Government of India, not the

states. The government was reported to be planning an appeal (BBC News Online, 2006).

18 However, the head of a law firm specialising in assisting foreign investors commented that reports of corruption in India are an 'exaggerated version of the truth … They don't have to do it' (Interview, 2003, LL10).

19 For example, a study by Pargal et al. (1997) of 250 factories in eight Indian states revealed no correlation between level of inspections per district and levels of pollution, indicating 'severe problems in the working of the formal regulatory system'. There was, however, a positive correlation between the wealth of the district in which the factory was located and the likelihood that it would be inspected, probably because they offered richer pickings in the form of bribes (Pargal et al., 1997, pp. 12 and 15).

20 In Sri Lanka, a substantial minority of foreign investors were found to be indifferent to, or even in favour of, broad bureaucratic discretion (Perry, 2001, pp. 63–4 and 2000, pp. 1644–5).

21 The planned extension runs 'along a cliff, with a drop of about 100 metres on three sides' and so would allegedly not pass the standards set by the International Civil Aviation Authority. It is alleged that the more appropriate option of a northwards extension was discarded because it would involve the acquisition of land belonging to 70 rich landholders. Instead, 208 families of *dalit* origin have been displaced, and are now living in a school (ESG, 2003a).

22 'Under pressure from multinational corporations and Indian industry, the Union government has been seeking avenues to circumvent the judgment'. However, civil society actors 'have succeeded so far in blocking the legislation from entering the national legislature' (Randeria, 2003, p. 314).

23 I have derived these figures by taking an average of Krishnan's 'High' and 'Medium' resourced groups as 'Richer' and an average of Krishnan's 'Low' and 'Bottom'-resourced groups as 'Poorer'.

24 Galanter and Krishnan (2003) report that prominent judges concerned with social welfare have begun to encourage the use of less formal *lok adalats* over public interest litigation (p. 108).

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Chapter 6

Spaces for Coordination

The third method by which a host state legal system might contribute to stable, productive community-like relations is by coordinating among the values and interests of multiple actors. This chapter explores the spaces for coordination in administrative and adjudicative processes in Bengaluru.

Administration

Indian administrative processes hold a number of spaces for coordination. However, these spaces are being eroded as a consequence of the commitment to economic liberalisation. As the Indian Minister of Finance, Shri. P. Chidabaram, is reported to have said, the Government of India is 'willing to tolerate debate and perhaps even dissent, as long as it does not come in the way of eight percent growth' (quoted in Saldanha et al., 2007, p. 6). Thick meta-regulating investment climate discourse is ensuring that the predilection for economic values and interests is becoming automatic, taken-for-granted. First, acts of coordination which go against investors are often perceived as threats to the investment climate. Of course, as one local commentator argued in an interview, it is 'nonsense' to suggest 'that if you renege' on a specific project, then 'you are reneging on foreign investment' (Interview, 2003, LC17). Nonetheless, the Government of Maharastra's withdrawal from Enron's Dabhol power project drew grave predictions of foreign investor flight (see Mehta, 2001). Similarly, when several states including Karnataka imposed partial or total bans on Coca Cola and Pepsi products in response to the pesticide scandal, business organisations such as the Federation of Indian Chambers of Commerce and Industry reportedly described the bans as 'arbitrary', and warned that they might affect the Indian investment climate. Similarly, a senior opposition politician criticised the Government of Karnataka's decision to challenge judicial support for the Infrastructure Project as indicating to the world that they were not 'investor-friendly' (*The Hindu*, 2006a and e).

The following sections trace the meta-regulating effects of investment climate discourse through to the continual reduction of bureaucratic discretion, and to the increasing pressure for competitive forces to influence administrative decision-making. Both trends have resulted in a narrowing of spaces for coordination.

Bypassing bureaucratic discretion

The ability to exercise discretion is a defining feature of the bureaucratic existence in India and elsewhere. Viewed from a law-and-community perspective, bureaucratic discretion is a space in which multiple interests and values might be coordinated. As one Bengaluru civil society actor observed, an element of bureaucratic discretion is necessary to governance, 'especially where there are conflicting interests' which need to be balanced (Interview, 2003, LCS04). For example, civil society actors have criticised bureaucrats for regarding the process whereby environmental clearances are awarded to investment as 'mere routine' (*Down to Earth*, 2005), implying that they ought to be more morally engaged in the process.[1] A foreign investor observed that, although bureaucratic decision-making can be frustrating, 'in the quiet of the evening you understand that there has to be a certain due process' (Interview, 2003, FI13). A recent internal review of the Indian Administrative Service (IAS) induction curriculum remarked that bureaucrats should be offered 'a balance between topics relating to revenue and regulatory administration, and of social and human development'. For example, they ought to cover issues such as how public participation may enhance service provision, and the role of self-help groups as 'vehicles for empowerment and development' (Ministry of Personnel, Grievances and Pensions, 2007, p. XX). Such exposure 'will certainly increase awareness among young IAS officers', especially post-Govindarajan, there is 'grave doubt' as to whether bureaucrats have the necessary 'administrative space … to bring to happy fruition' what they have learned (Rajan, 2007, p. 3288).

Liberal economic theory tends to disapprove of bureaucratic discretion. It argues that discretion is associated with a range of inefficient outcomes, such as delays, uncertainty and corruption. Investment climate discourse accordingly presents the need to reduce bureaucratic discretion as axiomatic (Perry, 2001, pp. 63–4; 2000, pp. 1644–5). In early post-Independence India, the impact of any apparently liberal, market-allocative laws was dampened by the highly discretionary manner in which they were implemented by bureaucrats. Since liberalisation began in 1991, discretionary procedures have, slowly but steadily, been replaced with rule-based procedures (Pistor and Wellons, 1998, pp. 81–3). The shift gained momentum in tandem with the dissemination of investment climate discourse through the reports of the Govindarajan Committee.

Reviewing progress in 2002, the Govindarajan Committee found that investors were still forced to endure a maze of overlapping institutions, rules and procedures before and after initial approval of the investment.[2] In keeping with the rule-based, market-allocative meta-regulation agenda, the Govindarajan Committee recommended a 're-engineering' of the approvals process, to introduce the lightest possible regulatory touch (Govindarajan Committee, 2002a, pp. 3–6; 2002b, pp. 2, 4, 23–4 and 43).

When bureaucrats are forced to 'follow the law absolutely', they are no longer 'allowed to use [their] common sense' (Interview, 2003, LA06), or to think creatively about how to coordinate among competing interests. In the following subsections, the impact of the Govindarajan Committee's mission to reduce

discretion is traced through both the National Environmental Policy of 2005, and amendments to the environmental clearance process in 2006.

National Environmental Policy of 2005 The 2005 National Environmental Policy produced by the Ministry of Environment and Forests (MoEF) may state that the legislative framework will be 'revisited' rather than 're-engineered', but the pervasive influence of the Govindarajan Committee in this and other contemporaneous environmental reforms is made explicit.[3]

The Policy makes some overtures towards the need to coordinate among multiple interests and values. For example, it states that the quality and productivity of land should be taken into account when considering whether to give environmental clearances, and that environmental appraisals should be compulsory in respect of projects involving 'large-scale diversion of prime agricultural land'.[4] But it also suggests that conservation ought to be substantively efficient and that environmental resources should 'be given economic value', which will 'count equally with the economic values of other goods and services' when 'alternative courses of action' are being analysed (MoEF, 2005, pp. 8 and 14). Here the rule-of-economics works towards the subservience, or even integration of, environmental interests with economic interests. The coordination of divergent interests cannot be achieved simply by their inclusion in a list of criteria – as a variable in some economic formula. It must be ongoing and case specific. It is to some extent dependant on widespread participation by actors, through which their interest and values can be identified.

There is also a commitment in the Policy to follow the Govindarajan Committee's recommendations to review legislation for procedural efficiency – to 'reduce delays and levels of decision-making, realize decentralization of environmental functions, and ensure greater transparency and predictability' (MoEF, 2005, p. 13). These recommendations include that, with respect to environmental and forestry clearances, if the requisite site visits by MoEF officials do not occur within a specified time limit, 'it may be deemed that such visits are not required'. Similarly, where members of the MoEF's Expert Committee fail to respond to an application within a specified time limit 'it may be presumed that they have no comments to offer' so that the clearance process might move on to the next stage (quoted in Saldanha et al., 2007, p. 7). There is no doubt that discretion was the cause of a good deal of inefficiency in India, so '[t]he need to ensure that investments are not unnecessarily bogged down by bureaucratic red-tap[e] is well appreciated'. However, efficiency considerations do not by themselves justify the privileging of economic over other interests and values, such as those enshrined in Indian environmental law (Saldanha et al., 2007, p. 7).

Environmental clearances The central purpose of the environmental clearance process is coordination: to highlight the 'potential impacts (beneficial and adverse) of a project', whether 'environmental, social, cultural or aesthetic …', in order to inform decisions to award clearances, and if so, with what conditions. In their in-depth review of the first decade of the clearance process, Kohli and Menon (2005) observe that the clearance process has generally been 'under-used, misinterpreted

or ignored'. Productive 'convergence' of attention has, they argue, occurred in 'a few cases', and then only 'partially' (p. 8). Furthermore, the scope and depth of the environmental clearance process have been significantly eroded by a series of amendments. Most recently, and in direct response the Govindarajan Committee Reports, the MoEF radically transformed the 1994 Environmental Clearance Notification in 2006.

The primary consideration in reforming the environmental clearance process in this way has been efficiency: 'not to hold investment up' (Kohli and Menon, 2005, p. 10). Speed may well be a priority for investment actors in some cases. For instance, an official from one European consulate in Bengaluru told how then Chief Minister of Karnataka Krishnan had held an annual week-long 'global summit' for investors during which he 'guaranteed that all permissions would be given in 10 days …. I was deeply impressed' (Interview, 2003, FG03). A UK-based solicitor specialising in large-scale foreign investment to India remarked that the country was rightly 'proud that it can implement projects faster than the US' taking just a year 'from coming up with the idea of a major project to construction …. That is all a very good process' (Interview, 2005, FL/LL30). But reform has also 'negate[d] some of the critical checks' that had been developed since 1994 'through dialogue between civil society' and government actors (Kohli and Menon, 2005, p. 10). A central target of the 2006 reforms is for final environmental clearance to be issued to projects within a year of application. Environmental activists argue that 'this makes a mockery' of the process given that the scientific procedures that underpin such Assessments tend to take at least a year to complete (ESG, 2005b).

It seems likely that the emphasis on speed at the beginning of the investment process will undermine efficiency in the medium to long-run. A UK-based solicitor observed that public hearings in India 'can be useful' and gave the example of a power project hearing in which some 'important' environmental considerations were raised and taken into account. Two other UK-based solicitors agreed that hearings are useful, but because once concerns have been aired and solutions proposed, investors have a degree of certainty, at least in respect of environmental issues (Interviews, 2005, FL/LL28, FL29 and FL/LL30). However, certainty depends in part upon the effectiveness of coordination. In the presence of multiple competing interests and values, investment actors would do well to value coordination. As the Infrastructure Project saga suggests, when effective public hearings do not occur or are defective, uncoordinated concerns are simply stored up for future deployment.

