

IBA GLOBAL INSIGHT

Aug/Sept 2013

War on fakes:
counterfeiting could cost the
global economy \$1.7tn by 2015

China:
Asia's emerging superpower is going
private with significant consequences

Global leaders:
Jim O'Neill on the
crisis, the BRICS and
Sir Alex Ferguson

The global land grab

Rising demand for agricultural commodities and
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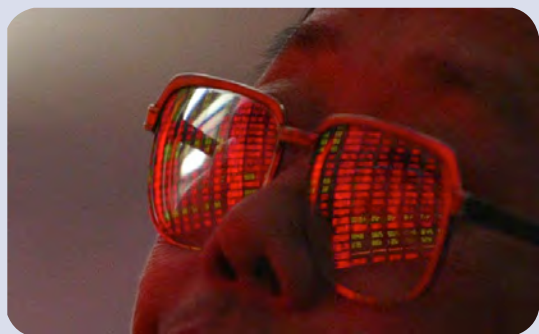
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From the Editor

Welcome to the August and September edition of *IBA Global Insight*. At this time of year, attention inevitably turns to the biggest single event of the IBA's calendar: the Association's Annual Conference – this year in Boston, from 6–11 October.

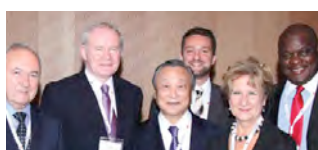
As ever, there'll be a host of high-profile speakers (see **IBA Annual Conference 2013: conversations with leading legal and business experts**, page 7). Former US Secretary of State Madeleine Albright will be the keynote speaker at this year's opening ceremony. Appointed by President Bill Clinton, not only was she the first woman to hold the position, she was instrumental in establishing the International Criminal Court in The Hague and brings a unique perspective to some of the IBA's core priorities; rule of law and human rights prominent among them. Sessions at the conference will address key considerations that exercised Albright and her successors as US Secretary of State. On 7 October, the legacy of the UN will be scrutinised in the session provocatively titled 'Human Rights at 65 – hale and hearty or in need of resuscitation' and, on 10 October, the fraught issue of drone strikes will be addressed. Both sessions will be hosted by the IBA Human Rights Institute. In this edition, we also have coverage of the issue, and the imminent report from the UN Special Rapporteur on Counter-Terrorism and Human Rights (see **Drone strikes: US must explain legal interpretations and respond to allegations of civilian harm, says UN Inquiry advisor**, page 10).

At the conference's Rule of Law Symposium on 11 October, former Chairman of the Federal Reserve Paul Volcker will consider themes of corruption and the rule of law. This will be a focus for various projects that culminate and will be presented in Boston. The IBAHRI report 'Tax abuses, poverty and human rights' will be presented at a session on 8 October. We'll also have a feature on this in the next edition of *IBA Global Insight*. Paul Volcker will be able to provide invaluable insight on the causes and consequences of the financial crisis, a theme tackled head on by the President's Task Force on the Financial Crisis, established under Akira Kawamura's Presidency. The resulting report *Justice and the Rule of Law* will be launched at the session on 7 October, 'Tackling poverty: the law's role'. In the meantime, the cover feature of this edition (**Global land grab**, page 12) touches on the work of the Task Force and covers some related themes that might provide food for thought for those at the session and the new Working Group on Poverty, Empowerment and the Rule of Law.

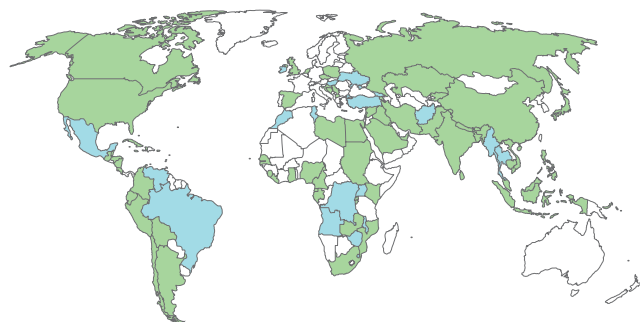
James Lewis



INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE (IBAHRI)



The International Bar Association's Human Rights Institute (IBAHRI), established in 1995, has become a leading global force in human rights, working to promote and protect the independence of the judiciary and the ability of lawyers to practice freely and without interference under a just rule of law. The IBAHRI runs training programmes and workshops, capacity building projects with bar associations, fact-finding missions, trial observations; issues regular reports and press releases disseminated widely to UN bodies, international governmental and non-governmental organisations and other stakeholders; and undertakes many other projects working towards its objectives.



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News

Cyber surveillance: whistleblower Snowden's defence underway

Despite attempts by authorities to bring the National Security Agency contractor and whistleblower Edward Snowden to the United States to face criminal charges, at time of going to press, he remains at Sheremetyevo Airport in Moscow.

Snowden's leaks describe in detail the US government's PRISM programme, which carries out mass surveillance on the communications of US citizens with foreign nationals via major online service providers. A similar project by GCHQ in the UK is potentially even larger, according to documents. While the state's powers to do so were emerging in the press earlier this year, the extent of the actual activity has caused considerable controversy.

Lawyers suggest that the 30-year old IT worker has already taken steps to help his legal defence. Kathleen Clark, John S Lehmann Research Professor of Law at Washington University in St Louis, said that the video interview posted by *The Guardian* newspaper on 9 June could influence the jury pool in his favour before any trial began.

'In some ways the video interview was a brilliant move,' Clark said. 'Snowden is clearly trying to go on a charm offensive by establishing the storyline about why he has done it, who he is, and that he is likeable and knowledgeable in some way.'

The US government has charged Snowden with theft of government property, unauthorised disclosure of intelligence information and espionage, the latter for releasing information relating to national defence that may cause injury to the US, or advantage to any foreign nation. Over the past few weeks, Snowden has leaked secret information alleging the NSA in the US and GCHQ in the UK have been involved in mass surveillance programmes involving the phone and email communications of ordinary citizens.

Clark said that the US government had already joined the fight over Snowden's credibility. US Secretary of State John Kerry branded Snowden 'a traitor to his country' for leaking the information. 'What Snowden's real motive is may not be legally relevant

to an eventual trial,' Clark said, 'but the emotional perception of Snowden is significant.' She said that the government had a track record of trying to systematically destroy the motives of previous whistleblowers.

General Keith Alexander, director of the NSA, told the rare public hearing that the PRISM programme – which is sanctioned by section 702 of Foreign Surveillance Act of 1978, Amendment Act of 2008 (FISAAA) – was critical to the ability of the intelligence agencies to defend the US. FBI deputy director Sean Joyce said FISAAA had helped the US to uncover and disrupt 50 terrorist plots and disrupt.

But critics remain unhappy that communications can be intercepted without a probable cause warrant, particularly since the Foreign Intelligence Surveillance Court conducts the oversight of the NSA's programme in secret. Despite the high profile Snowden has given PRISM, commentators do not expect Congress to put pressure on the government to rein back the programme.

'It is hard to see where you would get bi-partisan support for restricting government authority,' Stephen Vladeck, a professor of law at American University. 'Some people in Congress may make a lot of noise, but there is not a strong civil liberties caucus right now.' He says that Congress's view would be only likely to change if there were revelations that the NSA had been targeting US citizens in non-terrorist cases.

But the impact of the leaks is likely to be more extensive in Europe. The ability of US intelligence agencies to spy on communication between US and foreign companies is making business life more difficult, for example in Germany.

'There has been an immediate response from the German works councils on the matter of transferring data to the US,' Christian Harmann, Counsel at the German law firm Gleiss



Lutz, 'because it would be accessible to US intelligence services.' He says that this has thrown a spanner in the works of some business negotiations between US and German companies that would normally have been straight forward.

The revelations may also derail the timetable for making final amendments to the UK's forthcoming Data Protection Regulation. Anne Flanagan, Senior Lecturer of Communications Law at Queen Mary University – a group student member of the IBA – says that there has been intense lobbying by both US technology companies and governments to make the new regulations work better for their purposes. While she accepts that the original proposals would have been too prescriptive for business, she is concerned that the pendulum has now swung too far in the opposite direction.

'The question is, have we stepped away from the fundamental level of protection that citizens had under the original directive and sacrificed those for business expedience?' she said. 'I have a real concern that the EU is moving away from those levels of protection and that worries me.'

Flanagan says that the decision-making process should slow down to give the legislators time to develop precise legal definitions, make sure that people's privacy rights are not watered down and to make sensible derogations for business.

Read Arthur Piper's feature 'States of surveillance' in IGI June/July 2013 at tinyurl.com/IGI-surveillance.

IBA North America office opens in Washington DC

The IBA has opened a regional office in Washington DC, USA, with Michael Maya as its Director.

The IBA's President, Michael Reynolds, said, 'The opening of the IBA North America Office represents a particularly significant development in the continued expansion of the IBA. We are very excited by it and by the appointment of Michael Maya as its director.' He continued, 'This latest addition to IBA regional and specialist offices further demonstrates our commitment to our global membership and to the international legal profession more broadly. Core objectives of the IBA are promoting, advancing and fostering respect for the rule of law globally and developing harmonisation of law across

borders. All are areas about which Michael Maya is passionate.'

Before assuming the position as Director of the IBA North America Office, Maya spent almost two decades working with lawyers, judges, bar associations, human rights groups and other civil society organisations to promote the rule of law around the world. A considerable portion of his career has been spent with the American Bar Association, most recently as Deputy Director of the American Bar Association's Rule of Law Initiative (ABA ROLI), and in various roles at a predecessor entity, the ABA's Central European and Eurasian Law Initiative (ABA CEELI). Maya played a central role in creating ABA ROLI and



helped oversee its programmes in more than 60 countries. At ABA CEELI, Maya held a number of positions, including as its Tashkent-based representative in Uzbekistan; the Moscow-based director of its Russia programme; the Washington DC-based director of programmes in 12 former Soviet Republics, and later as its Deputy Director.

Young Lawyers from developing countries to attend IBA Annual Conference

This year, instead of registration discounts previously offered to IBA members from countries with reduced membership fees, the Association offered a scholarship to young lawyers who would like to attend the IBA Annual Conference but for whom it would be financially impossible.

The new scheme coordinated between the IBA and selected IBA member bar associations and law societies (Malawi, Namibia, Nigeria, Georgia and Paraguay), each chose five participants, based on specific selection criteria. These included submitting a short piece of up to 500 words, stating why they would like to attend the conference and what they hope to get out of it.

Successful participants will receive: free registration for the Annual Conference; a contribution towards a return economy flight to Boston; accommodation costs (room and breakfast) while attending the conference; and a stipend of \$50 a day.

Following the Conference the participants will be asked to submit a short report on the sessions they attended and what they enjoyed most about the conference.

Screening of 'Beatrice Mtetwa and the Rule of Law'



On 18 June, the IBA presented a screening of 'Beatrice Mtetwa and the Rule of Law', the first film to be produced about one of Zimbabwe's most courageous human rights lawyers. Mtetwa lives and works in Zimbabwe where, despite unlawful detentions and beatings, she continues to defend those who speak out against infringements of the rule of law and human rights by those in authority. An audience of around 350 viewed the screening held at the London School of Economics, and followed by a lively question and answer session with Mtetwa in person.

The screening was followed by a lively question and answer session with Beatrice Mtetwa in person, chaired by the BBC journalist Reeta Chakrabarti. The film's director, Lorie Conway, was also present at the screening.

For more information about Beatrice Mtetwa and the Rule of Law documentary film, see tinyurl.com/MtetwaFilm.

IBA Annual Conference 2013: conversations with leading legal and business experts



The IBA Annual Conference, Boston 2013 will see the return of the popular 'Conversation with...' interviews. These lunchtime events – open to all conference delegates – will take place throughout the Annual Conference week. Enquiring minds will have the opportunity to listen to personal insights about some key issues facing our world today, from distinguished guests, including: Ambassador Prince Zeid Ra'ad Zeid al-Husseini of Jordan; Professor Cherif Bassiouni; Beatrice Mtetwa and Professor John Ruggie. All 'Conversation with...' events include a Q&A session, providing the audience with the opportunity to address directly the high-level guests.