Karnataka's investment approvals process The Industries (Facilitation) Act, 2002, which implements many of the Govindarajan Committee findings in Karnataka, creates three levels of Clearance Committee, each dealing with projects of different value, to a strict timetable.[5] For example, members of the High Level Committee have 15 days to comment on Committee decisions, after which time the Commerce and Industries Department has 15 days to sanction any assistance or incentives, and other Departments then have 30 days make any necessary orders (Facilitation Rules, 2004, No. 3). Failure by any Clearance Committee, Authority

or Department to act within the requisite time frame results in the decision or clearance being deemed to have been confirmed or awarded.

Second, a Combined Application Form is introduced for additional licences to be obtained after a project is given initial approval (environment,[6] company, explosives, imports, land acquisition, planning, fire, electricity, water supply, tax and trade unions). This form must be accepted by departments and authorities (s. 14, Industries (Facilitation) Act, 2002, Rule 7, Industries (Facilitation) Rules, 2004). However, it is not clear which forms are replaced by the common application and, as of 2006, some old forms were still in use (Dasgupta, 2006, p. 14).[7]

Third, Clearance Committees have 'final authority in granting approvals for projects', and their decisions are declared to be 'binding on all concerned departments or authorities' (ss. 3–8 and 17, Industries (Facilitation) Act, 2002 and Rules 4–6, Industries (Facilitation) Rules, 2004). Once a project has been approved by a Clearance Committee, bureaucrats in government departments and parastatals are bound to issue whatever no-objection certificates, approvals, licences and so on that are required by the 'applicable acts' in order to 'set up an industrial undertaking in the State'.[8] So, the Committees have the power to force departments and authorities to make decisions, and the process of issuing licences gathers a good deal of momentum as a result. It remains to be seen whether bureaucrats are 'irritat[ed] about the transfers of power' (Interview, 2003, LG18). Departments and parastatals retain the power to determine whether the proposed investment complies with legislation, and what kinds of conditions, if any, to impose on the award of a licence. And clearances remain subject to 'compliance by the entrepreneur with the provisions of the applicable Central or State Acts and the rules made there under' (ss. 2(iii) and 3–5, Industries (Facilitation) Act, 2002). But by imposing presumptions and deadlines, the Act puts pressure on such bureaucratic discretion – space for coordination – as remains.

To what avail? Post-Govindarajan reforms appear to have had a limited impact upon bureaucratic performance in Karnataka or India as a whole (Dasgupta, 2006, p. 14). In Bengaluru, most interviewees in 2003 were entirely unaware of the Industries (Facilitation) Act, 2002, or of the Karnataka Udyog Mitra (KUM), the so-called 'friend of the investor' and secretariat to the Clearance Committees, which was established under the Act. For example, one adviser to European investors gave me a copy of the newspaper advert which had alerted her to the existence of the KUM for the first time. Later that week, another such adviser took down the contact details from my copy of the same advert. Some months later, his secretary contacted me in the UK to ask for those details again. This lack of awareness may be because the Act only relates to the roughly 10 per cent of investments that are associated with creating a new investment site, for it is only these which need this type of permission.[9] But it does not bode well.

Some investors and their advisers referred to the institution in derisive terms – as 'a window to other windows', or a 'window with no one behind it'. One observed that investors imagine that the KUM is 'only one chap who will give the green light and then we can move on'. In fact, 'he is a postman … although at least you know which head to hit if you have a problem' (Interview, 2003, FG16).

A large investor defended the KUM on the grounds that at least 'you don't have to run to 25 different agencies to get clearances'.[10] But he allowed that 'if you want things very fast, then you should go yourself and sit in this office until the person comes', and that this was ironic, considering that speed is the very purpose of the agency (Interview, 2003, FI15).

Of the nine Indian states covered in the 2005 World Bank Doing Business Survey, Karnataka scored the best on the aggregate Ease of Doing Business Index and the state ranks in the top third for all but one indicator (World Bank, 2005b, p. 19; see Table A4, Appendix).[11] The competition was hardly sprightly. For instance, it took 57 days to start a business in Karnataka and Punjab, but a month longer in Maharastra. Similarly it takes 35 days to register property in Karnataka as compared to 123 days in Orissa and 142 days in Punjab; and '"only" 8 years and 4 months' to close a business in Karnataka, as compared to an astronomical 20 years in West Bengal. So, although India was 'among the top 10 reformers' of investment climates covered by the World Bank's Doing Business Survey in 2003, it remained, one of the 20 percent of countries in the world 'where it is most difficult to do business'.[12] Indian bureaucrats preside over the 'worst' record in South Asia, with respect to, among other things, the time it takes to start a business (89 days), close a business (10 years), and register property (67 days) (World Bank, 2005b, pp. 11–12, 16 and 19).

Crucially, these unimpressive outcomes do not seem to matter much to investment actors. World Bank economist Paramita Dasgupta identified in 2006 that both the Bank's Investment Climate Assessment of Karnataka and survey results from the Public Affairs Centre 'suggest that corruption and business regulation are the key constraints faced by industry/business in Karnataka'. But, she asked, 'how binding are these constraints' in reality? Investors are undeterred by the fact that reform initiatives of the last five years have had 'limited' impact: 'investment continues to boom in Karnataka' with more than US$1 billion of investments approved in the last three quarters of 2005; and project implementation is up from about 24 per cent of proposed projects in 2000 to about 42 per cent in 2005 (Dasgupta, 2006, p. 18).[13]

One explanation for this conundrum is that investors are not actually very concerned about the legal system. This was my conclusion following a 2000 study of Sri Lanka in which less than half of foreign investors responding to a postal survey had made any pre-investment investigation of the legal system (Perry, 2000a, 2000b and 2001).[14] Interviews conducted in Bengaluru in 2003 reinforced the finding that the legal system is not of overwhelming importance for investors in deciding where to invest,[15] so while they might make a pre-investment investigation, it will not be the main criterion on which the decision is based. Similarly, the World Bank's own 2004 Investment Climate Assessment of India reveals, albeit in a footnote, that 70 per cent of firms responding to their survey had not made any pre-investment investigation whatsoever of the investment climate. Nevertheless, the Assessment repeatedly asserts that investors take account of legal systems in determining where to locate their investments (World Bank, 2004b, pp. 5 and 26; see Perry-Kessaris, 2008c).

Alternatively, it may be that investors do not in fact favour legal systems with the limited bureaucratic discretion and low corruption eulogised in investment climate discourse. This possibility is supported by a range of sources. One interviewee remarked that the notion that foreign investors do not like bureaucratic discretion 'is idealism–like asking for world peace' because discretion is 'both a challenge and an opportunity'. The proper response, he argued, is to 'first identify what the discretion is' and then 'get it exercised in your favour' (Interview, 2003, FG03; see further Perry-Kessaris, 2004, pp. 181–3). For example, Paul Davies, former managing director of Bengaluru-based multinational Infosys, claims that 'local knowledge' was essential when he helped a British company to invest in India: before his intervention, 'the organization had received a pretty flat rejection by the Reserve Bank of India' (Davies, 2004, p. 214). In another example, it seems that a negative experience of the regulatory aspects of the Indian legal system has not dampened the enthusiasm of Infrastructure Project investor NICE, for investing in India.[16] Once again, the 2004 Investment Climate Assessment can be called upon to undermine investment climate discourse. It reports that Indian states ranked by investors as relatively 'better' investment climates tended to have what the Bank would consider to be relatively *poor* legal systems: that is, high levels of inspection visits, management time involved in complying with regulations, corruption and costs of regulation. The Assessment concluded that investors ranked these states as 'better' investment climates solely on the basis of their physical infrastructure. Yet the executive summary still insists on the general importance of the investment climate as a whole, including the legal system. Nowhere does the report reflect upon whether investors might be attracted to these states *because* they have 'poor' legal systems (World Bank, 2004b, p. 31; Perry-Kessaris, 2008c).

Investment climate discourse glosses over such contrary possibilities. For example, as 'evidence' that 'regulatory unpredictability is a big concern for firms' the 2005 World Development Report adduces the proportion of respondent firms reporting that the interpretation of regulations *is* unpredictable (Word Bank, 2004a, p. 23, Figure 1.3). This leap of logic, from investors stating that X *is the case*, to the conclusion that investors find X to be *of concern*, is typical of the investment climate approach, and its rather idealised vision of foreign investors. Similarly, the World Bank Enterprise Survey of 2002 asked investors whether bureaucratic 'interpretations of regulations affecting [their] establishment are consistent and predictable'.[17] But consistency is not the only way of achieving predictability. Indeed, predictability can be achieved precisely because an investor plays a part in provoking an inconsistency.[18] Investment Climate Assessments in particular have been shown to be 'in a hurry to prove certain preconceived' ideas which 'do not follow from the data set assembled' (Harilal and Babu, 2002; see also Perry-Kessaris 2003 and forthcoming 2008c).

The upshot of this methodological intrigue is that it remains unclear under what circumstances legal systems are a determinant of investment flows, and if so, what kind of legal systems are attractive to investors. This means that investment climate discourse is misleading to those who wish to identify and promote the interests of foreign investors. Investment climate data sets have become somewhat

opaque and investment climate discourse has become ever-more entrenched, taken-for-granted, so it is becoming increasingly difficult to untangle truth from aspiration (see Perry-Kessaris, forthcoming 2008c). To the extent that investors are not in fact put off by features such as bureaucratic discretion, are not the sacrifices of space for coordination, and the associated frustration of the interests of others, in vain?

Decentralisation and competition

India's economic liberalisation has been associated with a political transformation from 'cooperative federalism' towards 'federalism without a centre' in which states now compete with each other, and with the Union, over foreign investment flows and other resources (Saez, 2002, pp. 135 et seq.).

'Just as competition is good within the market so too competition within and among state agencies is, in the neoliberal pantheon, something to be encouraged' (Sarat and Scheingold, 2007, pp. 6–7). The World Bank recommends that foreign investment approvals processes be decentralized both so that policies can be tailored to local areas and so that inter-state competition might unleash 'policy innovation' (World Bank, 2004a, p. 53). Ever concurring, the Govindarajan Committee argued that states must be 'incentivise[d]' to rationalise their investment procedures (Govindarajan Committee, 2002b, pp. 35–6). But at what cost? An emphasis on competition draws attention towards how to win the game, away from debates over why it is being played – away from, among other things, the coordination of multiple values and interests. The negative impact of competition on the communal mechanism of administrative coordination is illustrated below using the examples of investment climate benchmarking and environmental clearances.

Investment climate benchmarking The Bank's national and subnational benchmarking of legal systems is deliberately intended to harness the power of such inter-state competition in the service of the investment climate (see Mengistae, 2003). 'In certain regulatory areas – especially starting a business, registering property and enforcing contracts', the sub-national differences in 'ease of doing business' in India 'are significant' (World Bank, 2005b, p. 19). There is no doubt that inter-state competition energises government actors. 'There is a race between the state governments to attract private investment, including foreign investment' and 'canny' Chief Ministers 'go out of their way to woo the foreign investors, making presentations to impress' (Interview, 2003, LC20). For instance, when multinational Dupont's foray into Goa came to an abrupt end following a series of civil society and government-orchestrated setbacks, the company was 'courted by a total of eight states eager to attract [its] investment' and eventually re-located to the State of Tamil Nadu (Dupont India Community Projects website; CENEAR, 1998).