Further details of these and other Boston events can be found on the IBA website at tinyurl.com/IBA-Boston-2013.



'Law Rocks!' Boston 2013 in association with the IBA Annual Conference

This year, in conjunction with the IBA, the world tour is coming to Boston, with 'Law Rocks! Boston' taking place on the Thursday night of the IBA Annual Conference. Started in 2009 at one of the most celebrated live music venues in London, 'Law Rocks!' is a series of live 'battle of the bands' style rock concerts in which bands comprised of musically brilliant law firms and barrister's chambers battle it out on stage for charity. The net proceeds of the event will go to the IBAHRI and a Bostonian charity Horizons for Homeless Children.

Law Rocks! Boston will take place at The Paradise Rock Club, one of the most celebrated rock venues in the US where bands can follow in the footsteps of Guns n' Roses, Echo & the Bunnymen, R.E.M. and Tom Petty. And if that wasn't enough, the 'Dise is the first ever venue that U2 played in the US.

The call for bands has gone out across the world for an event we hope will add hugely to the social side conference week. If you think you and your band can help make what will be a truly memorable evening, let us know.

Opportunities for sponsorship are also available, and are very reasonable for a huge amount of exposure to the global legal industry.

For more information about the event in general or about band entry please visit www.lawrocks.com or email Nick M Child at nmc@lawrocks.com, Damian Hickman at cdh@lawrocks.com, or Ted Scott at ted@lawrocksusa.com.



Bianca Jagger to deliver keynote address at Boston showcase session



Credit: Featureflash/Shutterstock.com

Well-known human rights advocate Bianca Jagger is to be a keynote speaker at the IBA's showcase session entitled 'Climate change justice and human rights – preliminary concepts for legal and institutional reforms'. Through the work of the Bianca Jagger Foundation, she has taken a lead on both major human rights issues and climate change. Her presence at the IBA Annual Conference will help ensure that these issues gain attention and priority among IBA members. The session will take place at 0930 on Wednesday 9 October.

IBA launches Anti-Corruption Guidance for Bar Associations

The IBA has launched a range of practical and substantive recommendations to assist bar associations in developing their anti-corruption policies. The document entitled IBA Anti-Corruption Guidance for Bar Associations: Creating, Developing and Promoting Anti-Corruption Initiatives for the Legal Profession represents a new and important stage in the Anti-Corruption Strategy for the Legal Profession – a joint initiative of the IBA, the Organisation for Economic Co-operation and Development (OECD) and the United Nations Office on Drugs and Crime (UNODC). It sets out seven key modes through which bar associations can support anti-corruption initiatives in their jurisdictions.

The Guidance is available on the Anti-Corruption Strategy for the Legal Profession's website at www.anticorruptionstrategy.org via the Bar Guidance and Forum tab.

Human Rights News

Russia: amid trial delays, report urges Europe to move forward on Magnitsky Act

RUTH GREEN

As the first posthumous trial in modern Russian history continues to be plagued by setbacks, a report published by the European Parliamentary Assembly may be the strongest indication yet that Europe is getting closer to following the US and passing the Magnitsky Act.

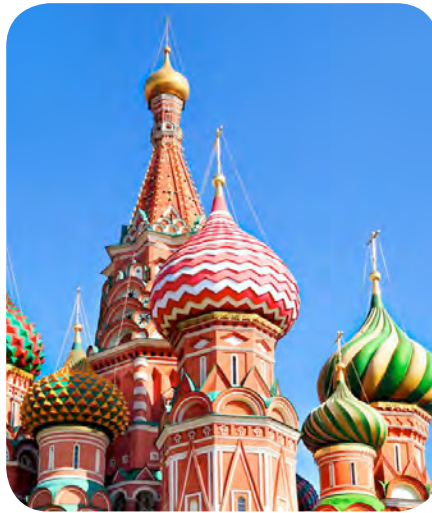
The posthumous trial of Russian lawyer Sergei Magnitsky, who died in a Moscow prison cell in 2009, began in March in Moscow's Tverskoi court. At that point the trial had already been delayed for two months after Magnitsky's family and the other defendant, the founder of Hermitage Capital and Magnitsky's former boss, William Browder, refused to take part in the trial.

The Russian authorities then appointed two lawyers, Nikolai Gerasimov and Kirill Goncharov from Law Office No5, to represent Magnitsky and Browder, respectively. However, the trial has continued to be wracked by delays as one of the state-appointed lawyers, Nikolai Gerasimov, also refused to participate. 'I have not found a single declaration from relatives requesting the case be reopened,' he said in court in April to Judge Igor Alisov. 'Since my participation contradicts the opinion and position of the defendant's relatives, I suggest that I do not have the right to participate in the trial.'

The trial was then postponed until 21 June while the state appointed another lawyer to the case. However, proceedings were delayed again as the other lawyer, Goncharov, failed to turn up to court, allegedly due to illness.

The trial was set to resume on 26 June, but it is understood that proceedings may have been delayed again. It is unknown whether another lawyer has been appointed to represent Magnitsky. Hermitage Capital declined to comment on the case.

The ongoing delays come as a draft report by the Parliamentary Assembly of the Council of Europe (PACE) has called for the Russian authorities to put an end to the posthumous trial once and for all. The report for the Council of Europe, which is the body



responsible for enforcing the European Convention on Human Rights, is the result of a six-month investigation into the Moscow authorities' handling of the case, which saw the Russian lawyer thrown into prison after uncovering a \$230m embezzlement scandal and die there before his case went to trial.

Denouncing the authorities' investigations into what happened as 'belated, sluggish and contradictory', the 41-page report calls on Russia to fully investigate the circumstances surrounding Magnitsky's death; to stop 'persecuting' company lawyers involved in the affair and to fully cooperate with other countries that have opened criminal investigations into money-laundering following Magnitsky's revelations.

The report also revealed that Europol, the EU's joint policy body, is conducting an investigation into Russian money laundering in EU banks. Although as Andreas Gross of PACE notes in the report, 'international cooperation requires a minimum of mutual trust', highlighting that he 'received confirmation of [...] distrust in London' earlier this year.

'The Head of the UK Central Authority told me at our meeting in February 2013 that a request for legal cooperation received from Moscow in March 2012 was so "blatantly politically motivated" that the British authorities could not possibly accede to it,' he said.

In the clearest indication yet that Europe might echo moves by the US Congress to introduce its own Magnitsky Act, the report also called on Russia to 'hold to account those responsible for his death.'

The Magnitsky Act, which aims to ban Russian officials implicated in human rights violations, was signed into law in the US in December. In what many have described as a retaliation tactic, the Russian authorities reacted by imposing an outright ban on Americans from adopting Russian children.

All the more interesting, earlier this month lawmakers in Russia passed a bill banning same-sex foreign couples from adopting Russian children. The move, which contrasts sharply with the wave of pro-gay rights legislation being adopted in the US this month, signals a growing rift in US-Russian relations, which have been fraught with difficulties in recent months.

Although the move seems to be in line with Russian anti-gay sentiment – a March poll by independent Russian research organisation the Levada Center found that 85 per cent of Russians opposed same-sex marriage – it also points to the wider crackdown on certain groups in Russian society.

Earlier this week the leader of St Petersburg-based gay-rights group Vykhod (Coming Out) was fined 300,000 roubles for failing to register the organisation as a 'foreign agent', a practice now required by law for all non-governmental organisations in Russia if they receive any funding from abroad.

While the PACE report urges European countries to adopt the Magnitsky Act, it still awaits the vote by all member countries of the Council of Europe, which includes Russia, in September.

Related IBA news analysis stories:

- Russia: historic Magnitsky trial brings corruption and rule of law into focus tinyurl.com/IBANews-Russia-Magnitsky.
- Russia's rule of law: reforming or unravelling – tinyurl.com/IBANews-Russia-RuleOfLaw.

Women's rights in Darfur, capacity building 2013



Albert González Farran
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The IBAHRI has partnered with the Human Rights and Social Justice Research Centre at the London Metropolitan University (HRSJ) to build the capacity of Sudanese lawyers to address human rights violations of women and girls living in Darfur, and particularly those living in internally displaced persons (IDPs) camps. The joint project aims to train lawyers to become trainers in their own communities on issues relating to sexual and gender-based violence. The IBAHRI and HRSJ are working closely with the Darfur Bar Association (DBA) with 20 DBA members participating in the project.

In June 2013, the IBAHRI and HRSJ completed phase one of the project, with a week-long training in Arusha, Tanzania. Participants will next be conducting needs assessments, in order to identify the issues that are most relevant to their communities and most beneficial to women. The completed needs assessments will be discussed and peer-training projects developed in during phase two of the project to be run later in 2013.

IBA report: ICC's reliance on live witness testimony at a crossroads



A report published by the IBA in July, examining and assessing the achievements, challenges and needs of the role of eyewitness accounts in cases before the International Criminal Court (ICC), finds that the Court's extensive reliance on witnesses is fraught with challenges. Mark Ellis, IBA Executive Director, commented that the ICC has encountered extreme witness-related challenges in all its cases. Citing the case of the prominent Kenyan politician Francis Muthaura, accused of crimes against humanity, Ellis said 'The ICC Prosecutor recently decided to drop all charges against Mr Francis Muthaura just one month before his trial was due to start. This was allegedly due to critical problems with key witnesses, such as bribery, the non-cooperation of the Kenyan authorities, and tainted, fearful or dead witnesses. This single case highlights the myriad issues and considerable impact that witness-management has on the Court's proceedings and the need for the ICC to evaluate and review its approach to witnesses in order to bolster its international credibility and ensure fair, efficient and effective trials.'

Entitled, *Witnesses before the International Criminal Court*, the IBA report is the result of comprehensive research and consultations with ICC officials and other key stakeholders. Reiterated throughout the report is the issue of the ICC's heavy reliance on live witnesses' testimonies. However, the IBA also includes reference to the prosecution's commitment to sourcing forms of credible and reliable evidence other than eyewitness testimonies. Justice Richard Goldstone, Co-Chair of the IBA Rule of Law Group, noted that 'On balance, the efforts of the ICC in its first decade are remarkable. Notwithstanding, there are critical fair trial issues at stake for the defence at the ICC in terms of inadequate operational support within the Registry on witness matters and non-cooperation by some states.'

The report was launched at a high-level roundtable discussion in The Hague on 15 July 2013, with a key note presentation by the President of the ICC, Judge Sang-Hyun Song. During the event, key ICC officials members of The Hague's diplomatic community, and leading ICC experts discussed the report's key findings.

Read the full report at tinyurl.com/IBAHRI-ICC-Report-2013.

IBAHRI returns to Myanmar/Burma

The IBAHRI returned to Myanmar/Burma in July on a scoping mission, to assess how the IBA can support the legal profession and further reform within the country. In particular, the IBAHRI will facilitate the Bar to become an independent body of lawyers and support a review of the Bar's licensing procedures. The scoping mission follows a previous fact-finding mission to Myanmar/Burma last year and the subsequent release of the mission report entitled *The Rule of Law in Myanmar: Prospects and Challenges* in January 2013.

Pictured (left to right): Phillip Tahmindjis (Director IBAHRI), Kyawmin Sann (Burmese advocate), Daw Aung San Suu Kyi (leader of the National League for Democracy) and Shirley Pouget (HRI Programme Lawyer).



Drone strikes: US must explain legal interpretations and respond to allegations of civilian harm, says UN Inquiry advisor

CHRIS HARMER



Controversy continues to surround the ongoing use of drone strikes. Serious concerns focus on the lack of clarity on rules of engagement that ought to govern this proliferating form of warfare. What accountability attaches to the architects of drone warfare in international law and which laws apply to 'targeted' killings by drones?

This is the focus of the inquiry led by United Nations Special Rapporteur Ben Emmerson QC into the use of remote killing in counter-terrorism and counter-insurgency initiatives. Its central purpose is to investigate strikes and examine the legality of drone warfare including its impact on civilians.

Sarah Knuckey, an international lawyer at New York University School of Law is one of the inquiry's advisors. 'The problem is that the US has not explained sufficiently its key legal interpretations, or released basic data on the programme,' she says. 'There are a number of key accountability measures that the government should take, including: releasing the legal memos justifying the targeted killing programme, releasing its own data on the number of strikes and records of any civilian casualties and publicly responding to specific allegations of civilian harm.'

At stake in the debate about the legality of remote killing is the body of law constructed particularly in the decades since the Second World War (but also before) in efforts to balance the conflicting principles of humanity and military necessity and place limits on the taking of life.

Forging a consensus on legality is likely to prove onerous, given the diversity of legal opinion on which laws apply to drone warfare. Many international lawyers vigorously assert that the rules of war – international humanitarian law – apply to the use of the weapon in armed conflict, and that international human rights law should govern their use outside armed conflict.

At the other end of the spectrum is legal opinion that western democracies are in an era of global warfare against non-state enemies such as al-Qaeda, the Taliban and 'associate forces', which does not recognise any boundaries to the theatre of war.

This latter interpretation, most notably asserted by international lawyers in the US, has been roundly rejected by the founder and guardian of international humanitarian law – the International Committee of the Red Cross (ICRC).

ICRC president Peter Maurer expressed clear opposition on defining the theatre of war as limitless on the grounds that this 'would mean that the whole world is potentially a battlefield and that people moving around could be legitimate targets... wherever they might be.'

Since the fundamental principles of international humanitarian law are proportionality, distinction, humanity and military necessity, evidence of whether these have been violated will

inform any conclusions the inquiry reaches about the legality of drone strikes.

This will in turn rest on evidence of civilian casualties and whether they are deemed proportionate, or otherwise, to military objectives. Emmerson will have at his disposal a wide range of reports and sources, one of which is 'Living Under Drones' produced by Stanford and New York Universities – an investigation into drone warfare in the region at the epicentre of the US campaign, the Federally Administered Tribal Areas (FATA) of north-west Pakistan.

'Living Under Drones' concludes that there is significant evidence US drone strikes have injured and killed civilians. Its findings directly contradict public statements by US officials.

In addition to efforts to establish the facts about *jus in bello* the inquiry will also be concerned with the body of law on recourse to the use of force – *jus ad bellum*, which is also highly contested, most notably in this context between the US and Pakistan.

Prime Minister Nawaz Sharif had barely arrived in office and not even sworn in when he called for an end to the US drone campaign and respect for Pakistani sovereignty following his election victory. In the first major Pakistani court ruling, a Peshawar High Court judge determined that drone strikes violate both *jus ad bellum* and *jus in bello* by breaching Pakistani sovereignty, in constituting a 'war crime' and a 'blatant violation of basic human rights'.

The age of drone technology is clearly upon us and its use proliferating, exponentially so by the US and it is estimated that 75 other countries now have unmanned aerial systems. If states fail to agree a legal framework on the use of drones then precedents could become established that will prove difficult to reverse when other states use drone warfare.

Read the full article at tinyurl.com/IGI-drones.



ANNUAL CONFERENCE OF THE
**INTERNATIONAL
BAR ASSOCIATION**

The IBA Human Rights Institute will be hosting a session entitled 'The use of drones: a human rights abuse?' at the IBA Annual Conference in Boston. The event takes place from 0930–1230 on Thursday 10 October 2013.



Ramon Mullerat OBE

1939–2013

‘He was a lawyer’s lawyer and contributed actively and hugely to every field of legal endeavour into which he ventured’

Ramon Mullerat believed the legal profession needs ‘lighthouses that radiate intense and comforting light... especially for its younger generations, to find the right way... to a haven of peace and justice in the world.’ Judging by the remarkably warm testimonials from those who had the pleasure of knowing and working with Ramon Mullerat at the IBA, he was just such a figure.

Paul Hoddinott was Executive Director of the IBA between 1995 and 2000. He recalls that when the time came to appoint a new Co-Chair to the IBA’s Human Rights Institute (IBAHRI) in 2000, Ramon Mullerat was an obvious choice. He had been closely involved with the IBAHRI since its launch in 1995; he had a considerable reputation on both sides of the Atlantic through his Presidency of the Council of Bars and Law Societies of Europe (CCBE) and active involvement with the American Bar Association (ABA), notably his work on international professional and business ethics; and he lectured widely to law faculties on both sides of the Atlantic.

‘Ramon was a generous host and loved to entertain international visitors at his home in Barcelona,’ Hoddinott recalls. ‘He was kind and ever-conscious of the needs of others and the plight of some, a sense of caring, which sprang from a deeply-held but unobtrusive religious faith.’

Ramon Mullerat had strong ties to Britain through his Presidency of the British Chamber of Commerce in Spain and as honorary legal advisor to the British Consul General in Barcelona; he was admitted as an Officer of the

Order of the British Empire for these services and was proud to place the letters OBE after his name. ‘Completely indefatigable, Ramon’s energy and commitment knew no bounds,’ says Hoddinott, ‘It was, perhaps, fitting that he died at his desk – there had been no let-up to the end.’

Professor Nicholas Cowdery AM QC, former Director of Public Prosecutions for New South Wales, Australia, was inaugural Co-Chair of the IBAHRI from its creation in 1995 until 2000. He met Ramon Mullerat through the IBA in the 1990s. ‘Even an inaugural Chair must move on and eventually, in 2000, that time came. Ramon had been adding to his extensive list of interests and by then was very active also in the area of human rights and had become engaged in IBAHRI activities. By some arcane IBA process, he became my successor as Co-Chair of the IBAHRI.’

‘In the handover process,’ Cowdery recalls, ‘I came to know Ramon better and that association continued for many years. He was something of a legal polymath. He became a leader in the field of arbitration, but he maintained a keen interest in subjects such as human rights, legal ethics, pro bono legal practice, corporate responsibility, the globalisation of law and lawyers and much more. He was a prolific writer and speaker on his subjects of interest and continued in that vein right to the end.’

Cowdery recalls the occasions that he encountered Ramon Mullerat more recently (usually at IBA conferences). ‘Ramon’s was always a friendly face to see – and he had an excellent memory of people and past events. He was

a gentle, thoughtful and scholarly man of great substance with a quiet manner. He was a lawyer’s lawyer and contributed actively and hugely to every field of legal endeavour into which he ventured.’

This sentiment is echoed by the IBA’s Executive Director Mark Ellis. ‘Ramon Mullerat was one the warmest and kindest people I have ever met at the IBA,’ he says. ‘When I first arrived at the Association, I had the privilege of working with Ramon as he chaired the IBAHRI. During this time, I watched a man of great substance focus on human rights issues with a passion and dedication that was unsurpassed. He never shied away from a controversial human rights issue and always had a keen awareness of and empathy for those who were victims of human rights abuses. These people had one of the smartest and most talented advocates focused on their plight. His quiet but forceful determination meant that victims of human rights abuses were not without a voice.’

Ellis recalls that Ramon Mullerat was also a passionate believer in the IBA. ‘He loved what the Association stood for and was always willing to assist in any endeavour that would further the IBA’s goals and aspirations. His counsel, insight and guidance were always welcomed and he helped me navigate a number of sensitive issues. He will be missed and the IBA was blessed to have Ramon as part of our family for all these many years.’


Ramon Mullerat is remembered with great fondness by all those at the IBA who knew him and worked alongside him. Our condolences go to his family.



The global land grab

Rising demand for agricultural commodities has led to a 'land grab' in some of the world's poorest countries. *IBA Global Insight* assesses the legal implications and the prospects for the developing world.

TOMASZ JOHNSON



In 2008 riots erupted in cities across the developing world. Throughout 2007 and 2008 food prices had rocketed, bringing millions of people into hunger. High price events are not uncommon in agricultural markets, but what distinguished this period was the jump in not just one, but in almost every major food commodity simultaneously.

The phenomenon struck at the staples on which the world's poor survive. From Haiti to Thailand, Bangladesh, Egypt, Côte d'Ivoire, Senegal, Cameroon and Afghanistan, they took to the streets. Shortly before the boom started, 830 million people went to bed hungry every night. Afterwards, for the first time in human history, it was more than a billion.

Combined with the shrinking appeal of other assets in the wake of the global economic crisis, the hike in food prices sent investors scurrying in search of agricultural land. Prior to 2008 the annual expansion of agriculture globally was around four million hectares; before 2009 had ended, deals had been announced for more than 56 million hectares across the developing world. More than 70 per cent took place in Africa, largely in impoverished, sub-Saharan states.

As the deals began to bear fruit, stories emerged of rural people being forced from their land at the barrel of a gun; of millions dispossessed to feed the demand for commodities in the developed world. The phrase 'land grab' gained currency.

In the immediate aftermath, it was almost impossible to discern the true scale and impact of thousands of deals, often negotiated in opaque circumstances. Were the abuses simply anecdotal, or did they reflect a deeper and more ominous trend? Was the 'land rush' an artificial bubble driven by speculation, or had the world entered a new, dark phase in the fight against poverty and hunger?

A disaster for poverty alleviation

In a 2011 report that attempted to fill the need for empirical data, the World Bank warned of 'immense' institutional gaps in the countries that had been targeted. 'Too often, they have included a lack of documented rights claimed by local people and weak consultation processes that have led to uncompensated loss of land rights, especially by vulnerable groups,' it wrote.

Many countries suffered from a litany of governance weaknesses that created an inability to properly consider the impacts of land deals, ensure that they were equitable, or build in social and environmental safeguards. 'All this implies a danger of a "race to the bottom" to attract investors,' the Bank warned.

By April 2013, the clearest picture yet had emerged. A coalition of development organisations published a report based on a comprehensive database of large-scale land acquisitions globally since 2000.

It found that the 'land rush' of 2009 was very real and had targeted many of the world's poorest states. Most deals took place in countries with high levels of hunger, yet had the intention of exporting food to far wealthier countries. The displacement of rural communities and the dispossession of their farms was a common feature, with scant compensation or benefits in return. For food security and poverty alleviation, it was a disaster.

Although it had slowed since the peak of 2009, the report found, the land grab had continued.

Agriculture and the global challenges

The nature of agricultural development over the coming decades will play a decisive role in a distinct set of global challenges.

At a conservative estimate, the task of feeding a growing population will bring six million hectares into production each year to 2030. If the pattern of agricultural expansion in the 21st century is continued, this will lead to tropical deforestation, rising greenhouse gas emissions, conflict over increasingly scarce water resources and increased malnutrition among poor populations.

Contemporary environmental crises have made the task of managing the food crisis far

harder, by creating competing demands for land and commodities. The demand for biofuels to meet renewable energy mandates in wealthy countries contributed to the spike in crop prices. Indigenous people in tropical forested countries also face the specter of a 'green grab' – the acquisition of forests to 'offset' carbon emissions by avoiding deforestation.

There is a growing, irrefutable consensus that a cornerstone of the solution to all of these crises lies in securing land rights for rural communities. In May 2012, the UN Committee on World Food Security (CFS) endorsed the *Voluntary Guidelines on the Responsible Governance of Tenure*. The *Voluntary Guidelines* promote tenure rights as a means of eradicating hunger and poverty.

Announcing the agreement, the Director-General of the Food and Agriculture Organization of the UN, José Graziano da Silva, said: 'Giving poor and vulnerable people secure

'Giving poor and vulnerable people secure and equitable rights to access land and other natural resources is a key condition in the fight against hunger and poverty'

José Graziano da Silva
Director-General, Food and Agriculture
Organization

and equitable rights to access land and other natural resources is a key condition in the fight against hunger and poverty.'

Conversely, analysis by the International Food Policy Research Institute has found 'a definite [inverse] correlation between access to land rights and hunger'.

The historical evidence suggests that its importance lies not only in ensuring development is pro-poor, but as a precondition of successful development. It played a decisive role in enabling several countries during the 20th century to embark on rapid economic transformation without falling prey to the 'resource curse' – a fate that now threatens those worst affected in 2009.

In *How Asia Works*, published this year, the academic and journalist Joe Studwell argues that the rapid economic transformation of northeast Asian states like China, Japan and South Korea in the 20th century was predicated on the support for small-scale, household farming. This model, he says, created the groundwork for





Aerial view of forest being cleared by palm oil companies in the Ketapang district of Indonesia's West Kalimantan province. Photograph by Crack Palinggi for pictures.reuters.com

the export-oriented manufacturing sectors that enabled them to flourish, leaving counterparts like Indonesia in their wake.