But competition also triggers some decidedly unproductive behaviours which work against coordination. A former World Bank Country Director for India explained that the benchmarking of investment climate data made competitive

politicians jump. 'I wouldn't want to overstate' its importance, he said, 'I don't think … state level politicians lie awake for very many nights worrying if we find their state is lousy'. However, the publication of data showing 'trends and state comparisons', and sealed with the World Bank brand name 'does create a bit of a stir'. For example, in 2004 when the Chief Minister of the State of Uttar Pradesh demanded an emergency Sunday morning meeting at the Country Director's home in order to voice his concerns about the investment climate indicators released for his state (Interview, 2006). In Karnataka, the publication of investment climate data resulted in a public tiff between two former Chief Ministers of Karnataka. The publication of Karnataka-specific statistics in the Investment Climate Assessment of 2004 and the Doing Business Report of 2005 was reported as follows in the English language press:

> Karnataka has got some bouquets for its friendly investment climate but has to shake off the labels of corruption, regulation, and poor infrastructure as listed by a large number of constrained investors … Although it fares better than most other States, Karnataka needs to polish up its performance to meet international benchmarks, according to the findings…. (*The Hindu Businessline*, 2005)

Using the Bank's Doing Business and Investment findings as ammunition, Deve Gowda accused Krishna of being responsible for making Karnataka 'the most corrupt state in India in 2004'. Krishna demanded 'clarifications on the Report' from the Bank. The Bank's Country Director explained that the Karnataka figures had been misrepresented. They were, he said, based on firm's perceptions, rather than objective measures and as such they could indicate many things, including that businesses in the State had relatively high expectations of it (*Times of India*, 2005b).[19]

Environmental clearances A second illustration of dangers which attend inter-state competition can be found in the much reviled, little debated MoEF Notification on Environmental Impact Assessments of 2006, which has substantially decentralised the environmental clearance process. Under the new regime, projects of a type 'likely to have a higher impact on the environment or to have impact on more than one state or neighbouring country' are cleared, or not, by the Indian Ministry of Environment and Forests on the recommendations of a new Expert Appraisal Committee. Labelled 'Category A', these projects are identified according to their sector and include, for example, nuclear power and asbestos projects. All other projects are 'Category B', to be dealt with at the state level by the newly created State Environment Impact Assessment Authorities.[20] The clearance process has also been significantly watered down in respect of Category B projects. These are sub-divided into Category B1 and B2, with the latter requiring no public hearing or environmental impact assessment at all. Projects are to be categorised as A or B on the basis of preliminary information before an environmental impact assessment has been conducted. Category B projects are 'assumed' to 'have lower impacts' on the basis of their sector, and irrespective of their location (Kohli and Menon, 2005, p. 58; see also MoEF, 2004).

To pass further responsibility for environmental clearances to the states in this way is a potentially dangerous move, not only because no provision has been made in the 2006 Notification for ensuring that are equipped to deal with their new responsibilities (ESG, 2006c), but also because they are subject to the pressure of competitive federalism. Some fear that competition will provoke a 'dystopian' race-to-the-bottom of environmental standards (Interview, 2003, LL/LCS02). The federal environmental law regime assures that the 'bottom' cannot, on paper, be set below national standards. But there is certainly scope for such a race in respect of their implementation. State Pollution Control Boards have long been viewed as the weakest link in India's environmental protection chain. The Economist Intelligence Unit reported in 2004 that state governments were pressurising state Boards 'to clear new projects quickly' and consequently the Union Ministry of Environment and Forests 'is often the only body to apply environmental rules' (EUI, 2004, p. 25). Similarly it has been reported that Chief Ministers of several states viewed delays in this centrally-administered clearance process as an obstacle to valuable investment, and put pressure on the Ministry to address the problem (Sharma, 2004a).

Adjudication

Since the introduction of public interest litigation in the 1980s, the Indian judiciary has transformed itself into something beyond a collection of 'mere dispute settling institutions'. It has become a significant 'instrument of public advocacy of human rights', of 'due process' and of 'public accountability' (Sathe, 1997, p. xxxviii). From a law-and-community perspective, the courts have ever more explicitly taken on the communal function of coordination. 'The interests involved' in writ petition cases 'tend to transcend far beyond the litigating parties' (Sathe, 1997, p. xliii). In these cases the courts are primarily concerned with coordinating not among the values and interests of individuals, as in traditional litigation, but among the values and interests of multiple networks of relations of community – traditional, affective, instrumental and belief. Public interest litigation is an imperfect tool. While India's judiciary can not be expected to 'solve all technical, economic social and other questions', it has the capacity 'to provide more transparency and more responsibility' among state actors and thereby to 'encourage trust in the democratic state' (Dembowski, 1999; see also Dembowski, 2001). The task of this section is to establish whether public interest litigation is a viable mechanism, albeit flawed and controversial, for coordinating multiple interests and values that are brought into conflict in the context of investor-government-civil society relations. As the following sections explain, impediments to coordination arise from both within and outside the judiciary.

Bypassing courts

The first potential constraint on the ability of the courts to act as a communal resource for coordination is the fact that investment climate discourse places

a premium on judicial, as well as bureaucratic, efficiency. It tends to associate efficiency with speed, and to leave little space for valuing coordination. The World Bank reported, for example, that Karnataka was ranked third out of nine Indian states with respect to the time (709 days) and costs (17.4 per cent of debt) of judicial contract enforcement in 2005 (2005b, pp. 34–7; see Table A2, Appendix);[21] that India has the second worst figures for delays within the South Asia region;[22] and that the Indian judiciary is generally more elaborate, slower, and more costly than those of China and the US (see Table A1, Appendix).

Relying on World Bank-sponsored benchmarking data, the Govindarajan Committee (2002b) observed that many investors 'identified time-consuming legal processes and delays in settlement of legal disputes as an impediment to implementation of their projects'. Remarkably, the Committee made no further reference to the courts. Instead, it suggested that more attention be paid to arbitration (pp. 40–41).

Arbitration has been available to domestic and foreign investors in India since 1940, but its role as an alternative to the Indian judicial system was dramatically enhanced during the process of economic liberalisation by the introduction of the Arbitration and Conciliation Act, 1996. At first glance investment actors appear to agree with the Committee that arbitration is preferable to the courts. One adviser to investors has argued that 'it is absolutely vital' that contracts with Indian companies be governed by the foreign investor's home state law and jurisdiction (Davies, 2004, p. 160). Interviewees suggested that investors opt for foreign dispute resolution – whether by courts or arbitration – for all contracts except for minor issues such as leases; and that government actors who are keen to attract a particular investor may well agree to an investment actor's request for a clause in favour of foreign arbitration (Interviews, 2003, LL/LCS01, LC17 and LG18).[23] However, the evidence suggests that arbitration is not in fact in regular use among investment actors operating in India. Statistics on the use of arbitration are hard to come by but certainly the rate of international arbitrations arranged through Indian institutions is very low. For example, the Govindarajan Committee noted that the International Centre for Alternative Dispute Resolution,[24] whose function is to appoint arbitrators and monitor proceedings with a view to encouraging their speedy conclusion, has not been a success. It has received an average of just two or three cases every month since it opened in 1995.[25] The Committee proposed that the low rate of arbitration 'suggests limited knowledge and awareness about this mechanism' (Govindarajan Committee, 2002b, p. 41).

An alternative explanation is that arbitration offers an incomplete and in many ways unsatisfactory escape from the Indian courts. Domestic and international arbitral awards are enforceable in the Indian courts and are protected from judicial modification (Kwatra, 1996, p. 51; Arbitration and Conciliation Act, 1996, ss. 36 and 44–60).[26] However, the courts are still empowered to set aside awards on grounds such as jurisdiction, procedural impropriety or violation of public policy (s. 34(2)). This 'opportunity … has been much availed of' by the courts, causing the Supreme Court to remark that the way in which arbitrations are 'without exception challenged in Courts … has made lawyers laugh and legal philosophers weep' (Galanter and Krishana, 2003, p. 103. Quoting *Guru Nanak Foundation v.*

M/s Rattan Singh and Sons, 1981).[27] Furthermore, Indian arbitrations are subject to the same delays as the courts (Galanter and Krishnan, 2003, p. 103), in large part because the 1996 Act protects arbitrators from judicial interference, but without setting deadlines for the completion of proceedings.[28]

From a law-and-community perspective, it is significant that the Committee's emphasis on arbitration disregarded the fact that it has caused controversy for many years precisely because it bypasses national mechanisms. The Ministry of Law and Justice (undated) has noted that a 'drafting … mistake' in section 20 of the Arbitration and Conciliation Act, 1996, 'gives an impression that in the case of a purely domestic arbitration between Indian national/companies, the arbitration can be outside India' and that 'some companies incorporated in India' had been 'taking undue advantage' of the 'mistake' by stipulating London arbitrations 'even though the subject matter of contract or its performance is in India and there is no foreign element'. It also notes a similar 'mistake' in the wording of section 28 which 'has given an impression' that foreign law may be applied to resolve purely domestic arbitrations occurring in India (pp. 5–7).[29] The effect is to allow Indian actors to 'completely short circuit Indian law' (Interview, 2003, LL/LCS01).[30] Amendments to resolve these 'problems' were put before Parliament in the form of the Arbitration and Conciliation (Amendment) Bill, 2003.[31] However, the Bill was withdrawn.

Particular concern has been expressed at the willingness of government actors to agree to international arbitration. The 2003 Bill proposed that offshore arbitration is 'inconsistent with the sovereignty of the laws' of India, especially where a government party is involved (Statement of Objects). Other commentators argue that government actors should 'never enter into a contract where the jurisdiction is a court outside your country. If foreign investors insist, have the courage to say no to them. If you don't trust my system, why should you do business with me?' But, as one lawyer observed, when the 1996 Act was introduced, 'no one was debating this – the decision makers just wanted to know what laws do [investors] want and they would provide it. They were sending bureaucrats abroad to train them in that thinking' and recommending that arbitration clauses be used in domestic and international trade (Interviews, 2003, LC17 and LL/LCS01; see also Kwatra, 1996, p. 77). Government actors also seem to be developing a scepticism of offshore dispute settlement. So, for example, in 2006 the Reddy Committee, set up to re-examine the Infrastructure Project after a change of government in Karnataka, recommended that the Infrastructure Project Framework Agreement ought to be amended to require arbitration in Bengaluru rather than London. It was felt that London had been a suitable location when the Memorandum of Understanding was signed with a foreign consortium, but it should have been changed when the Framework Agreement was signed with NICE, which was by then an Indian-incorporated company, albeit one with foreign investment (Sharma, 2006). One reason is that the costs of international arbitration are 'quite startling when compared to cost of legal proceedings in developing countries'.[32]

In dismissing the judicial system, and recommending that investors simply be awarded safe passage out of it through arbitration, the Govindarajan Committee

forgot that investors may be involved in non-commercial litigation, such as that brought in the public interest, from which they do not have the option of escape. So, even if one cared solely about investors, the courts require more attention than that. Whatever the future holds in terms of the attitudes of government actors to arbitration, it is unlikely that arbitration poses a significant threat to the ability of the Indian judiciary to act as a communal resource. It does not affect the ability of members of the public to bring public interest litigations involving investment actors.

Communal space, individual interests

The second source of constraints on the ability of the courts to offer an effective space for coordination is the incompetent, exploitative and abusive behaviour of some actors.

Stalling The extent of delays plaguing the Indian legal system has been noted. Those 'who benefit from delay and the status quo' will tend to be drawn to, and bed down in, the courts. Delays are attractive, for example, to those who have 'weak cases' (Galanter and Krishnan, 2003, p. 101) or who wish to stall 'remedial action' (Sawhney, 2003).[33] Similarly, a number of interviewees from all sectors also suggested that court delays can sometimes be a blessing to civil society actors, allowing them to delay an unwelcome project; and Galanter and Krishnan allege that government actors and bureaucrats practice 'scorched earth litigation' – 'pursu[ing] cases simply for delay, engaging in relentless appeals even when the chance of winning is remote' (2003, p. 101). As a powerful tool for challenging state actors, public interest litigation must not be allowed to decay into the quagmire of delay and frustration that plagues the rest of the Indian judicial process (Sathe, 1997, pp. xliv–xlv).

Windfall Because public interest litigation is an accessible way to raise the profile of an issue, it has engaged in respect of issues which 'could, and should, be addressed to other agencies' (Ahuja, 1997a, p. 11).

Furthermore, it is sometimes possible to turn the institutions resulting from public interest litigation to the private advantage. For example, the Central Empowered Committee, established in connection with the *Godavaram* case to monitor the protection of forests, seems to be of more use to the private sector than to civil society or indeed government actors (*T.N. Godavarman Thirumalpad v. Union of India and others*, 1995; see p. 133).[34] That Central Committee, which still exists, can be moved by 'any individual' asking for 'suitable relief' in respect of actions of the Union or State Governments, 'or any other authority' (s. 1, MoEF Notification on the Centrally Empowered Committee, 2002). A preliminary analysis of 140 cases filed directly before the Committee (as opposed to being referred by the Supreme Court)[35] by 2005 indicates that Karnataka (32 cases) and Uttar Pradesh (54 cases) are the states by far the most frequently referred to.[36] Dutta and Kohli interpret these figures as indicating that these are the States in which actors have identified the Committee as the appropriate forum for their

claim, rather than those in which environmental laws are most in jeopardy (Dutta and Kohli, 2004). But which actors? Civil society actors contributed the second highest proportion of applications nationally (58 application), and government departments were third (seven applications). Both civil society and government applications related to public interest issues such as encroachment of forest areas (Dutta and Kohli, 2004). But the most frequent applicants were saw mill and veneer industry owners (70 applications)[37] who challenged government refusals to issue them with licences to saw and veneer in forest areas (Dutta and Kohli, 2004). Thus a communal resource, created through a participatory mechanism, and intended to act as a coordinating mechanism, had come to be dominated by individual interests.

Fraud Third, private sector actors are able to abuse the public interest litigation gateway. Concerns have been expressed that many PIL actions are vehicles for personal vendettas, 'corporate gains' and 'political advantage' (Perry and Anderson, 1996; Ahuja, 1997a, p. 11). One local commentator claimed that 'whenever' the 'economic interests' that are affected by infrastructure projects 'cannot legitimately take up their case, then they take it up [through] environmental agents'. Public interest litigation can be used to challenge a project simply because it is 'undertaken by a competitor', or by the government. Many 'good government projects have been screwed up by PIL'. Alternatively, those who are in favour of the project, may 'challenge matters in courts inadequately', so that 'they can rely on the principle of *res judicata* to make sure it does not get challenged properly' (Interviews, 2003, LLCS01 LC11, LL12, LC17, LC22).

It seems that such abuses have caused the judiciary to lose trust in litigants. In one example, the Supreme Court of India reportedly dismissed a public interest litigation against the appointment of a judge and fined the petitioner Rs 10,000 for abusing the process. It observed that the petitioner's motive had been self-publicity and warned that: 'the judiciary has to be extremely careful that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking' (Indlaw.com, 2004).

The Supreme Court has repeatedly stated that it will not allow a frivolous or bad faith public interest litigation to act as a bar to future litigation (see *State of Karnataka and another v. All India Manufacturers Organization and others*, 2006, para. 32). Living up to this promise requires that the judiciary have a good nose for deceit, as they did in relation to the third Infrastructure Project litigation, Madhuswamy's case (*State of Karnataka and another v. All India Manufacturers Organization and others,* 2006). Justice Srikrishna of the Supreme Court described the petitioners as acting in the 'so-called "public interest" … sponsored by the State Government to put forward its changed stand in the garb of a public interest litigation'. A counter public interest litigation was launched by the All India Manufacturer's Organisation and two ex-mayors of Mysore who petitioned the High Court in support of the Project, asking the courts to direct the State to implement the Project according to the Framework Agreement. Justice Srikrishna described the counter-action as 'put up by [NICE] and … virtually projecting [their] viewpoint', 'also in the so-called "public interest"' and 'perhaps inspired

by Mr. Madhuswamy.' (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006, paras 18 and 59).[38]

Of the two impersonators of public interest litigants before it, the Supreme Court appeared to be most disgusted by those acting on behalf of the Government of Karnataka. It described the government's 'flip-flop' on the Project, and its abuse of public interest litigation as 'utterly dishonest', 'irresponsib[le]' and political (paras 7 and 24). It was also noted that the petitioners relied upon the testimony of two senior bureaucrats who were now under criminal investigation for perjury (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006, paras 7, 22 and 24). The State of Karnataka was ordered to pay Rs 500,000 in costs to investor NICE as penance for 'the frivolous arguments and the mala fides with which the State of Karnataka and its instrumentalities … conducted [the] litigation'. Madhuswamy and his co-petitioners were also ordered to pay Rs 50,000 in costs to the Court (para. 77). In addition to demeaning itself in the eyes of the courts, the government jeopardised well-intentioned challenges to the land allocations.

Where judges fear to tread?

The third source of constraint on the ability of the courts to act as a communal resource for coordination comes from the aforementioned judicial tendency to shy away from 'policy' and 'technical' issues in respect of economic matters (see p. 52). The first subsection below demonstrates that this tendency appears disingenuous in light of judicial willingness to shake off such 'constraints' when addressing environmental claims (Ahuja, 1997a, p. 10). The nature and effects of this reticence are illustrated in the following subsection through an analysis of the litigation relating to the Infrastructure Project.

Judiciary as executive The development of public interest litigation has entailed a 'shift in judicial concern from merely seeing that decisions are taken correctly to ensuring that correct decisions are made' (Upadhyay, 2000) – from matters of procedure, to matters of substance. Indeed, judges have regularly gone so far as to enter into 'realms of decision-making previously reserved for the legislative or executive branches of government', thereby promoting heated debate (Sathe, 1997, pp. xl and xliii).

For example, the Supreme Court has created new bodies to oversee the implementation of its orders using powers of 'continuing mandamus' (Forest Case Update website). In the famous Doon Valley case (*Rural Litigation and Entitlement Kendra and others v. State of UP and others*, 1988), the Court constituted a Monitoring Committee which oversaw quarrying and mining in the Valley for more than a decade after final judgement was delivered in the case (*Supreme Court Monitoring Committee v. Union of India*; Upadhyay, 2000). Likewise, in 2002, the Court ordered the Ministry of Environment and Forests to set up a Central Empowered Committee to monitor the implementation of court orders in relation to the *Godavaram* forestry case, which had been heard under continuing mandamus since 1995 (*T.N. Godavarman Thirumalpad v. Union*

of India and others, 1995). That Committee, which still exists, can be moved by 'any individual' asking for 'suitable relief' in respect of actions of the Union or State Governments, 'or any other authority' (MoEF Notification on the Centrally Empowered Committee, 2002, s. 1).[39]

The Court has even gone so far as to appoint a new authority to protect a particular area. For example, when the Government of the State of Maharastra failed repeatedly to produce a suitable Master Plan for the ecologically sensitive Dahanu region, the Supreme Court directed the Government of India to establish the Dahanu Taluka Environment Protection Authority. This 'hybrid-fuzzy creature' had a 'diverse membership' – including a retired judge, planners and environment specialists – which 'ensured that it would be capable of engaging in a multiplicity of discourses.' It was to act both as 'legal decision-maker' and as a 'mechanism for "good" environmental management' and, because they were appointed by the Union Government, members were protected from local political pressures. The resulting 'aura of scientific objectivity and political independence' allowed the Authority 'to gain the trust of the local community.' This trust was to prove well-placed when, in 1997, the Government of Maharastra began negotiations with P&O Australia for the construction of a mega port in the Dahanu region. Local residents, environmental activists and labour unions objected. The Authority decided that the project was in breach of the Master Plan, and P&O pulled out. The Dahanu model may be of limited application as it is one of only three areas formally notified by the Government of India as ecologically sensitive (Perez, 2002, pp. 5–6, 14–15 and 24; Dahanu Campaign website). Nonetheless, it illustrates the lengths to which the judiciary is prepared to go to coordinate among multiple interests and values in the face of government recalcitrance.

Some have applauded this activism as a welcome 'reassertion' of judicial 'integrity', and of the courts' 'essential function as an organ of the state' (Ahuja, 1997a, p. 13). For these commentators 'the detached application of the Wednesbury rule' – which limits the judiciary to striking down decisions made unreasonably or in bad faith – is inadequate. The 'judicialisation of public life' is, they argue, a necessary supplement in respect of socially significant matters such as the protection of the environment (Upadhyay, 2000). They also point out that judicial activism is often a direct response to 'administrative "inactivism"' (Sridharacharyulu, 2002, p. 35), that the judiciary is 'stepp[ing] into the power vacuum left by the weak executive branch' (Pistor and Wellons, 1998, p. 83). Shyam Divan and Armin Rosencrantz (2001) begin their seminal work *Environmental Law and Policy in India* with the following blunt assessment:

> As a system for [protecting natural resources], the law works badly, when it works at all. The legislature is quick to enact laws regulating most aspects of industrial and development activity, but chary to sanction enforcement budgets or require effective implementation. Across the country [bureaucrats in parastatals] wield vast power to regulate industry … and other polluters, but are reluctant to use their power to discipline violators … The judiciary, a spectator to environmental despoilation for more

> than two decades, has recently assumed a pro-active role of public educator, policy maker, super-administrator, and more generally, *amicus* environment. (p. 1)

On the other hand, there are those who regard highly interventionist judicial activism as impractical, regardless of whether it is filling a gap left by the executive. As one foreign government representative who advises foreign investors in Bengaluru remarked, 'judges can be good managers of law, but how can they be good managers of business?' (Interview, 2003, FG21). Civil society actors are also concerned. For example, one worried that the Supreme Court's decision in the so-called Delhi vehicular pollution case (*M.C. Mehta v. Union of India*, 1991) to order that all buses and rickshaws in Delhi be converted to compressed natural gas was 'erratic', without legal basis, and risked undermining the efforts and reputations of environmentalists (Interview, 2003, LL/LCS19).[40] Certainly, the effects of administrative inaction, judicial activism and public participation have been disorderly at times:

> The flurry of legislation, lax enforcement and assertive judicial oversight have combined to create a unique implementation dichotomy: one limb represented by the hamstrung formal regulatory machinery comprised of the pollution control boards, forest bureaucracies and state agencies; the other consisting of a non-formal, *ad hoc* citizen and court driven implementation mechanism. (Divan and Rosencrantz, 2001, p. 1)

Nevertheless, from a law-and-community perspective, it is important to hang on to the fact that in the process, the interests and values of multiple networks of relations of community have been coordinated. Furthermore, it is significant for the purposes of the present study that the judicial refusal to consider 'policy' and 'technical' issues in cases involving economic matters limits the possibility of coordination in respect of investor-government-civil society relations. This point is demonstrated in the following section using the example of the courts' refusal to enquire into compulsory land acquisitions associated with the Infrastructure Project.