'In contrast to Northeast Asia, Southeast Asia became a beacon for what not to do if you want economic transformation,' Studwell told the Astana Economic Forum in May this year. 'Despite many announced plans for land reform, governments allowed landlordism and scale farming to continue despite the presence of vast numbers of under-employed peasants capable of growing more.'

Today China's progressive land tenure reform programme is being undone with a vengeance by debt-ridden local governments. But in the late 1970s it laid the groundwork for the economic trajectory we are still observing.

Equally, in Thailand and Vietnam, the clarification of property rights and technological support for small farmers has had 'a major impact on poverty reduction', according to the World Bank. 'It also illustrates that increases in production are by no means contingent on large-scale land acquisition,' the Bank found in the 2011 report *Rising Global Interest in Farmland*.

But in February 2013, a report by the Rights and Resources Initiative (RRI), a coalition of more than 120 organisations advancing tenure reforms, observed that in attempting to replicate the economic successes of Brazil and China, many developing nations were failing to heed this historical lesson. While these successes had been predicated on property rights and support for local enterprise, poor nations were now

'surrender[ing] economic and political control of their land and resources, in effect, replicating economic systems created during the colonial era driven by resource extraction and export'.

Faced with what RRI called 'a fork in the road', many nations were being seduced into making the wrong choices as '[a]gribusiness, miners, loggers, and other industrial investors continued to market their endeavors to developing nations as the shortcut to prosperity'.

Nothing as profound as land grabbing

Alfred Brownell is President and founder of the Association of Environmental Lawyers of Liberia (Green Advocates).

'I've never seen anything as profound as land grabbing,' he says. 'It's a crime that has to be defined in international law, because it attacks the very poorest. It's a crime against humanity.'

Against a backdrop of land grabbing across sub-Saharan Africa, Liberia stands out. According to local analysts, some 75 per cent of the country's area has been carved up and allocated to companies for mining, logging and agriculture.

The two largest known deals were concluded in 2009 and 2010, with Malaysian giant Sime Darby, and Golden Veroleum, a New York-based investment vehicle created by Indonesian firm Golden Agri Resources. Both cover 220,000 hectares and were intended to produce palm oil for export.

'The investments are a massive assault on poor, traditional indigenous people,' says Brownell. 'They can't teach their young ones about their history and culture, their water supplies dry up, they can't produce food. They don't have access to medicine. It's completely destroying their culture. It's an outright assault on their ability to survive.'

In 2013 the fate of Liberia's rural poor hangs in the balance. Its president, 2011 Nobel Peace Prize laureate Ellen Johnson Sirleaf, has instituted a major reform of land tenure. But, large-scale and inequitable resource exploitation continues to take a heavy toll on its indigenous, forest-dependent communities.

Deals such as that with Sime Darby pose a genuine threat to stability in a country that has only recently emerged from more than a decade of civil war. By late 2012, 95 per cent of the cases before the country's Supreme Court concerned land. The Chair of the nascent Land Commission warned that the disputes could 'take the country back to crisis' if not handled properly. 'Land dispute threatens peace,' he said.

Brownell says that the government is institutionally incapable of either negotiating with major companies like Sime Darby or Golden Veroleum in a way that safeguards Liberian people, or monitoring the implementation of the projects.

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‘Their financial might is too massive,’ he says. ‘There’s no way they can regulate this.’

‘They don’t have a clue what’s happening in the field. They don’t have the capacity to monitor, to ensure compliance or enforce laws against them. The company is effectively left to govern itself.’

‘Governments have to increase the tools they have at their disposal for negotiations... Corporate governance has a role to play, but we have to beef up domestic frameworks...and international trade frameworks must also be addressed’

Peter Maynard

*Past Chair of the IBA’s Public and Professional Interest Division and
Chair of the IBA’s Presidential Task Force on the Global Financial Crisis*

Growing recognition for indigenous land rights

A 2011 analysis by Owen J Lynch, a professor at the University of the Philippines College of Law, found a growing recognition of indigenous land rights in international and domestic laws. Examining both laws and judicial cases, Lynch found ‘an extraordinary number of legally supportive developments on international and national levels’.

‘As such, it can now be credibly asserted that international law, including international customary law, mandates legal recognition of native/aboriginal title,’ Lynch wrote. ‘Whether policy makers, political leaders and economic elites respect and implement this emerging and hopeful new international legal norm remains to be seen’.

Lynch told *IBA Global Insight* that while he is confident the positive trend has continued since 2011, there remains a disconnect between international law and de facto practice, with governments failing to enforce those progressive laws to which they are signatories.

‘Law is an important part of the ingredient, but it’s not sufficient without enforcement,’ he says. ‘Enforcement is a question of political will. Without political will who cares what the law says.’

Liberia is a case in point. A legal review of the contracts signed with both Sime Darby and Golden Veroleum found that the Liberian government had failed in its duty to ensure that the terms protected the human rights of affected communities. This failure placed the government in violation of legally binding international

commitments relating to customary rights and natural resources.

Lynch notes that national laws recognising and reciprocating obligations made internationally are more meaningful than international laws themselves. He cites the growth of civil society in developing countries as a significant factor in improving enforcement.

Yet for Brownell, there is continuing concern over whether national laws are sufficient either.

‘In the last few years in Liberia we’ve learnt how to script what donors want to hear,’ he says. ‘So if we have a problem with land, what should we do? We draft legislation on community rights. We’ve ticked the box. But there’s still a serious land problem. Ok, we’ll have a Land Commission. We’ve ticked another box. But the land grabs continue.’

In a phenomenon that has a distinctly international dimension, and with target states like Liberia ill-equipped to deal on an equal footing with huge multinational corporations, Brownell says there is a dire need for international legal measures that are enforceable.

‘What we have are voluntary standards. I think there’s a need for the international community to rise to the occasion.’

‘We have the [World Bank] IFC’s principles, the [CFS] *Voluntary Guidelines*, the African Commission on Human and Peoples’ Rights, but these are not very strong. You have to have binding measures.’

Kirk Talbott works on the United States Agency for International Development’s (USAID) tenure programme as an attorney and land rights specialist with Cloudburst Consulting Group. He cites the CFS guidelines as an important step that will bring ‘more coherence and forge legally enforced standards to uphold land tenure rights’.

‘The *Voluntary Guidelines* are a first step toward incorporating the standards into international law – a self law, in a sense,’ he says. ‘We need to get declarations built into regional fora like ASEAN [Association of Southeast Asian Nations], to work at international and local levels in a concerted way to fight for these rights. But we’re not there yet.’

Peter Maynard is Managing Partner of Peter D. Maynard Counsel & Attorneys, and co-editor of the forthcoming book reporting on the second phase of the. It examines the impact of the financial crisis on poverty and the role the legal profession can play in ameliorating those impacts. Maynard, who chairs the Task Force, recognises the need for a ‘multidimensional’ approach to improve corporate governance while strengthening the negotiating powers of governments, to ensure they have the ability to enter agreements that safeguard the interests of the people they represent.

‘The governments themselves certainly have to increase the tools they have at their disposal for negotiations,’ he says. ‘We have to look at the problem from a multidimensional perspective. Corporate governance has a role to play, but we have to beef up domestic frameworks and improve the approach of governments to negotiations. And international trade frameworks must also be addressed.’

Maynard believes that the presence of government lawyers within the IBA can play an important role. He notes that a number of IBA lawyers are working pro bono on issues related to Liberia, and that the question of money laundering, for example, has drawn the interest of lawyers from Nigeria. These factors are indicative of the role the IBA can play within the sector, and in its interrelation with broader drivers of poverty that are being addressed by the Task Force.

Indonesia: limited usufructuary rights

On 16 May 2013, the Indonesian Constitutional Court struck one word from the Forestry Law. It was a ruling that was a long time coming. ‘It’s like the Latin saying that water wins from a stone, not by force but by falling continuously,’ wrote one leading scientist. ‘Good things come to those who wait,’ said the Secretary-General of the leading indigenous peoples’ organisation, succinctly.

The word – ‘state’ – had, since the passage of the law in 1999, placed the forests of some 40 million indigenous people under the control of the national government. The ruling eliminated a troublesome ambiguity and made for the first time a clear distinction between ‘state forests’ and ‘customary forests’.

The ambiguity had enabled the state to grant leases to plantation, logging and mining companies in customary forests, while the indigenous people exercised only limited usufructuary rights – enabling the holder to derive benefit from the property. For indigenous people it had devastating implications.

Over the past 20 years, Indonesia and neighbouring Malaysia have met almost all of the rapidly growing global demand for palm oil. In response to growing demand for processed fats and biofuels, the area of oil palm plantations more than doubled in Indonesia between 1997 and 2007, from 2.9 million hectares to 6.3 million hectares.

While it has proved dramatically successful in generating rural jobs and improving livelihoods for those involved in effective smallholder schemes, the dominant model has been the ceding of large areas to plantation companies. These have disproportionately targeted indigenous forests on the islands of Sumatra,

Borneo and, latterly, Papua New Guinea. The dispossession of these communities has fostered a simmering human rights crisis that has exploded occasionally into bouts of violence, and drove deforestation rates to the highest in the world.

At the heart of the problem lies a plural legal structure in which the customary or *adat* laws of indigenous communities sit uneasily alongside state law. Under the pre-independence Dutch administration, a dualism existed between colonial and *adat* law. But post-independence state laws have often ignored or overridden *adat*.

‘I’ve never seen anything as profound as land grabbing. It’s a crime that has to be defined in international law, because it attacks the very poorest. It’s a crime against humanity’

Alfred Brownell

President and founder, Association of
Environmental Lawyers of Liberia

According to Henri Subagiyo, Executive Director of the Indonesian Center for Environmental Law, the problem is not the coexistence of differing legal structures per se, but the supersession of *adat* law. ‘Because legal pluralism in Indonesia is weak pluralism,’ he says. ‘When dealing with customary law and state law, the law of the state is more powerful. It can be seen that the indigenous people and their rights are constitutionally recognised, [but only] if not contrary to applicable law.’

The Forestry Law was a profound example of this. The offending provision read: ‘... customary forests are state forests located in the areas of customary communities’. In effect, it recognised customary rights but subjugated them to state control.

Challenges remain to ensure that the ruling is implemented, not least through the local legal delineation of customary forests. A key obstacle is the rampant corruption that plagues natural resource management and subverts sensible government; Indonesia is very far from properly recognising the role of small-scale farming and lags behind other Southeast Asian neighbours in granting rights.

‘The drive and economic returns for large-scale exploitation of land and natural resources is very high,’ says Nonette Royo, an attorney and the Executive Director of the Samdhana Institute. ‘It is closely linked with the political

ambitions of local and national leaders and their parties. Conversely, there is very little economic valuation of the contribution of rural communities and local people.'

Agricultural transformation or business as usual?

On the eve of the Group of Eight (G8) talks in 2012, Barack Obama announced a \$3bn commitment from major companies to support projects that would assist small farmers. The initiative, branded the New Alliance for Food Security and Nutrition, would boost farmers' incomes and lift 50 million out of poverty.

A core objective was to raise yields in Africa, which could substantially relieve the additional burden on land; the World Bank estimates that none of the sub-Saharan states targeted by investors in 2009 were achieving more than 30 per cent of their potential on cultivated land. For that, the private sector was needed.

'A basic reality is that you've never seen agricultural transformation occur without active and direct engagement of the private sector, and that certainly will be true in sub-Saharan Africa,' the director of USAID told Reuters.

The New Alliance will play a leading role in determining if and how private sector investment will support fragile tenure reform processes in countries like Liberia. Yet credible concerns have been raised over whether the agreements signed between the G8, companies and African states in fact support the exact reverse – more land grabs.

Under the New Alliance, Côte d'Ivoire, for example, has signed a deal that gives French grain trader Louis Dreyfus the rights to 100,000 to 200,000 hectares for rice production. Another, an Algerian company, is reportedly targeting 300,000 hectares.

In its analysis of the agreements with target countries, the NGO Grain found 'no policy commitments... to protect peasants and pastoralists from the growing number of land grabs taking place.' The New Alliance promoted a voluntary approach to regulating investments, merely asking partners to 'take into account' the CFS' *Voluntary Guidelines* on tenure.