Public purpose in the Infrastructure Project There is little space for coordination in the law relating to compulsory acquisition of land. The central role that land plays in relations of affect, tradition and belief is largely ignored. For example, compulsory acquisition legislation typically does not provide for land-for-land compensation, so no weight is given specifically to those values that are central to the way of life which is being disrupted. Neither the existence of a public purpose, nor the location and amount of land required to fulfil any such purpose is open to review under the Industrial Areas Development Act, 1966. Only the amount of compensation, the identity of the land-losers and the measurement of the land may be challenged.[41] Viewed from a law-and-community perspective, the role of mechanisms such as public interest litigation is to coordinate among multiple interests and values and thereby to mitigate the nature and extent of the sacrifices made by the land-losers. Public interest litigation has provided an alternative gateway for challenging the amount, location, public purchase and

bona fides of compulsory acquisitions of land made in connection with the Infrastructure Project. These challenges have proved unsuccessful for a variety of reasons, including the Courts' disgust at the manner in which the Government of Karnataka sought to abandon the Project by the time of Madhuswamy's case (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006). For instance, in determining that the Government could not 'change its stand and contend that the land allotted for the Project was in excess of what was required' the High and Supreme Courts were persuaded by the need to ensure that they not 'be abused by politicians and others … to gain a political objective', which they had not been able to achieve 'on the floor of the Assembly'. To do so 'would encourage dishonest politically motivated litigation and permit the judicial process to be abused for political ends' (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006, para. 58). But the greatest underlying constraint on adjudicative coordination in respect of the Project has been the judiciary's shifting and uncomfortable relationship with what it chooses to classify as 'technical' and 'policy' matters, and with what government actors choose to describe as 'public purpose'.

In considering whether the allocations of land to the Project could be undone, the High and Supreme Courts in Madhuswamy's case (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006) and in *Somashekar* (*N. Somashekar and others v. State of Karnataka and others,* 1997) began by adjudging that the government actors had endorsed the allocation of 20,193 acres for the construction of a road and other components to the point that they could not deny its legality. First, there was a contractual endorsement in the Framework Agreement. Contrary to the findings of Justice Chandrashekariah in 2003, the Division Bench of the High Court and the Supreme Court decided that the Agreement 'did not materialise out of the blue', but was the subject of 'detailed deliberations' by public bodies. It could not be regarded as arbitrarily entered into; it must be treated as valid. Next, the government endorsed the validity of the allocation by extending the Industrial Areas Development Act, 1966, to cover infrastructure projects. The Courts interpreted this amendment as being specifically intended to allow the acquisition of land for the Infrastructure Project, and by extension, as incontrovertible evidence that the intention was and always had been to produce an 'entirely integrated infrastructure development project and not merely a highway project'. Lastly, in *Somashekar* and the early stages of Madhuswamy's case, the government submitted evidence to the effect that the allocation was the 'minimum extent of land' required for the Project. These representations were accepted by the Courts and passed into the realms of decided fact and *res judicata* (*N. Somashekar and others v. State of Karnataka and others*, 1997; *State of Karnataka and another v. All India Manufacturers Organization and others*, 2006, paras 7, 10–11, 14, 47 and 72–3).[42]

Next, the Courts in both cases decided that, because government actors were acting *qua* government, their endorsement of the allocation served to fix its validity in perpetuity. In so doing, the judges advanced several tangled lines of reasoning which drew on the principles of judicial review, the 'political question doctrine',[43] and eminent domain; and vacillated over whether the processes underlying the

allocation of land were technical, political and/or policy matters. First, the acquisition was characterised as a technical matter of locating industrial sites, conducted by specialised bureaucrats and 'assisted by experts'. Such a decision could not be judicially reviewed except where it was 'so grossly irrational' as to be 'irrational, discriminatory or so patently absurd as to be incapable of being countenanced' (*N. Somashekar and others v. State of Karnataka and others*, 1997, p. 410E). Next, the Courts felt themselves unable to interfere with the Framework Agreement because it 'was in reality a policy choice of the Government' (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006, paras 11 and 14). Later still, the Supreme Court refused to undo the Framework Agreement on the grounds that it was the *non-political* work of a previous government. Justice Srikrishna (at para. 61) quoted the following passage from *State of Haryana v. State of Punjab and Another* (2002):

> in the matter of execution of a decision taken by a previous Government, on the basis of a consensus arrived at, *which does not involve any political philosophy*, the succeeding Government must be held duty-bound to continue and carry on the unfinished job rather than putting a stop to the same. (p. 24, my emphasis)

So, the compulsory acquisitions were a policy matter in the sense that it is for the executive, not the judiciary, to decide; but not a political matter, in the sense that it might be allowed to die with a change of government. The former argument is unconvincing because of the above noted willingness of the courts to enter into the realms of environmental policy. The latter is unconvincing because, although the compulsory acquisition of land may not be an inherently political act, the endorsement of its allocation to a private actor under the title of 'public purpose' surely is.

Next, the Courts in *Somashekar* and Madhuswamy's case drew on the principles of eminent domain to characterise the petitioners' claims that the land had not been acquired for a public purpose as, in essence, impossible. The idea that the Project breached individual rights was rebutted on the grounds that the 'right of eminent domain' is enforced in pursuit of a public purpose, and 'once government decides in its wisdom to establish an industrial area' then, '*so long as the exercise of the power is for a public purpose*', there is no 'deprivation' of the individual's 'right to livelihood, particularly when the owner is paid compensation …' (*N. Somashekar and others v. State of Karnataka and others*, 1997, p. 410G, my emphasis). The effect of this line of reasoning is that 'once the purpose is a public purpose' – which means only that the government of the day says it is – 'the satisfaction of the State Government as regards the need to acquire the land cannot be questioned'. Furthermore, it seems that the mere signing of an agreement with an investor may be adequate evidence of public purpose since the Court in *Somashekar* found that there was 'no question of characterising' any aspect of the acquisition as being 'unconnected with the public purpose', as 'long as it arose from the terms of the' Framework Agreement (*N. Somashekar and others v. State of Karnataka and others*, 1997, p. 410C).

Perversely, given their own insistence that they may not inquire into the policy-technical-eminent domain issue of public purpose, the Supreme Court in Madhuswamy's case determined that the Project *is* 'a public project which is in larger public interest' and 'of great importance to the Government of Karnataka' (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006, paras 58 and 76). The Supreme Court objected on several occasions in its judgment to the idea that it might be used 'by individuals raising frivolous and untenable objections' to 'scuttle a project of this magnitude and urgency … for public benefit' (para. 76; see also para. 50), and, like the High Court, felt compelled to find in favour of the respondents because the 'larger public interest required the implementation of the Project' (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006, para. 59). To recap: if the government has at some stage said a purpose is public, it is. If the government has at some point said that it needs something for that public purpose, it does. If the government later has a change of heart, tough.

Finally, the Court in Madhuswamy's case sought comfort in private law. It argued that the Framework Agreement was a contract and to go behind or interfere in it would be beyond the scope of a public interest litigation (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006, para. 47).

Notes

1 A similar attitude has been noted among often poor and disadvantaged claimants in health and employment tribunals in the United Kingdom. The effort to treat like cases alike caused claimants to complain that '[t]hey don't look at you as a person. They have got the rule book there and they have got to go by the book', or that the tribunal 'kept going on about this other bloke's case all those years back, and not looking at mine' (Genn, 1993, pp. 405–6).

2 Even after having obtained any necessary initial approvals under the so-called 'automatic' route, a typical project at the time of the Report was still required to get 23 general clearances from state or central governments; plus a number of sector-specific clearances and licences which were to be constantly updated during the operation of the investment. Although direct restrictions on the location of investment at the approvals stage had been abolished, planning, land use and environment legislation continued to restrict location at the implementation phase, and further inefficiencies were to be found in the implementation of those laws. For example, it was reported that bureaucrats delayed the environmental clearance process by continually introducing new, or reopening existing, technical issues. The Committee was also concerned that 'abuse of power' by bureaucrats should be 'curbed' because it was 'delaying the granting of approvals'. There was no concern as to the threat of over-enthusiastic awarding of approvals, or other such investor-benefiting activities.

3 In particular, there is a reference to the fact that the environmental clearance process is 'under major revision in line with the Govindarajan Committee recommendations', presumably referring to the 2004 draft review of the environmental clearance process by the Ministry of Environment and Forests.

4 There is also a commitment to 'encourage clustering of industries and other development activities' in order to facilitate environmental management, monitoring and enforcement (MoEF, 2005, p. 14).

5 The High Level Clearance Committee meets at least once every two months, usually in Bengaluru and is authorised to examine and decide upon proposals for investments of Rs 500 million (Rs 50 crores) and above; the State Level Single Window Clearance Committee for projects of between Rs 30 and 500 million (Rs 3 to 50 crores) also meets in Bengaluru and the District Level Single Window Clearance Committees meet monthly in each District of the State and deal with proposals for projects of up to Rs 30 million (Facilitation Act, 2002, ss. 3–8 and Facilitation Rules, 2004, No. 4–6).

6 Environmental considerations are taken into account in issuing environmental and other licences. Additional environmental clearance is required for larger investments (EIU, 2004, p. 24; DIPP, 2005, p. 7; Govindarajan Committee, 2002b, p. 19).

7 The Facilitation Act states that the Form replaces 'existing forms prescribed under the applicable Central or State Acts' except the licensing of a factory under s. 41A of the Factories Act 1948 (s. 14). This implies that the CAF replaces those forms required under the Acts listed in the Facilitation Act, 2002, 2 (1a), and only those Acts. However, matters do not seem to be that simple. A further set of rules issued by the KUM – 'Form I: Combined Application Form Instructions' – lists the forms replaced by the CAF. These include, as expected, some items related to Acts listed in s. 2 (1a) of the Facilitation Act, 2002, such as applications for site and plans approval under the Factories Act, 1948. It also lists licences for water, sewage, power, provision of certain information to local government bodies, and for registration and certification for certain professional taxes (KUM, 2003, para. 7).

8 'Applicable acts' are defined to include the Factories Act, 1948, the Boilers Act, 1923, the Karnataka Shops and Establishments Act, 1961 and the Contract Labour (Regulation and Abolition) Act, 1970 and a number of other laws relating to payments to employees (Facilitation Act, 2002, 2 (1a)).

9 Those who are locating in an existing investment park will deal largely with the managers of the park, and those who require a very large amount of land will deal with the KIADB.

10 He also suggested that there are certain things that investors might want to do themselves. For example, an investor in the IT sector will always want to speak to the electricity authorities themselves.

11 The other states examined, in order of descending ease of doing business, were Punjab, Tamil Nadu, Rajasthan, Maharastra, Andhra Pradesh, Orissa, Uttar Pradesh and West Bengal. The Ease of Doing Business Index is the simple average of a state's rankings for the seven areas (starting a business, hiring and firing, property, credit, enforcing contracts, protecting investors and closing a business) covered by the Doing Business Index (World Bank 2005b, p. 22, fn. 3).

12 For example, it takes about half as many procedures and a fraction of the time and cost to start a business in the US as compared to India (Doing Business Survey 2004; see Table A6, Appendix).

13 In 2005, 84 per cent of foreign investors responding to a survey conducted by the Federation of Indian Chambers of Commerce and Industry indicated that their overall assessment of India as an investment destination was 'positive', up from 74 per cent in 2004 and just 40 per cent in 2003 (FICCI, 2005).

14 Worse still, less than a quarter of respondent investors in Sri Lanka reported making what might be considered to be an in-depth investigation.

15 Several interviewees felt that whether or not an investor investigates the legal system would depend upon their individual characteristics. Only one interviewee was firmly of the view that the legal system was not relevant, arguing that 'profits and margins are more important' (Interview, 2003, LL/LCS01). Of course this comment ignores the possibility that the legal system might affect profits and losses.

16 In early 2006 it was reported that its managing director Ashok Kheny was leading a new round of US$4 billion worth of urban infrastructure investment in the State, and that he claimed that American, British, Japanese and Hong-Kong-based funds were interested in investing various Special Purpose Vehicles to be used to complete current future components of the Project. As the newspaper pointed out, his enthusiasm was ironic given his role as 'pet target' of the current Deve Gowda anti-investment campaign (*Times of India*, 2006a).

17 It would be interesting to have an objective measure of any actual differential treatment by bureaucrats as between foreign and local investors. Unfortunately the Bank does not collect such information. If speed is any indication of bias, then things look good for foreign investors, who report spending less time than local investors in dealing with or waiting for decisions by regulators (see Appendix). Similar disparities between the experiences of foreign and (worse) local investors have been noted in the past (Perry-Kessaris, 2003).

18 In a 2005 webcast of a World Bank seminar introducing a set of governance indicators a number of Bank staff in the audience express uncertainty about the indicators (see Governance Matters IV Webcast website).

19 Deve Gowda's outrage was timed for maximum political impact: a leisurely 10 months after the release of the Report but in the middle of a political crisis in Karnataka. Then Chief Minister of Karnataka Dharam Singh made the customary offer of a 'probe' into the poor ratings, a move considered 'pointless' by one commentator since the indicators are based on an overall macro-impression, not on individual incidents or departments (Krishnaswamy, 2005).

20 With the exception of projects sponsored by state governments or entities under their control, which always must be cleared by the Ministry of Environment and Forests regardless of their sector. The new authorities are staffed largely by State Government officials but the Ministry of Environment and Forests is charged with creating the bodies, and it remains the final arbiter of the award of clearances.

21 Other states surveyed were Punjab, Tamil Nadu, Rajasthan, Uttar Pradesh, Andhra Pradesh, Orissa, west Bengal and Maharastra.

22 Although there have been improvements in relation to debt enforcement (World Bank, 2005b, p. 16).

23 So, for example, the Framework Agreement of the Infrastructure Project included a jurisdiction clause in favour of arbitration in London, and it has been reported that NICE, the investors in the Project, 'threatens every so often' to 'drag the matter into international arbitration if Karnataka abrogates the Framework Agreement (Gene Campaign and ESG, Representations, 13 March 2005).

24 The ICADR was created 'under the aegis of the Ministry of Law and Justice, to promote alternative dispute resolution facilities'. It is headquartered in Delhi, with regional offices in Hyderabad and Bengaluru (pp. 40–41; ICADR website).

25 Another leading Indian arbitral body not mentioned by the Govindarajan Committee is the Indian Council of Arbitration, established in 1965 with headquarters in Delhi and regional offices throughout the country. It is sponsored by the Government of India and various business organisations such as the Federation of Indian Chambers of Commerce and Industry (FICCI) and the Associated Chambers of Commerce

and Industry (Assocham). Its services include the provision of arbitration facilities, in India or abroad, and the maintenance of a panel of arbitrators, including some of foreign nationality. It has its own Rules of Arbitration, but is also able to conduct arbitrations according to other rules (Kwatra, 1996, pp. 76–82; International Council of Arbitration website).

26 Domestic awards were made directly enforceable. International 'commercial' awards were enforceable upon application by one of the parties so long as they were delivered in states signatory to the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927, or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. Other foreign arbitral awards may still be enforceable in the general law of India 'on the grounds of justice, equity and good conscience' (Kwatra, 1996, p. 51).

27 For example, one interviewee told how several investors who were at loggerheads with the Government of Tamil Nadu over the construction of the Chennai harbour were deeply concerned by the idea that the dispute would have to go to international arbitration because 'there are local processes that you have to go through first and the bureaucracy are so adept at stringing things along'. So even having the 'get out clause' of the international system is not so appealing (Interview, 2003, FG07).

28 This was a 'conscious decision' by legislators, based on the mistaken impression 'that judicial interference was the root cause of delays in arbitration'. In fact arbitrators, most of whom happen to be retired senior judges, have been encouraged by a fee of up to Rs 30,000 per sitting, to 'revert to the habit … acquired in the courts' of liberally awarding extended adjournments. Arbitral proceedings, have consequently 'dragged on for years', 'often … in five-star hotels' (*Indian Express*, 2004). Amendments proposed in the now defunct 2003 Bill would have addressed this problem by providing that, in the absence of party agreement to the contrary, awards would be delivered within one year (s. 23 Arbitration and Conciliation (Amendment) Bill, 2003).

29 Section 2 of the Act specifies that an arbitration is 'international' if it involves an individual national or resident of another country, a corporation incorporated in another country, the government of another country or 'a company or an association or a body of individuals whose central management and control is exercised' in another country (1996). This then allows the Indian incorporated subsidiary of a multinational enterprise to benefit from the generosity of s. 28, according to which the law applicable in international commercial arbitrations, even when occurring in India, is to be chosen by the parties. The Ministry of Law and Justice has noted that it is '*the basic principle in all countries*' that where disputing parties are citizens 'of the same country, the law of that country alone would apply for resolution of disputes' (Ministry of Law and Justice, undated, pp. 5–7, emphasis original).

30 Some of the trouble arises from the 1996 Act's origins as a rather messy transplantation of the UNCITRAL model law on international commercial arbitrations, to cover all arbitrations connected with India, whether or not they include a foreign element (Ministry of Law and Justice, undated, pp. 5–7; Arbitration and Conciliation (Amendment) Bill, 2003, Statement of Objects).

31 This would have amended sections 2 and 28 so that disputes involving only Indian individuals or companies – whether or not subsidiaries of multinationals – would always be treated as domestic, not international, arbitrations. Furthermore, Indian law alone would have applied to such domestic arbitrations. With respect to international arbitrations, the Bill would have ensured that the place and applicable law of arbitrations were still chosen by the parties, or failing that, by the arbitral

tribunal (Ministry of Law and Justice, undated, pp. 5–7; ss. 4, 17 and 21 Arbitration and Conciliation (Amendment) Bill, 2003).

32 For example, the International Chamber of Commerce reportedly charges $780,000 for resolving a dispute worth $100 million using three arbitrators. It is often necessary to use lawyers who charge developed nation prices but whose pricing practices are so opaque that it is very difficult to estimate in advance the cost of arbitration (Babu, 2006, p. 390).

33 For example, by March 2004, regulatees had used the courts to challenge about one in three of the 321 closure orders issued against them by the Karnataka State Pollution Control Board.

34 In the first Order issued in the *Godavaram* Case (Supreme Court Order of 30/10/02). the Supreme Court imposed a requirement that all those seeking to engage in 'non-forest activities' within an area of forest must obtain a licence from the Union Government.

35 In the absence of any systematic official information, the best available source on the proceedings of the Committee is the independent Forest Case Update edited by Ritwick Dutta and Kanchi Kohli (Forest Case Update website).

36 The next three states are each responsible for just eight applications or less.

37 Forty-eight from Uttar Pradesh, 12 from Karnataka.

38 By contrast, 'Somashekar had the special technical expertise to impugn the Project on the grounds that he did' so he could not 'be dismissed as a busy body' (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006, para. 32).

39 The Committee has been given jurisdiction over the implementation of environmental legislation reaching far beyond forests, including the Environment Protection Act, 1986 as well as the Forest (Conservation) Act, 1980, Indian Forest Act, 1927, Wild Life (Protection) Act, 1972, National Forest Policy, 1988 and all Rules, Notification and so on falling under those Acts (MoEF Notification, 2002; Forest Case Update website as at 4 August 2005; Supreme Court Orders of 09/05/02 and 09/09/02; Kohli and Menon, 2005, p. 54; Dutta and Kohli, 2004). The Committee Chairman is the Former Secretary of the Ministry of Environment and Forests and he is joined in the Committee by two serving Ministry staff, an environmental lawyer and a representative from a tiger preservation charity (Supreme Court Order of 9 May 2002; Dutta and Kohli, 2004).

40 The case was a public interest litigation launched by the renowned environmental lawyer M.C. Mehta (see M.C. Mehta Environmental Foundation website).

41 This is due to fact that ss. 6, 18 and 24 of the Land Acquisition Act, 1894, were incorporated by reference into s. 30 Industrial Areas Act.

42 The petitioners in Madhuswamy's case sought to avoid the bar of *res judicata* by claiming that the land had not been specifically 'identified' at the time of *Somashekar* (1997). The court dismissed this as a 'semantic distinction'. They refused on the grounds of *res judicata*, as well as the doctrine of the political question, to reopen any aspect of what it repeatedly and over-simplistically referred to as 'the issue' of excess land (*State of Karnataka and another v. All India Manufacturers Organization and others*, 2006, para. 45).

43 For an example of a US court grappling with what the 'political question doctrine' see *Sarei v. Rio Tinto, PLC* at p. 4135.

Chapter 7

Conclusion

Theory

Investment climate discourse, like other liberal economic perspectives, tends to applaud law when it operates as an 'individual or private resource for channelling power' (Cotterrell, 2002a, p. 643), and to be sceptical of law when it impedes business. Our intrepid investor, armed with the results of the latest Doing Business and Enterprise Surveys for orientation, picks his (yes) way gingerly through a tangle of gnarled legislation and dodges the snapping regulators who launch themselves at his every limb. Finally, in the half-light, we catch sight of him heroically heaving himself out of a judicial quagmire. Ah, the investor's burden!

I wish to advocate a move from the dominant investment climate discourse, according to which law should act as a lure to the touring investor, but is too often an inconvenience; and towards Roger Cotterrell's law-and-community approach, according to which law is not only a resource for individuals to pursue their own interests, but also a communal resource for the support of stable, productive, community-like relations. Law can support trust, which is essential to the existence of productive relations, by *expressing* the various forms of trusting relations that characterise community in authoritative descriptions of systematic social practices; by ensuring broad *participation* in social life; and by *coordinating* divergent needs and agendas.

The notion that law might act as a communal resource – that law has a function beyond that of merely facilitating individual trajectories – has instant curb appeal to the study of foreign investor-government-civil society interactions. The fit between theory and query remains neat and valuable when examined in the Indian context, where examples of the legal mechanisms of expression, participation and coordination are easily discernible.

It seems desirable, if ambitious, to hope that civil society-government-foreign investment interactions in Bengaluru might develop into the stable, productive, trusting variety that characterise relations of community. So long as there is foreign investment, there will be civil society representatives who wish to scrutinise and challenge it, and there will be government actors who are responsible for protecting and balancing the interests of investors with those of civil society actors and others. So it is easy to imagine such actors engaging in sustained and relatively stable interactions in fulfilment of the objective requirement of Cotterrell's community-like relations. The convergence of their attentions on

foreign direct investment suggests that they also have the potential to fulfil the subjective requirement.

The factor most likely to undermine the development of community-like relations or a sense of community among these actors is the ebb and flow of their mutual interpersonal trust. Global economic activities such as foreign investment tend to 'promote moral distance in the social relationships controlled or shaped by them' (Cotterrell, 1996, p. 332). Any bonds of mutual interpersonal trust between these actors are likely to be inherently weak, and placed under regular strain. Indeed, a lack trust may be a motivating factor behind some of their interactions. For example, civil society actors might engage with foreign investors in order to influence them not to pollute the environment, and they may do this precisely because they do not trust government actors to do so.