A paper released in May by CIDSE, an alliance of 16 Catholic development agencies, expressed deep concern over the New Alliance's emphasis on private sector investment. It warned that it both fell short of what is needed to eradicate hunger and 'could potentially undermine progress towards that end'.

The New Alliance is not alone in lacking coherence, or indeed in failing to support the kind of agricultural reform that it has recognised the need for.

In 2012, Oxfam identified a surge in development institutions lending money through financial intermediaries, such as private equity funds and banks. The model prioritised financial returns over safeguards, despite the fact that many of the institutions had explicit poverty reduction mandates. Among them was the World Bank's International Finance Corporation (IFC), which was subsequently found by its own ombudsman to have made investments without the ability to track whether they were doing poor people harm or good.

The World Bank claims that its substantial, and increasing, investments in agriculture are a vital part of the mix, which are helping smallholders increase productivity and reach market. Oxfam contends that there is insufficient transparency and safeguards to ensure the benefits are felt by the poorest people, and has made as yet unsuccessful calls for the World Bank to temporarily freeze investments.

The shortcomings in the IFC's investment model was laid bare in 2009, when an audit by its ombudsman found that it had failed to mitigate the social and environmental risks of investing in the oil palm sector in Indonesia. The audit found that IFC staff were aware of unresolved land disputes with local communities, but still decided to make loans and investment guarantees to Wilmar – one of the world's largest palm oil trading firms.

The audit contributed to a decision by the World Bank to carry out a comprehensive review of its support for the palm oil industry. Wilmar, by contrast, has continued to be embroiled in rights abuses, in one case enlisting Indonesian police to systematically evict communities.

If the reforms that have taken seed with the Constitutional Court decision bear fruit, Indonesia's indigenous people may one day be protected from such practices. But while such delicate governance processes evolve, poor rural people will need as much protection as possible from land-hungry corporations. Whether they will receive it, in Indonesia, Liberia or beyond, remains uncertain. ☒

Tomasz Johnson is a freelance journalist and can be contacted at tomaszjohnson@hotmail.com



The IBA's Presidential Task Force on the Global Financial Crisis has focused on factors contributing to poverty. The resulting book will be presented at the IBA annual conference in Boston and subsequently made widely available. Further information on the Task Force can be viewed here: tinyurl.com/IBApoverity



Syria:

should the US and Europe intervene?

Experience in Afghanistan, Iraq and Vietnam shows that rule of law and respect for human rights cannot be imposed by military force.

JOEL BRINKLEY

The United States is unlikely to intervene in the Syria conflict in any significant way – beyond providing small weapons and ammunition as recently promised. And it takes only a cursory examination of American military history to understand the reasoning.

Look at Vietnam today, as I did on a visit early this year. It's in a similar situation to that it would have been in had the US never tried to change the course of history there half a century ago – even though the US lost 58,000 lives and \$5tn, in current-era dollars. There has been no discernible improvement in rule of law or human rights. It's a one-party state that censors news and social media sites while also jailing dissidents without trial or qualm.

In Iraq more recently, the long costly American war simply replaced one dictator with another. And it turned a relative quiescent (though heavily repressed) authoritarian state into a nation riven with violent sectarian conflict and blatant human-rights abuses.

If you want to know why human rights and rule of law have improved little, if at all, you only need to look at the treatment of Iraq's news media – a prime example of its failure to observe human rights or uphold the rule of law that America left behind.

'In Iraq,' the Committee to Protect Journalists (CPJ) said in a recent report, 'at least 92 journalists, or nearly two out of every three

killed, did not die in air strikes, checkpoint shootings, suicide bombings, sniper fire or the detonation of improvised explosive devices. They were instead murdered in targeted assassinations in direct reprisal for their reporting. Many were targeted because of their affiliations with US or Western news organizations.'

The CPJ also publishes what it calls its 'impunity index,' an accounting of how frequently people are arrested for killing journalists. And in Iraq, the committee wrote, 'even today, as Iraq has moved beyond' the war, 'authorities have shown no interest in investigating these murders.' Iraq's impunity rate 'is 100 percent' – the 'worst in the world.'

Internal conflicts react badly to military intervention

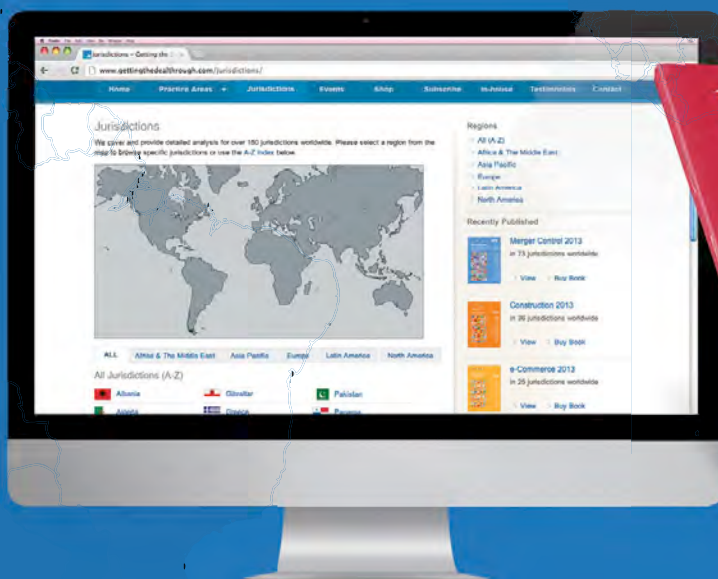
When the US and other Western forces leave Afghanistan next year, if they also end their foreign aid, 90 per cent of the country's revenues will disappear. The Taliban will almost certainly sweep through most of Afghanistan once again – they already control significant areas – returning the nation to almost the same state it was in when the United States invaded in 2001. The Taliban is likely to impose a draconian Islamic state again, ensuring that women are repressed and ordinary Afghans are beheaded for violating the Taliban's view of Islamic law.

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The Taliban have about as much respect for Western human rights standards as they do for Christianity.

True, al-Qaeda is gone – displaced to Pakistan with affiliates now spread to scores of other countries. And US forces have begun turning security responsibilities over to the Afghan army, whose members have killed 36 American trainers in so-called ‘green-on-blue’ attacks.

But the Soviet Union spent many years training an Afghan military during its occupation of the state in the 1980s. The minute they withdrew, the International Crisis Group reported, Afghan soldiers simply shed their uniforms and went home. Already Afghan military commanders are complaining that their forces aren’t capable of doing the job alone.

So what will the US, European and other coalition forces have accomplished?

Put simply, these experiences show that internal insurgencies simply cannot be defeated with military force, and that’s what an invader would face once Assad is deposed.

What’s more, history shows that a military cannot impose rule of law on a nation that has never had it. In modern times, the US has never once succeeded at that, but you don’t have to look only at American foibles. The French military invasion of northern Mali simply drove the Islamic insurgents into the hills and to neighboring states, like Niger, where they are stirring even more trouble. It was like squeezing one end of a balloon, watching the other end swell. Now that United Nations peace keepers have largely replaced the French, the Malian militants are attacking them. Like Islamic militants everywhere, these know little about basic human rights – and care even less.

The allied bombing of Libya last year left an exceedingly weak government that does not maintain legal or judicial control over most of the country, giving jihadist groups free reign. They’re the ones who killed the American ambassador and three others last year.

At the G8 summit in Northern Ireland this spring, Russia and the US agreed to push for a summit in Geneva to bring about a peaceful solution to the Syrian crisis.

That was in June, but the same angry arguments that have consumed every element of the Syria debate have hobbled this idea, too. Shortly after the agreement, Russia promised to send a shipment of S-300 advanced missile-defense systems to Damascus, angering the West. And then Russia accused the US of breaching the summit agreement by promising to support the Syrian rebels with small arms.

Now the summit plan seems to be just another idea lost in the cacophonous debate.

Syria’s uniquely entangled insurgency

Today, Syria presents the most complicated internal insurgency with more malign actors than any in recent times.

Consider the players: Syrian President Bashar al-Assad, the ruthless dictator who shows no respect for fundamental human rights – quite the opposite in fact. He has killed as many of his own people as necessary to keep his hold on to power, more than 100,000 civilians so far, the UN says. Another two million Syrians are refugees in bordering states that are increasingly being drawn into the conflict, and 4.5 million others are internally displaced within their own country. Altogether, that’s 35 per cent of Syria’s population. These people are suffering without sufficient food, medical care or education for their children, overwhelming the world’s humanitarian relief agencies.

The groups vying for power are the Syrian army on one side fighting alongside Hezbollah militants, surrogates of Iran. Hassan Nasrallah, the Hezbollah leader, vowed to fight to the death to keep Assad in power. Iran and Russia are sending Assad weapons of all sorts. Shi’ite Iraqis, too, have joined the fight on behalf of Assad.

On the other side are Syrian Army deserters and others who have joined the anti-government rebels. Also fighting against the regime are the al Nusra Front, an al-Qaeda affiliate that recently made a unification pact with the Islamic State of Iraq, another al-Qaeda group, and other Islamic extremists. Militants from Saudi Arabia, Turkey, Qatar and other regional states are also joining the fight. And the truth is, these various groups on two sides of this conflict are spending as much time fighting and killing each other as they are pursuing their goals in the civil war.

As this goes on and on, the US and Europe continue proposing strategies for peace that get lost in the dissonant clamor. It’s a vivid demonstration of governance failures almost everywhere. Even the American proposal to provide small arms to the rebels has set off contentious arguments in the US Congress and is indefinitely stalled.

For the Obama Administration one important factor is American public opinion. A *New York Times*/CBS news poll this spring found that 62 per cent of Americans do not believe the US has the responsibility to intervene in Syria.

These people must surely look at recent history in Afghanistan, Iraq and Vietnam and realise: what could the US or Europe accomplish by plunging into that toxic stew? ☒

Joel Brinkley, a professor of journalism at Stanford University, is a Pulitzer Prize-winning former foreign correspondent for *The New York Times*.



Global leaders:

Jim O'Neill

Jim O'Neill spent many years with Goldman Sachs, most recently as head of Asset Management. He's well-known for coining the term 'BRIC' economies. He's also a good friend of recently retired manager of Manchester United, Sir Alex Ferguson, and was a director at the club. In this in-depth interview, conducted by former CNN news anchor, Todd Benjamin, he shares his views on the financial crisis, the progress of the BRICs, and what we can learn from the phenomenally successful leadership of a football legend.

Todd Benjamin: Of course you have a broad perspective, Jim. What is your assessment of where we're at now – because it's been a volatile five years since the financial crisis?

Jim O'Neill: That's for sure. Look at the strain it's taken on me. That's a tough question to start with and it's not easy to give a little, nice, simple packaged answer.

TB: Take your time.

JO: I think one could tentatively say that the Fed [The Federal Reserve System, the US central banking system] is starting to have more confidence that there's some sort of virtuous private sector recovery beginning to take place.

We've had hints of that for each of the past two years but it kind of fizzled out. What is so intriguing about this year is that it hasn't fizzled out yet and importantly that's despite the fact the US authorities have tightened fiscal policy quite a bit this year. So I would say there's some more justifiable hope about the US today than probably most times since that terrible sort of epitome of the mess five years ago. Japan is showing some signs of life and of course they're on a degree of policy aggression that is almost unheard of anywhere in the developed world. But we have enormous challenges in Europe...

so you've got the US sort of leading the developed world, if you could simplify it that way, in terms of showing signs of sustainable private sector recovery but the other intriguing development is we have more and more so-called 'emerging countries' showing the opposite signs of having their first really big challenges since. One of the reasons why the whole BRIC thing kind of became so big is, in 2008/2009, it looked like many of them were unscathed, and here we are five years later and I find my mind wondering whether there is some kind of linkage that is not so obvious superficially, but below the surface you can think why, a number of these countries are showing signs of certainly slowing down and in some cases some challenges.

TB: It's very interesting you should mention that because in 2001 you wrote a paper in which you were so optimistic about some of these emerging economies. You coined the term BRIC referring to Brazil, Russia of course, India and China. And, when I look at those big four economies, yes, they have a tremendous amount of potential but some of that is now being called into question.

JO: Yes and no. I mean, again there's no straightforward nice little box answer but let me try and give you some flavour briefly. The big story in the first decade of 'BRIC life', let's call



On the financial crisis:

‘One of the reasons why the whole BRIC thing kind of became so big is in 2008/2009, it looked like many of them were unscathed... a number of these countries are showing signs of certainly slowing down and in some cases some challenges’

it, is that each of the four did way better than even the most optimistic scenario that I had of the three in that first paper. And so, as with a lot of things in life, people assume that what has happened will just go on. So many people are judging the standards of what’s happening in these countries by the standards of that first decade which is probably a mistake. The second thing is, linked to the big 2050 stuff that we started about the world in 2003 and the one that really made the whole BRIC thing so popular... I’ve been working with assumptions about each five-year period as we go through that 50 years, and so far this decade China is actually still growing by more than I’ve assumed despite the fact it’s slowed. So China’s a disappointment for people who thought the drug of ten per cent growth would go on forever, but I would suggest anybody that’s looked at it closely might not be so disappointed. The other three: Brazil and India are definitely disappointing, but Russia, again if you really focus on what their growth potential is, Russia’s actually by and large doing what I assumed it would do. But Brazil and India are definitely disappointing so far this decade.

TB: I tend to be more sceptical on China and part of the reason is because I see certain things happening in China, potentially they could grow old before they grow rich but I think there

are even greater problems. I think credit is a major issue there. If you look at the amount of bad debt, especially in local governments, by some estimates it could be 20 to 40 per cent of GDP. There’s a lot of debt that’s been rolled over because they invested in enterprises to create employment that aren’t profitable. Water is another major issue in that country. I mean we could talk about other things as well – corruption obviously. And then this whole question of whether or not they truly do have the right leadership to help the country transform to a more service oriented economy versus export oriented economy.

JO: You’ve cited some of the best known challenges. You could probably add another ten, and I hear about them all the while. A couple of things to start this off, and I could spend the rest of our time just talking about China, I think it’s really important to focus on China first of all and I’m sure many of the listeners appreciate it but what happens in China is the single most important thing that happens for the world in this decade. Even with it slowing, China is creating huge impacts on the world economy. I’ve assumed that this decade China will grow by 7.5 per cent. So far in the first two years of the decade it’s grown by 8.3 per cent. 7.5 for China is equivalent to the US growing by four or



less. The US has not grown by four per cent for any decade in my life. So if China grows by 7.5 its global impact is bigger than if the US grew by four which it has never done. To give some specifics, China in 2011 created another Spain that year. It creates another Greece every 13 weeks. As I joked to a number of people during the Cypriot mess, by the time the Cypriot banks opened again, China created another one. And, within the BRIC thing, I only discovered this myself when I was preparing some charts for the last events I was at with Goldman Sachs, since the end of 2010 China's created another India. So my first big point is what happens in China is huge. If China gets it really badly wrong, that's going to be a really big new negative for the world. If China gets this transition right, it's fantastic for the world.

TB: What is your biggest concern then?

JO: My biggest concern is not any of those that you said. One of the things that is great about China is the Chinese authorities worry about all this stuff that you've cited and more, more than you do. And what I love from my experience of being in finance for over 30 years, I like countries where the policymakers worry. The places that I really worry about are where they don't. I love going to Beijing, a few famous hedge-fund-kind-of-guys that I've been to Beijing with at the end of the first day have said 'Oh my God, this is a disaster.' They're all worried about everything. I said well, you know, isn't that good that they're focused on those problems? And so of course they have these huge challenges but the policymakers are focused on a lot of them. The thing that worries me is one of the most basic things: if you delve into the five-year plan which is governing what they want to do in this transition, they talk a lot about trying to support more creativity and

knowledge-based growth. How do you do that without giving 1.3 billion people more individual choice and freedom? And at some point that is the thing that's going to probably be the biggest problem, not stuff about credit. There's not really a credit prob... There is a problem in some sectors. China's biggest problem on things like this is they save nearly 50 per cent of GDP. They don't need credit. If you spend a lot of time in any

On the BRICs:

'China's a disappointment for people who thought the drug of ten per cent growth would go on forever, but I would suggest anybody that's looked at it closely might not be so disappointed'

urban area, still today, you will see people paying for ridiculously expensive things with cash. There's the famous stories of these Lamborghini showrooms, five minute walk from Tiananmen Square, people go in and pay for them in cash. So it's not an economy that's really suffering in aggregate from things like that. Everybody talks about it all the time but I don't think it's really true.

TB: What was really interesting: up until maybe two years ago everyone was debating 'who will be

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on top, India or China?’ It was sort of the dragon versus the elephant. And now no-one’s really talking about India in the same way except in terms of worryment – it’s had its slowest growth in a decade, corruption’s still a problem there, bureaucracy. Have you become much more pessimistic about India?

On China:

‘What I love from my experience of being in finance for over 30 years, I like countries where the policymakers worry. The places that I really worry about are where they don’t’

JO: I used to joke to people and still do, as you know I’m a big football fan and comparing India and China is a bit like comparing Manchester United and Manchester City. It’s just so unfair to the Indians. I mean, as I said in the past two years China’s created another India so, you know, it’s kind of crazy on many levels. Now, funnily enough, at the start of this week I just spent a day in India meeting a rather controversial figure, the possible head of the Bharatiya Janata Party (BJP) going into the election. And I would controversially put it to you that India in the next 20 years could be way more important for the world than China because, in contrast to China where I think you mentioned yourself

this famous phrase, ‘they will get old before they get rich’, India’s demographics of course are incredible. Back in the day with some of these papers we showed that from 2000 to 2020 India’s population could increase by the size of the US. Its working population could increase within that by the combined size of the working population of the UK, Germany, France and Italy. And if they can do things to unleash productivity – and that’s partly why this guy is so interesting – India could conceivably grow by maybe even ten per cent if not more some years in the next 20 years. So, India’s had a tough couple of years but I think, you know, because they’ve done so little policy-wise in contrast to China, if they get some of it right, I mean India’s a really exciting place still. And so I’ve come back from that and I’m probably going to write a big piece about it I think. I think people are right in India, you know, Manchester City are making an effort to challenge Manchester United, let’s put it like that.

TB: So in terms of the BRIC, we’ve talked about China, we’ve talked about India. In Brazil, there’s a very interesting situation right now because as we speak there have been demonstrations going on in recent days, people upset that they were going to raise bus fares, now the government seems to be backing off. But, like so many of these demonstrations, it starts with a singular spark and then morphs into other things and of course these demonstrations now are about corruption in Brazil, they’re talking about the lavish spending on stadiums for the World Cup. How do you see Brazil, how do you see these demonstrations?

On world economies and football:

‘Comparing India and China is a bit like comparing Manchester United and Manchester City’

JO: [Joking] I think it’s a more subtle thing because they realise they don’t have that good a football team these days and they’re not going to win the World Cup on their own, so they want to get it abandoned. You know, Brazil has some aspects of the same problem as Russia. In particular, of course, it’s a huge commodity producer and the famous ‘Dutch disease’ phrase was created about big commodity-producing countries that get stuck on the drug of assuming commodity prices will help you all the time and it’s created this environment in the past decade.



As I said, Brazil like all the others have done better than I thought but what a lot of Brazilian policymakers themselves haven't focused on is that in their case it was probably because of this massive rise in commodity prices. And with commodity prices turning down, it exposes the rest of the economy's vulnerabilities without that

On India:

'India in the next 20 years could be way more important for the world than China'

constant drug. Another consequence of it is of course the Brazilian real rose to an incredibly strong level which made the non-commodity sector of Brazil highly uncompetitive. And so they've got some big fundamental issues to deal with. The problem they have, as with many of these other exciting countries and some we

haven't talked about yet, you get the levels of wealth rising and it gives more and more people a lot of hope, and when things slow down and they see some signs of the old life returning, they get upset. And so this is an important moment for [President] Dilma Rousseff and her advisers to try and respond to some of these basic challenges. As you imply, the Olympic Games protest or bus fares is probably just an excuse for much broader simmering resentments.

TB: We know that you've been a devoted Manchester United fan all your life and of course it's a global brand. You've been a director there, you're good friends with Alex Ferguson, the manager who just retired. He had an amazing track record. What do you think that business in general could learn from him in terms of running an organisation or in terms of leadership?

JO: I do think Alex's success as a leader is almost unparalleled. You know, people were going on to me about my 18-and-a-half years at Goldman. This guy, 27 years, and I've seen him with a lot



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of footballers including some recently; they're scared of him. Even guys that have been playing and are paid ridiculous amounts of money, they're scared of him. I don't want to bore people about the years of Manchester United but he's effectively generated four different, really successful teams through this 27 years during wildly different circumstances surrounding world business and world football. When Alex first came to Man United, Martin Edwards nearly sold it for less than £10m. And here it is today quoted, sort of in a cack-handed way on the New York Stock Exchange and at one moment a few weeks ago it was supposedly worth £2bn. And here's Alex, still managing. He's dealt with the structure of an individual owner, a publicly quoted company to the controversial one of the past five years, one of the most highly levered takeovers in many things I can see and Alex just manages to somehow deal with all of that and get on with it and have this staggering success. So I think the underlying message from it all is the adaptability as well as keeping focus is something that so many of us could learn from. It's just incredible. It's so hard to do...

TB: The structure of football, especially in the Premier League here which again globally people follow, the pay structure here is off the charts. If you look at it compared to let's say Germany for instance, German players make a lot less and most of the German clubs actually are owned by the fans.

On Sir Alex Ferguson:

'The underlying message from it all is the adaptability as well as keeping focus is something that so many of us could learn from'

JO: Oh, I love it. I love it. The Dortmund model to me is something not only beautiful but quite important for supposedly declining parts of Britain. Dortmund is at the heart of supposed industrial decline in Germany and yet... I went to the European final and I happened to be in the end with the Dortmund fans and my son was jealous. I think probably half the population of Dortmund was there and the noise and the passion that they created and the excitement of the team, it's fantastic. I was asked to do a speech at my old university about football and economics and of course first I was just going to do it rather jovially but I realised quite a lot of

people that studied these things were going so I put in a lot of effort. And I was thinking at one moment of saying the Premier League is where banking was but with a five year lag because the whole structure and the way the wages are is just insanity. In the past five years the increase in the value of wages paid in the Premier League is the same as that of Germany and Spain put together. Is the Premier League that successful compared to arguably the two top footballing nations in Europe today? I don't think so. For the premiership clubs the average wages to income ratio is 85 per cent. People complain about what it is in the City if it creeps above 50 per cent. The average is 85 per cent. It is clearly unsustainable.

TB: I know you have no love lost for the Glazers who own Man-U but if you could structure football in such a way, would you allow any clubs to have public shareholding and would you allow any foreign ownership or would you make everything owned by the fans?

JO: I also chaired an event in New York just before I left about the growth markets in the changing world and there was a session on there about football and I hadn't realised until that moment that, I believe, you cannot own an NFL [US National Football League] club, either as a non-American or with leverage, which I hadn't realised. I wish I'd known it a few years ago. It's partly why I have this adaptive capitalism thing in my head. I don't have any views about any nationality owning something in other countries. I don't see the need to have restrictions against that. I'm a very sort of global person and it's served me so well and I have friends from all over the world. But what I do think is if you're going to have a non-resident owner of something as core to people's weekly lives as football, you have got to have some kind of responsible behaviour of putting something into the community. And I think the notion of some sort of fan ownership, as we've seen with Dortmund and a number of German teams, is really healthy. I got interviewed by a guy that runs one of the hardcore fanzines at Man United and the most interesting thing in the discussion is something he said. He said for hardcore United fans the biggest kick they get these days is going to an away League Cup match which is the third tier competition. I said why is that? He said there's no tourists, it's affordable and we can have a laugh. ☼



This is an edited version of the full interview, which can be viewed at ibanet.org

Can you do the right
thing if you don't
**know the
right thing?**



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China: Asia's emerging superpower is going private

The recent surge in US-listed Chinese companies going private has highlighted the potential in the Asian superpower's M&A market. *IBA Global Insight* assesses the opportunities and their impact on law firm Asia strategies

CHRIS CROWE

Listed on NASDAQ since 2005, Focus Media – a leading Chinese digital media group – was taken private in May 2013 with a \$3.66bn buyout led by private equity firm Carlyle. It was the largest 'going private' deal by a Chinese company and the largest leveraged buyout of a Chinese company, involving \$1.5bn of finance. The nine lenders included a mixture of Chinese and international investment banks.