A lack of trust implies a greater need for communal legal mechanisms, especially the more proactive mechanisms of participation and coordination. It is where trust is weak that the legal system has the most to offer as a communal resource. So, realising the aspiration of productive community-like foreign investor-government-civil society actors may depend substantially upon the Indian legal system and the precise nature of its operation. A legal system cannot create relations of community, not least because it cannot create mutual interpersonal trust from thin air. But it might provide an environment in which trust, and thereafter, a sense of community, and finally actual relations of community, can thrive.

Reality

> I sit under the mango tree at the end of the garden at home in Delhi, next to a mound of contemporary newsprint. Fifteen years have gone by since the first freaks hit our shores, and Indian feature writers are no longer writing about drugs and hippies. They are preoccupied with silicon chips, test-tube babies and black holes. I note the trend with relief and hope that the Oriental is to be released from the burden of being either obscure or oracular. (Mehta, 1979, p. 11)

Both the image and the reality of India have changed dramatically since Gita Mehta sat under her mango tree, yet her vision of India The Quotidian is still not shared by a substantial number of visitors. For example, Tim Edensor found that foreign visitors to the Taj Mahal had strong expectations of what this essential component of The Indian Experience would do or be for them. Independent backpackers expressed 'a desire for self-realization' and a belief 'that India forms a space in which such enlightenment can be achieved'. They hung around for hours, often with their backs to the monument, revelling in 'what they consider to be their superior, more individualistic mode of travel and their deeper level of perception'. Package tourists, by contrast, had brochure-inspired plans to 'gaze romantically' at the Taj 'in solitary immersion'. But they were 'thwarted' both by bossy tour guides, who hustled them around the site in a flurry of information and on to the souvenir shops; and by the 'hordes that clutter up the romantic

vista' (Edensor, 2002, pp. 168–9 and 178–80). Even those who are engaged in the 'serious' matters of business save a place for mystical expectations of India. My interview with one economic advisor attached to a European consulate in Bengaluru was delayed while he met with a guru from a local ashram. The adviser planned to surprise a group of managers visiting from his home country by sending them to the guru's sparsely furnished ashram for a week. In his view the prank was both amusing and essential to complete their Indian Experience. The guru played along merrily, proffering a CD, a website, and a vastly inflated price tag for the enlightenment of foreigners.

This study has focused on a peculiar type of tourist – the foreign investor – just as self-involved as the Taj Mahal gazers, and just as full of expectations. Our tour guides have been government actors, and our cluttering hordes are civil society representatives. The task of this study has been to examine the part played by the Indian legal system in the tripartite interactions of these actors in Bengaluru. It has also been to examine the impact on this scene of an increasingly dominant guide book, the investment climate discourse of the World Bank.

Investment climate effects

When a legal system is assessed through the investment climate lens, the legal needs of foreign investors are given an analytical primacy. The question 'What is law for?' is analysed from the presumed perspective of the investor, and the answer is 'for predictability and efficiency.' This is an error with positive and normative dimensions.

The investment climate lens distorts the positive fact of foreign investors' involvement in a wider set of social interactions with actors including, but not limited to, government and civil society. Efficiency and competition may or may not be the most important criteria for determining whether a legal system can effectively support commercial transactions. They may well be irrelevant to investors' success in the other interactions in which they will be forced to engage. The perceptions and expectations of investors are less than half of the story.

The investment climate lens also obscures and hobbles the legal system's potential normative function of supporting and nurturing productive relations. The World Bank peddles a number of legal reform schemes, including those branded with investment climate discourse, which are focused on promoting rule-bound procedures and market-allocative rules.[1] But communal legal mechanisms are probably best served somewhere between the state and market-allocative extremes. Here, government is less able to dominate investors (the market), and neither government nor investor can easily drown out civil society actors. Similarly, communal legal mechanisms are probably best served by procedures that are somewhere between the rule-based and discretionary extremes. Here, there are more likely to be rules to ensure that participation can occur, coupled with the necessary discretion to allow the interests revealed by such participation to be effectively coordinated.

There will always be limits to what can be achieved by reforming state law. For instance, many have warned against the dangers, and even hopelessness,

associated with transplanting laws between social settings. From a law-and-community perspective it is important that law's communal aspirations cannot be realised if it is regarded as 'an alien intrusion, an inaccessible resource, or a special component only of particular … settings'. Law may be more efficient if it is 'rationally planned and purposeful'. But it is perhaps more important that it be 'deeply rooted in', the 'everyday conditions of social interaction'. For only then can law act as 'the cement that gives moral meaning to social existence'. Only then will individuals more often 'welcome[d]' or even 'demand[ed]' law, rather than 'resist[ed]' it (Cotterrell, 1996, pp. 21, 307–8 and 313–14).[2]

Bengaluru findings

India 'has definitely neither implemented all the policy reforms demanded by the World Bank and the IMF nor enacted all suggested legal changes …' (Randeria, 2003, p. 323). But it has chosen to swallow the World Bank's investment climate approach whole. Amendments to the Indian legal system made in pursuance of the investment climate agenda have privileged bilateral interactions between foreign investors and government actors over tripartite interactions involving civil society actors. This has had two consequences. First, tripartite interactions which might under present social conditions occur through law, such as public hearings, have been disrupted or even prevented by law. Civil society actors in particular are condemned to marking time on the bench. Second, by glorifying competition and efficiency, to the exclusion of coordination and participation, the investment climate approach discourages the development of productive tripartite relations in the future. So, the effect of the dominance of the investment climate discourse is not only to undermine development of a communal function for law as a positive reality, but also to undermine the development of the community approach as a widely held normative goal.

… on expression There is indeed little in the way of tripartite mutual interpersonal trust among the foreign investment, government and civil society actors of Bengaluru. Regular interactions occur as a consequence of these actors' involvement in, and preoccupation with, foreign investment, but their trust in each other is thin. It follows that there are no examples of such tripartite trust being expressed in law or even soft law.

As Figure 7.1 illustrates, there is no significant bilateral trust to be expressed between foreign investment and civil society actors. Gnawing away at the possibility that such trust might develop is the sense that the interests of civil society and foreign investment actors are incompatible. Some signs of trust can be found between government and civil society actors, and this trust has sometimes found expression in law. But such trust seems to be thin and patchy. Furthermore, government actors have sometimes sought to express their distrust of civil society actors in law. In this way law has itself been implicated in the undermining of trust.

Trust is most strongly evident in investment-government relations, where it has been expressed, for example, in legislation governing investment approvals

and access to land, as well as in contracts concluded between investment and government actors. However, there have also been occasions on which government actors have felt a strong distrust of investment actors, and have sought to use law to express that distrust.

Importantly, levels of trust in each set of bilateral relations seem to be somewhat interdependent. In particular, trusting relations between foreign investment and government actors, seem to have a corrosive effect on trust between civil society and government actors. In Putnam's (2000) terms, trusting relations between government and foreign investment actors are perceived by civil society actors to be of the exclusive, inward-looking, 'bonding' variety (see pp. 25–6).

If the legal system is not expressing community-like tripartite relations in Bengaluru because such relations do not exist, then investor-government-civil society relations require more pro-active support in the form of the communal legal mechanisms of participation and coordination.

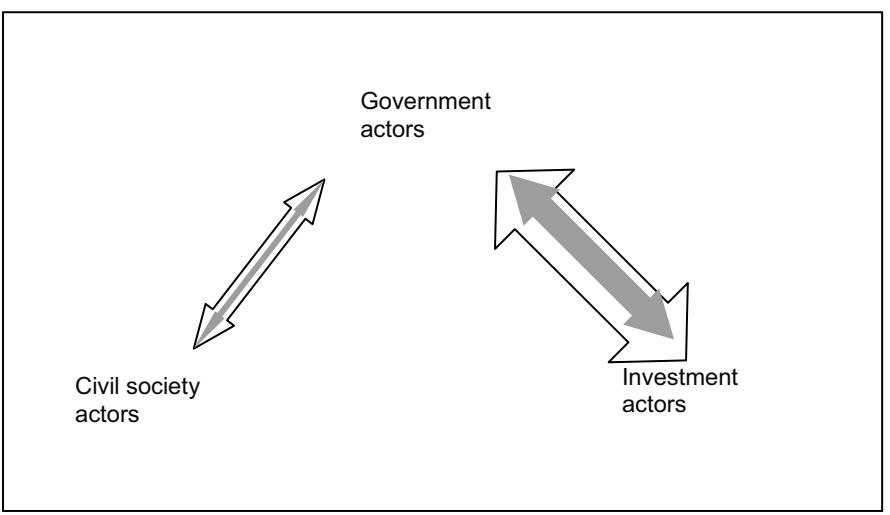

Figure 7.1 Expressing mutual interpersonal trust in Bengaluru?

… *on participation* Two major Indian projects – liberalisation and decentralisation – have been 'working in opposite directions' in India since the early 1990s, and the outcome has not been positive for administrative participation. Innovations such as public hearings and *panchayats* have opened new gateways to participation. But these '"spaces" for people' have come to be 'seen as a hindrance', causing 'delay' and 'additional cost' to 'investments and "development"' (Vagholikar, 2005, p. 44). Certain gateways, such as those originally embedded in the environmental clearance process, have been eroded as a result. Some of the blame for this impoverishment of participation can be laid squarely at the door of investment climate discourse.

At the intersection of these two projects stand public private partnerships, which ought perhaps to act as a bridge between decentralisation and liberalisation. But few examples exist, and those which do, such as the Bangalore Agenda Task Force are tainted by accusations that they are dominated by the private sector – that decentralisation has become a sub-clause of liberalisation.

As Figure 7.2 shows, in practice, administrative gateways to participation appear to favour foreign investment and government actors over civil society actors. To the extent that government actors are implicated in this bias, there is, once again, a corrosive effect on trust between civil society and government actors. The resulting negative impact on trust, especially as between government and civil society actors, confirms the proposition drawn from the work of Ayres and Braithwaite (1992) that participation is safer and more valuable if it is consciously converted into a communal, rather than an individualistic, mechanism. Participation must be widespread if it is to succeed in nurturing productive trusting relations. Narrow participation has precisely the reverse effect (see p. 26).

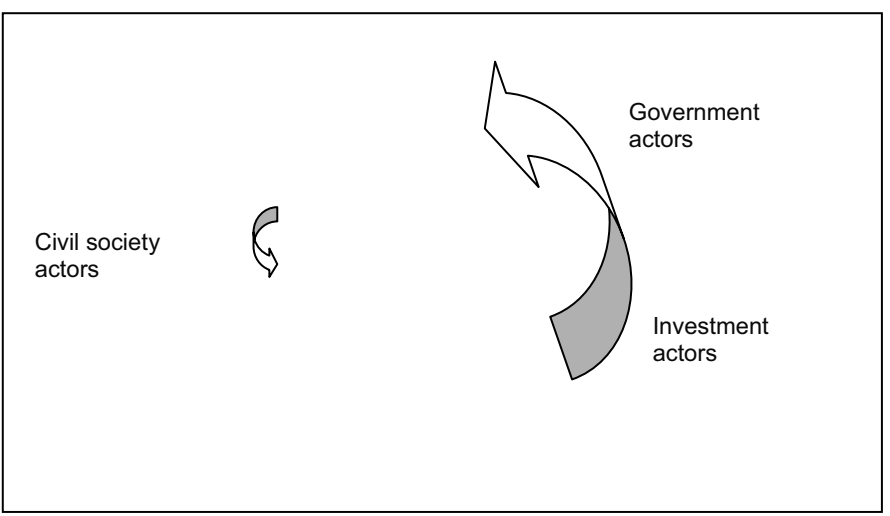

Figure 7.2 Securing broad participation in Bengaluru?