Reuters has reported that 27 US-listed Chinese businesses announced their intention to be taken

private in 2012. Investigations by the US Securities and Exchange Commission (SEC) into US-listed Chinese companies, as well as the compliance costs associated with remaining on the US stock markets, and the threat of US litigation, has created an unforgiving environment in which a number of Chinese entrepreneurs have chosen to take their companies private.

Douglas Freeman, a corporate partner at Fried Frank Harris Shriver & Jacobson, resident in Hong Kong and New York, advised the private

equity consortium behind the Focus Media transaction. He says many listed Chinese entities have felt no option but to take the company private. 'US investors were not valuing Chinese equities in the same way that they were valuing US equities,' he explains.

Michael Gisser, head of Skadden, Arps, Slate, Meagher & Flom's Asia Pacific practice says that many US-listed Chinese companies had especially high stock valuations before a spate of accounting scandals relating to several US-listed Chinese companies broke and the SEC started to investigate. 'The problem was that they all got tarred with the same brush and stock prices collapsed. Perhaps some didn't deserve a high valuation, but it was certainly not true of all of them,' he says.

Buoying the M&A market

US investors turning their backs on Chinese stocks has caused many founders and controlling shareholders to choose to take their companies off the stock market by purchasing the shares that they don't already own. It's attractive to controlling shareholders because they generally get to buy back the company at a valuation way below that of the initial public offering (IPO). They then have the possibility of listing on another exchange at a later date or selling the company to a strategic acquirer or investor. These public to private transactions often involve the controlling shareholder teaming up with private equity investors and using leveraged debt to re-acquire the company and delist it from the stock exchange. Gregory Puff, head of Akin Gump Strauss Hauer & Feld's Asia practice says: 'The chairman's view may be that the company is not getting the market valuation that it should be and they might be concerned about potential litigation in the US and the high cost of listing in the US. The expectation might be that the company is better off on a different market or as a private company.'

The long list of Chinese companies looking to exit the New York capital markets over the last two years has been a welcome trend for legal and financial advisers. The public to private market has satisfied a huge hunger for Chinese M&A, particularly as advisers were seeking a new boom market after the IPO bonanza in Hong Kong and mainland China ended in 2011. Caroline Berube, a partner at Asia-based law firm HJM Asia Law & Co and Co-Chair of the IBA's Asia Pacific Regional Forum, is confident that the flow of take private deals is unlikely to dry-up in the near future. 'This seems to be particularly true for Chinese companies that went public by way of reverse merger, as this had enabled them to avoid some of the regulatory scrutiny

Anatomy of a public to private transaction

Listed on NASDAQ since 2005, Focus Media was taken private in May 2013 with a \$3.66bn buyout led by private equity firm Carlyle. The largest going-private deal by a Chinese company, it was also the largest leveraged buyout of a Chinese company, involving \$1.5bn of leveraged finance.

The nine lenders included a mixture of Chinese and international investment banks. The private equity consortium included FountainVest Partners, CITIC Capital Partners and China Everbright Structured Investment Holdings. Focus Media Chair and CEO Jason Nanchun Jiang has remained a part-owner of the private company. Shanghai-based Fosun International, which held the largest stake in the company after Jiang, was also part of the buyout consortium after rolling its equity into the acquisition vehicle.

Skadden Arps Slate Meagher & Flom, led by Beijing partner Peter Huang and Asia Pacific head Michael Gisser, advised Jiang.

Fried Frank Harris Shriver & Jacobson, led by Hong Kong partners Douglas Freeman and Victor Chen, advised the private equity consortium.

Sullivan & Cromwell, led by Hong Kong M&A partners Michael DeSombre and William Chua also advised the private equity consortium on the acquisition and the financing elements of the transaction.

Kirkland & Ellis, led by Hong Kong partner David Zhang represented the Special Committee.

Simpson Thacher & Bartlett, led by Kathryn Sudol and Chris Lin in Hong Kong, and Daniel Fertig in Beijing, advised Focus Media.

Zhong Lun Law firm was Chinese counsel and Conyers, Dill & Pearman was Cayman counsel to Focus Media.

Shearman & Sterling, led by Hong Kong partner Paul Strecker advised JP Morgan Securities as financial adviser to the Special Committee.

that companies which launched IPOs faced,' she explains. Berube believes that private equity capital is an obvious alternative source of capital for these Chinese companies.

It's a particularly positive sentiment given that China M&A has been a raw subject for many years. A vice president of M&A at a leading US investment bank in Hong Kong says that banks have struggled to target Chinese M&A for years and public to private deals have finally provided some reward for their efforts: 'M&A in China has been patchy and from a financial adviser perspective these take privates have provided a great pipeline of deals.' He says that all the top banks in the region have compiled detailed spreadsheets on the remaining Chinese companies that are listed in the US, in the hope that they too may be taken private.

These banks have tended to flit from one boom area to another in the region over the last decade. In 2010 and 2011, banks and law firms concentrated much of their attention and resources on Hong Kong IPOs with many Chinese and overseas issuers such as Prada identifying the Hong Kong exchange as a prime location to raise capital.

Since 2011, advisers have chased public to private deals, particularly as private equity sponsors have started to take a role on the transactions. Many of the deals also involve leveraged debt, often provided by Chinese banks, and this creates multiple advisory roles for eager lawyers.

Akiko Mikumo, Asia Managing Partner at Weil Gotshal & Manges says that there has been an historical shortage of appropriate targets in China for private equity firms to invest in. And where attractive targets have come onto the market, competition amongst investors has been fierce. 'There is a lot of money chasing deals in China and a private company might have a price expectation that is quite high,' she says. 'But in going private

deals, the private equity sponsor and the founder or controlling shareholder are aligned in wanting to pay as low as possible.' Mikumo says these deals have pushed open the gates for investors to acquire stakes in Chinese businesses.

A classic example is the take private of Focus Media in March 2013, in which Carlyle Group led the private equity consortium investing in the

'I think there is a growing appreciation in China that acquiring a US listed company is an achievable transaction'

Douglas Freeman

*Corporate partner, Fried Frank Harris
Shriver & Jacobson*

\$3.8bn buyout. It was the largest leveraged buyout in China's history and was completed despite negative reports issued by US short seller Muddy Waters, which initially caused its share price to dive in 2011. Freeman remarks: 'Focus Media is a great example of the growth and maturity of the M&A market in China. It was a very complicated deal and involved a very sophisticated consortium of private equity sponsors.'

These public to private deals are expected to rouse the traditionally sluggish private equity sector in China. Asia Pacific-focused funds have zeroed-in on jurisdictions such as Australia and Korea, but these Chinese US-listed entities are now bright spots on the private equity radar, especially as their valuations have been hit by negative investor sentiment.

Up till now Chinese regulations have restricted the leveraged buyout market because the rules make it hard for offshore banks to lend money to onshore entities. David Zhang, a senior corporate partner at Kirkland & Ellis in Hong Kong, says that it is virtually impossible for foreign lenders to get security over onshore assets. But Gisser believes that private equity firms are going to revive their efforts in China: 'These going private deals are very well suited to investment by private equity firms because the company already has experience with the international capital markets and has world-class accountants, financial records and internal record keeping systems. It makes it much easier for a private equity firm, especially an offshore private equity firm, to get comfortable with investing in these companies.' Gissing and his Beijing partner Peter Huang have represented



a series of company founders and controlling shareholders in the going private arena.

As a US attorney, Gissing is familiar with taking a company private, but these transactions are very new to China and the region. Furthermore, only a limited number of change-of-control deals in China have allowed for acquisition or leveraged finance.

Chinese entrepreneurs are young and hungry and are often unwilling to handover control to investors, but public to private transactions do provide openings. 'In many cases, management

investor consortium Edward Tian. CITIC Capital Partners, which led the private equity consortium, was advised by Davis Polk & Wardwell.

A member of a US investment bank who is close to many of these deals says that while many of the biggest deals have recently closed, the most obvious candidates to be taken private are quickly running out. He says that most of the prime candidates for a going private transaction have already started or gone through the process. Zhang agrees: 'The going-private phenomenon will continue but whether it will continue at the same pace I

'The going-private phenomenon will continue but whether it will continue at the same pace I don't know. It seems that the low hanging fruits are mostly gone'

David Zhang

Corporate partner, Kirkland & Ellis Hong Kong

or founders only have a minority stake in these public companies and need to team up with US dollar private equity funds,' Zhang explains. 'This has led to increased opportunities for private equity funds to do change-of-control deals in China.' Such control deals are a regular occurrence in Europe and the US, but in going private transactions in the West it is rare for founders or controlling shareholders to have a large existing stake. Michael Dell's \$24.4bn offer to take Dell private, alongside private equity firm Silver Lake, is one of the few exceptions in the West.

End of the road?

For now the stream of public to private deals is in full flow. NASDAQ-listed 3SBio, a Chinese biotech company, was taken private for \$370m in June and is expected to re-list in Hong Kong in the future. CITIC Private Equity, the private equity arm of China's state-owned investment group CITIC, led the acquisition alongside 3SBio's CEO, Jing Lou.

Akin Gump's Puff, who advised CITIC Private Equity on the 3SBio transaction, says there are still more deals to come: 'There are still about 250 Chinese companies that are listed in the US and any of these may look for a potential exit. It will come to an end at some point but whether that is in a year or five years, it is hard to say.'

The \$890m take-private of AsiaInfo-Linkage in May also illustrates the strength of the public to private segment of the market. On this deal Shearman & Sterling advised the Special Committee and Skadden represented AsiaInfo-Linkage's co-founder and member of the

don't know. It seems that the low hanging fruits are mostly gone.' Legal and financial advisers recognise that not all founders or controlling shareholders of these Chinese companies will actually want to be taken private, despite the harsh realities of being listed in the US.

Even so, legal and financial advisers are confident that when the pipeline of public to private candidates comes to an end, it will not be a case of frantically searching for the next boom sector. 'It's generally assumed that every company that has been taken private, with private equity sponsors particularly, will want to eventually go through an IPO or a trade sale,' Zhang explains. The Hong Kong Stock Exchange may well appeal to many, although the requirements imposed on issuers are higher than many other exchanges.

Zhang also says that bad stock market performance, the threat of shareholder litigation and stringent regulatory scrutiny will not necessarily deter Chinese companies from continuing to raise funds on the US capital markets. He believes that NASDAQ is still attractive for many high-growth companies, particularly those in the technology sector that have yet to achieve big profits and revenues.

Plum roles

For the banks and law firms, going private deals have been an important sector, not least because they involve unusual complexities and a number of parties to the transaction. Because the controlling shareholder is buying the company, there is an inherent conflict of interest.

A controlling shareholder or founder will attempt to buy the company at the lowest price



possible even though shareholders are generally programmed to sell at the highest valuation. For this reason a Special Committee is formed to sell the company and ensure that it receives a fair price. In theory, the Special Committee may seek other purchasers, but multiple bids through an auction are non-existent because the transaction requires approval from the controlling shareholder, who in essence would be a competing bidder.

For legal advisers to a public to private transaction, there is the possibility of representing the controlling shareholder, the sponsor and the Special Committee. There is also the chance to advise on the financing where leveraged debt is involved.

The number of parties involved means the deal is far from straightforward. Special Committees are expected to appoint financial and legal advisers to help with a fair valuation and to ensure that the right processes are followed. For those US-listed Chinese companies that are incorporated in the US, shareholder litigation is almost inevitable. Delaware for instance demands a higher standard of fiduciary duty from the Special Committee, whereas for many companies that are incorporated offshore, such as in the Cayman Islands, the risk of litigation is considerably less.

If the Special Committee does not follow the correct procedures of sale, it could face potentially damaging lawsuits. Mikumo says: 'In the US, you might have ten class actions filed against the board when the going-private transaction is announced.' Freeman suggests that legal advisers generally expect litigation for companies that are registered in the US state of Delaware. 'Many of the cases will get settled,' he says. 'In places like the Cayman Islands, the situation is quite different. These jurisdictions don't have class actions, but we still take precautions.'