By contrast, adjudicative gateways to participation by civil society actors are at least equally favourable to those offered to foreign investment and government actors. Public interest litigation was created specifically to act as a gateway for participation by those acting in a public, or communal, interest, including civil society actors. However, those actors seem to be avoiding public interest litigation, whether for reasons of cost, calculation or conscience. Furthermore, the communal potential of both judicial and administrative gateways is unfulfilled, and undermined, due to the strategies of abuse and avoidance adopted by

government, investment and civil society actors. So the gateways to adjudicative participation in India are also narrow and sometimes narrowing. While public interest litigation 'inspires hope for relief', it does not yet 'warrant trust in democratic governance' (Dembowski, 1999).

…on coordination Coordination often creates winners and losers. What is important from a law-and-community perspective is to maintain the sense that coordination has taken place, and that the door is open for future coordination, in which the values and interests that lose today might yet become the winners of tomorrow.

In Bengaluru, spaces for coordinating among the interests and values of investment, government and civil society actors exist in both the administrative and the adjudicative spheres. However, but they are being eroded. As Figure 7.3 illustrates, the erosion of the space is occurring in a manner that is likely to cause disproportionate harm to the interests and values of civil society actors. Judicial and bureaucratic self-censorship are in part to blame. Another cause of present and potential future narrowing and skewing is the shadow of investment climate discourse, which has closed down some areas of coordination altogether, and may be encouraging further self-censorship by bureaucrats and judges. The abusive behaviour of some actors has also hampered the effectiveness spaces for coordination.

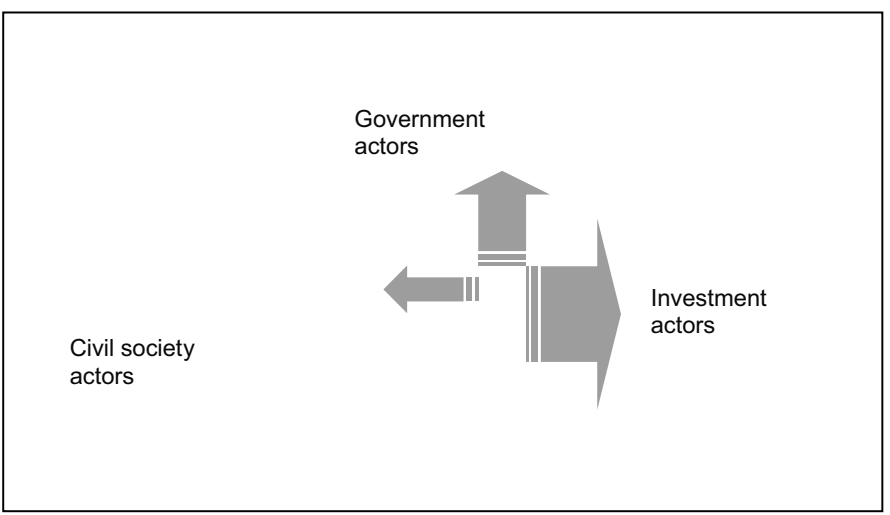

Figure 7.3 Coordinating between multiple networks in Bengaluru?

… on legal strategies It would be absurd to attempt to saddle the World Bank, or investment climate discourse, with all the blame for the Indian legal system's failure to promote productive relations between investment, government and civil

society actors. Also relevant are the strategies adopted with respect to the Indian legal system. As Figure 7.4 illustrates, the Bengaluru-Mysore Infrastructure Project has provided innumerable examples of such behaviour. Government actors alone have used law both as a 'scapegoat' – a reason why a certain course of action must or must not be pursued; and as a 'magic charm' – a cure all (Benda Beckmann, 1989). For example, first, law was used to facilitate the Project, and a reason why the Project must go ahead; later, law was presented as a reason why the Project must be halted.

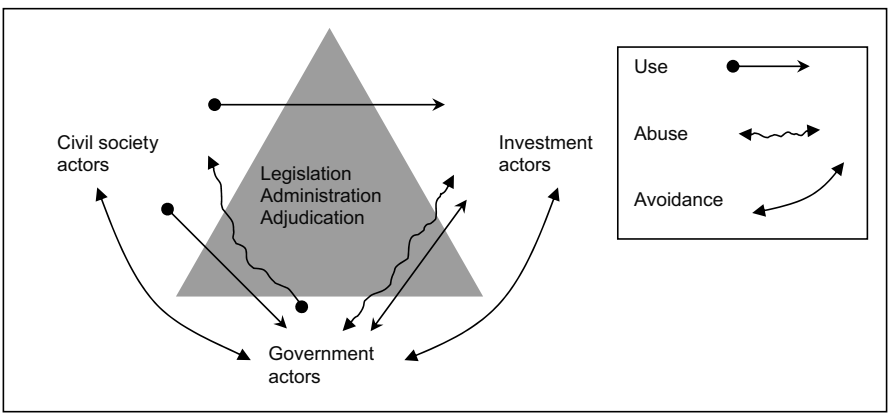

Figure 7.4 Legal strategies in the Infrastructure Project

Where to?

A law-and-community approach exposes how the legal system succeeds, and fails, in supporting a broad range of actors, each with different motivations – financial, political, social – but all requiring the support of the same facilitator for their productive interaction: mutual interpersonal trust. Insights derived from this approach might allow legal reform projects to be targeted more effectively – at those areas which are actually of concern to various actors – and more equitably, taking account of the need to balance competing interests within and between communities. A better knowledge of the legal system's role in mediating relations might also be helpful to actors in planning their legal strategies. It is my hope that this study might encourage fellow researchers to adopt this analytical framework in other settings, and so help to build a picture of the diverse needs that law must serve, and the extent to which it acts in support of stable, trusting, productive relations of community.

Notes

1 There is competition among individual actors within the Bank, and between the Bank and other institutions, for prestige and resources. Most importantly, these various camps are competing for borrowers 'while doing little to reflect on [the] results' of their projects (Santos, 2006, p. 291).

2 'Proponents of the 'legal origins' school of thought within and outside the Bank argue that much of the law on the books of developing countries is a legacy of colonialism rather than any national political choice or efficiency considerations. It can, therefore, be dispensed with without sentimentality' (Santos, 2006, p. 294). The same might be said of the laws resulting from investment climate discourse.

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Appendix

Table A1 Contract enforcement through Indian, Chinese and US courts

	Days	Cost as % of debt
India	425	43.1
China	241 43% faster	25.5 41% cheaper than India
US	250 41% faster	7.5 83% cheaper than India

Source: World Bank, 2005a, pp. 104, 111 and 129.

Table A2 Contract enforcement through Indian state courts

	Days	Cost as % of debt
Karnataka (rank)	709 (3)	17.4 (3)
Best state value	425	16.3
Worst state value	1165	43.7

Source: World Bank, 2005b, pp. 34–7.

Table A3 Perceptions of interactions with Indian bureaucrats among domestic and foreign investors

	Domestic investors	Foreign investors
Firms (%) agreeing that 'In general, government officials' interpretations of regulations affecting my establishment are consistent and predictable'	55.88	35.57
Average time to claim imports from customs (days)	15.63	6.56
Time spent in meetings with government officials (days)	11.08	6.25
Senior management time spent in dealing with requirements of government regulation (%)	22.6	14.25

Source: World Bank Enterprise Survey, 2002.

Table A4 Doing business in Karnataka compared to other states*

Indicator	Karnataka rank out of 9 states (actual value)	Best state value	Worst state value
Time to start business (days)	1 (57)	57	89
Cost to start business (% of GNI/capita)	4 (46.1)	43.4	51.5
Time to register property (days)	1 (35)	35	142
Cost to register property (% property value)	3 (11.4)	10.2	14.1
Time to complete insolvency (years)	1 (8.3)	8.3	20.2
Cost of insolvency (% of estate)	2 (4)	4	8

* Karnataka was ranked 2 for the rigidity of employment index and 3 (95 weekly wages, the worst value) for cost of firing.

Source: World Bank, 2005b, pp. 34–7.

Table A5 Inward FDI flows to Indian states 2000–2003 (%)

	2000	2001	2002	2003
Delhi	30.60	18.90	18.50	22.00
Maharastra	44.50	43.70	30.10	10.70
Karnataka	7.20	8.30	5.50	10.50
Tamil Nadu	6.87	4.70	8.30	8.40
Chandigarh	–	–	5.20	–
Gujarat	–	–	–	10.90
Andhra Pradesh	3.13	2.10	–	–

Source: World Bank. 2004b, p. 25.

Table A6 Starting a business in India, China and the US*

Country	Procedures	Days	Cost (% of income per capita)
India	11	89	49.5
China	12 9% more	41 54% faster	14.5 71% cheaper
US	5 54% fewer	5 94% faster	0.6 99% cheaper

* Actual figures for India. China, South Asia and OECD presented proportionately 'better' or 'worse' than India.

Source: World Bank Doing Business Survey, 2004.

Table A7 Tactics of New Delhi NGOs 1999–2000 (n = 73)

Tactic	Proportion of NGOs adopting tactic
Litigation	25
Involvement in policy formation and service on government committees	33
Contact with bureaucrats or legislators	
Informal	59
Formal	40
Work with political parties	37
Monitoring government activity	71
Public awareness activities (seminars, publications)	74
Demonstrations and protests	62
Use of media	33

Source: Krishnan, 2003, p. 14.

Table A8 Litigation involving Karnataka State Pollution Control Board to 2004

	Board	Regulatee	Civil society
Criminal cases	248	–	–
Won	76	60	–
Pending	112	–	–
Closure orders issued	321	–	–
Appeals against closure	–	103	–
Won	86	6	–
Pending	–	11	–
Public interest litigation	–	–	320
Won	275	–	4
Pending	–	–	41

Source: KSPCB, 2004, Annexure XX.

Table A9 Closing a business in India, China and the US*

Country	Time (years)	Cost (% of estate)	Recovery rate (cents on the dollar)
India	10	8	12.5
China	2.4 76% faster	18 125% costlier	35.2 182% better
US	3.0 66% faster	8 Same	68.2 446% better

* Actual figures for India. China, South Asia and OECD presented proportionately 'better' or 'worse' than India.

Source: World Bank Doing Business Survey, 2004.

Table A10 India compared: property registration

Country	Number of procedures	Time (days)	Cost (% of property value per capita)
India	6	67	12.9
China	3 50% fewer	32 52% faster	3.1 76% cheaper
US	4 33% fewer	12 82% faster	0.5 96% cheaper

Source: World Bank Doing Business Survey, 2004.

Table A11 Foreign and domestic investors compared: legal system as an obstacle to operation and growth of business in India*

… is major/severe obstacle (% reporting)	Domestic	Foreign better by	Foreign worse by
Corruption	38.24	–0.87	–
Tax administration	17.65	–	+8.89
Economic and regulatory policy uncertainty	32.35	–11.62	–
Anti-competitive or informal practices	24.24	–6.88	–
Labour regulations	20.59	–3.91	–
Customs and trade regulations	20.59	–6.67	–
Business licensing and operating permits	14.71	–1.28	–
Access to land	24.24	–15.4	–

* Sample: 811 domestic, 29 foreign firms.

Source: World Bank Enterprise Survey, 2002.

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