Freeman believes that despite all the challenges involved in closing a going private deal, these transactions are educating the market about what can be achieved in the China M&A segment. He says that it might not be such a coincidence that China's Shuanghui International has launched a \$4.7bn offer for Smithfield Foods in the US just at a time when Chinese entrepreneurs are buying back their companies and taking them off the US stock markets. 'I think there is a growing appreciation in China that acquiring a US listed company is an achievable transaction,' he remarks. When it comes to Chinese investors looking overseas, it could be that few Western targets are now really out of range. ☒

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Ambitions for harmony

Southeast Asia is aiming high as it plans for closer economic and trade integration. Law, and lawyers, have a big part to play.

PHIL TAYLOR

With the issues confronting Europe, is now the time to form new trading blocs? ASEAN seems to think so. High on the agenda at the 2013 summit of the 10-member Association of Southeast Asian Nations was the plan to establish an ASEAN Economic Community (AEC) by 2015.

According to ASEAN, the AEC will form a single market and production base and be a highly economically competitive and fully integrated region.

In November 2007, ASEAN leaders adopted an Economic Blueprint outlining the measures to be taken and the schedule of implementation for the AEC. It also sets out three further characteristics of the AEC: a rules-based community of shared values and norms; a cohesive, peaceful, and stable region with shared responsibility for comprehensive security; and a dynamic and outward-looking region.

According to *Riding the ASEAN elephant*, a report sponsored by law firm Baker & McKenzie and published by the Economist Corporate Network (ECN), the global community is in support of the project. But although more than half of the respondents to the survey informing the ECN report thought ASEAN would succeed in building the AEC, 46.8 per cent felt it would arrive several years late.

However, the ECN report quotes Pushpanathan Sundram, a former deputy Secretary-General of the ASEAN Secretariat, as saying that even if ASEAN only meets 70 per cent of its AEC targets by 2015, 'that will still be a huge achievement.' The report also says companies are already reaping the benefits of existing ASEAN frameworks, with many already pursuing regional strategies 'without waiting for ASEAN to create a perfect market'.

In many ways, the plans and goals of the



ASEAN Member States

AEC echo those of the European Economic Community (the forerunner of the present-day European Union) and it is tempting to make frequent comparisons between the projects. But these comparisons should be applied bearing in mind the fundamental cultural and historical differences between ASEAN and the EU. The two blocs arose as a result of different influences and with different goals. Present day ASEAN is also in a very different shape from Europe at the point of its integration. 'There is no ASEAN political union in sight, and no monetary union – it's more of a free trade operation than anything else,' says Simon Makinson, Allen & Overy's Bangkok Managing Partner.

Fred Burke, Managing Partner of Baker & McKenzie in Vietnam, has a similar opinion. 'Some institutions are just not on the cards – a central bank, a common currency, a parliament, or even a common legal system,' he says. 'But a common set of principles is taking root to govern trade and investment, movement of skilled labour and resolution of disputes. This allows businesses to treat the diversity of ASEAN as a benefit, not a burden, by planning their head office, manufacturing and service operations

each in the most appropriate location.'

ASEAN has grown up through a system of informal understandings; in contrast to the EU which from its early days used legally-binding treaties to regulate the relationships between the union and its members, and between the members themselves. 'The culture is not one of open disagreement, therefore a lot is left to the grey, not black and white,' says Dr Kien Keong Wong, Chair of Baker & McKenzie's activities in Singapore, Malaysia and Indonesia. 'It's hard to create ASEAN institutions to bang people into shape.'

This approach appears to have served the region well, however. In a speech given in 2001, then ASEAN Secretary-General Rodolfo C Severino said: 'By not forcing its incredibly diverse and mutually suspicious members into legally binding standards, ASEAN has done the remarkable job of moving its members from animosity to the close cooperative relationship that they enjoy today.'

This incredible diversity is another feature which, many say, sets ASEAN apart from the EU. John Lewis, United Kingdom Director and partner of boutique law firm Anglo-Thai Legal,

explains. 'The EU have a common history and interlinking traditions whereas the ASEAN region is a group of massive islands which share few commonalities,' he says.

Internal free trade agreements have long been a mainstay of the bloc's integration and economic growth, while external agreements have now become a key part of ASEAN's strategy. This has resulted in a network of FTAs (free trade agreements) so complex it has been nicknamed 'the noodle bowl' (see box – **ASEAN: key facts**).

'In Europe there has been a ceding of sovereign power in certain areas... I suspect we're quite a long way from that in ASEAN'

Patrick Sherrington

Asia and Middle East Regional Managing Partner,
Hogan Lovells

Similar to the EU, but different

Some may wonder why, if FTAs have served ASEAN so well, the AEC is needed at all. Severino partly answered this question in his 2001 speech, saying: 'I believe that it is about time that people looked upon ASEAN in terms of legal obligations and norms.'

'As ASEAN moves into further integration, we can expect an expanded number of binding undertakings,' Severino continued. 'More broadly and fundamentally, ASEAN countries will have to harmonise domestic laws and regulations that govern trade and investment... to provide the harmonised regional investment regime that investors increasingly require.'

The Blueprint also acknowledges the need for legal development, stating that ASEAN is making efforts to lay the groundwork 'for an institutional framework to facilitate free flow of

information based on each country's national laws and regulations; preventing and combating corruption; and co-operation to strengthen the rule of law, judiciary systems and legal infrastructure, and good governance.'

Member countries are required to build the programmes and activities set out in the Blueprint into their own development plans, and a scorecard mechanism has been developed to monitor progress. The first results were published in 2010, covering the previous two years' work.

'The scorecard noted that the implementation of the regional commitments during the period under review was generally positive, with around 73 per cent of the AEC legal instruments targeted within this period having entered into force,' says James Evans, a consultant with Tilleke & Gibbins in Bangkok.

Another update on progress was given at the 8th ASEAN Senior Law Officials Meeting (ASLOM) in November 2011. After the meeting, the officials produced a joint communiqué in which, with perhaps some hint of self-congratulation, they 'noted with satisfaction the progress made by ASLOM in carrying out its work in the implementation of various legal cooperation programmes and activities agreed upon at previous [meetings]'.

But it is clear that this work is at a very high level – it has included producing an updated *ASEAN Government Law Directory*, the establishment of the ASEAN Law Information Authority, and the implementation of various ASEAN government law officials' programmes and exchange of study visits. Speaking at the opening of the 2011 ASLOM, Cambodian Prime Minister Hun Sen acknowledged that ASEAN 'must intensify cooperation on law and legal matters to jointly address the legal challenges to ensure the success of integration.'

Lawyers also say ASEAN needs to move more quickly if it is to achieve any kind of substantive legal integration by 2015. Some stress the need for central institutions with a considerable amount of power, again pointing to the practice of the EU.

'In Europe there has been a ceding of sovereign power in certain areas so that the ECJ [European Court of Justice] becomes the supreme court in certain issues,' says Patrick Sherrington, Asia and Middle East Regional Managing Partner of Hogan Lovells. 'You have to decide that there are certain things about the common market



ASEAN: key facts

Founded: 8 August 1967

Member States: Brunei, Burma, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand, Vietnam

Population: 604 million (8.8 per cent of world population)

GDP: \$2.18tn (ninth in the world)

Average GDP growth: 4.7 per cent

Total FDI inflow (2011): \$114bn

Sources: www.asean.org, CIA World Factbook

that are going to be applied in a common way. It requires a lot of coming together to establish a common court – it requires people to give up sovereignty in certain areas.’

‘I suspect we’re quite a long way from that in ASEAN. There just isn’t the same political motivation as there was in post-war Europe,’ he adds.

‘Perhaps ASEAN could provide something similar to Article 4(3) of the Treaty on European Union so as to ensure conformity between all Member States,’ suggests Mariette Peters-Goh, IP and Knowledge Management Partner with Zul Rafique & Partners in Malaysia. This is a fundamental provision which sets out the ‘principle of sincere cooperation’, and under which Member States must take appropriate measures to fulfil their treaty obligations and do nothing detrimental to the proper functioning of the union.

Harmony isn’t easy

However it is brought about, creating a more formalised and harmonised region with a freer movement of goods, services, investment, skilled labour and capital will bring many benefits to the economies of the member countries. The AEC will also bring benefits to external parties investing into individual ASEAN countries or the region as a whole. At present, however, investors must deal with vastly differing administrative and political policies and very diverse legal and regulatory standards. Commercial law is practised very differently in across the bloc, and discussions on harmonisation have generally been at quite a high level thus far.

‘ASEAN is still very much a talking shop where we exchange ideas and academic papers, and [share] experiences. Harmonisation is a long way away,’ comments Mochamad Fachri, a partner of Hadiputranto Hadinoto & Partners, Baker & McKenzie’s Indonesian member firm. ‘Some ASEAN countries, such as Thailand and the Philippines, do not have a competition law to harmonise with other ASEAN countries.’

The advent of an effective AEC will help foreign investors overcome many of the issues they currently face, one of which is the disparities in foreign investment rules. With regard to regulation, at one end of the spectrum is Singapore, which allows 100 per cent foreign ownership in almost all domestic sectors. Near the other end of the scale lies Thailand. ‘Recognising the importance of foreign investment for its economic growth, Thailand has through the years relaxed restrictive investment laws and regulations. At the same time, however, it has stubbornly held on to some antiquated laws restricting foreign participation in industries where Thai nationals are deemed to

not yet be competitive,’ wrote law firm Tilleke & Gibbins in a recent online briefing.

The Philippines falls somewhere in the middle of the spectrum. There, the retail sector is tightly regulated, while in financial services foreign investors must enter a 40:60 partnership with a local firm. And although Malaysia has a relatively well-developed legal system, according to Peters-Goh it has often faced scrutiny. ‘The issues raised by most lawyers are regarding the separation of powers and transparency,’ she says.

Lawyers say many of their larger multinational

‘There is no ASEAN political union in sight, and no monetary union. It’s more of a free trade operation than anything else’

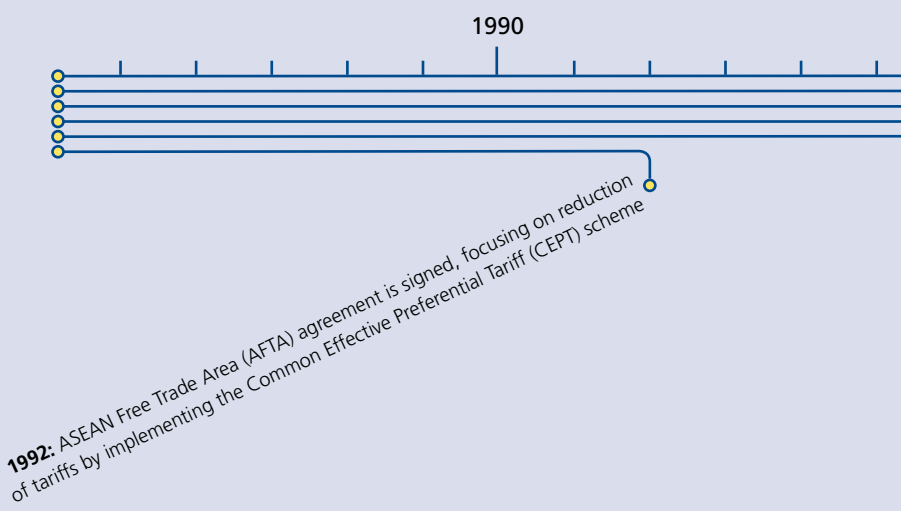
Simon Makinson

Bangkok Managing Partner, Allen & Overy

clients are already looking at ASEAN as a single bloc, and one which provides huge opportunities. Many support the idea of allowing investors to treat ASEAN as a single territory for investment purposes. ‘I can see a lot of benefit for foreign investors coming into the region and saying they want to treat ASEAN as one bloc,’ says Wilson Ang, a partner with Norton Rose Singapore who heads up the firm’s regulatory compliance and investigations practice. ‘What I can’t see is how that can be achieved practically, given the diversity of laws and cultures in ASEAN,’ he continues.

In the field of capital markets and corporate finance, a number of initiatives are being

Timeline: network of agreements



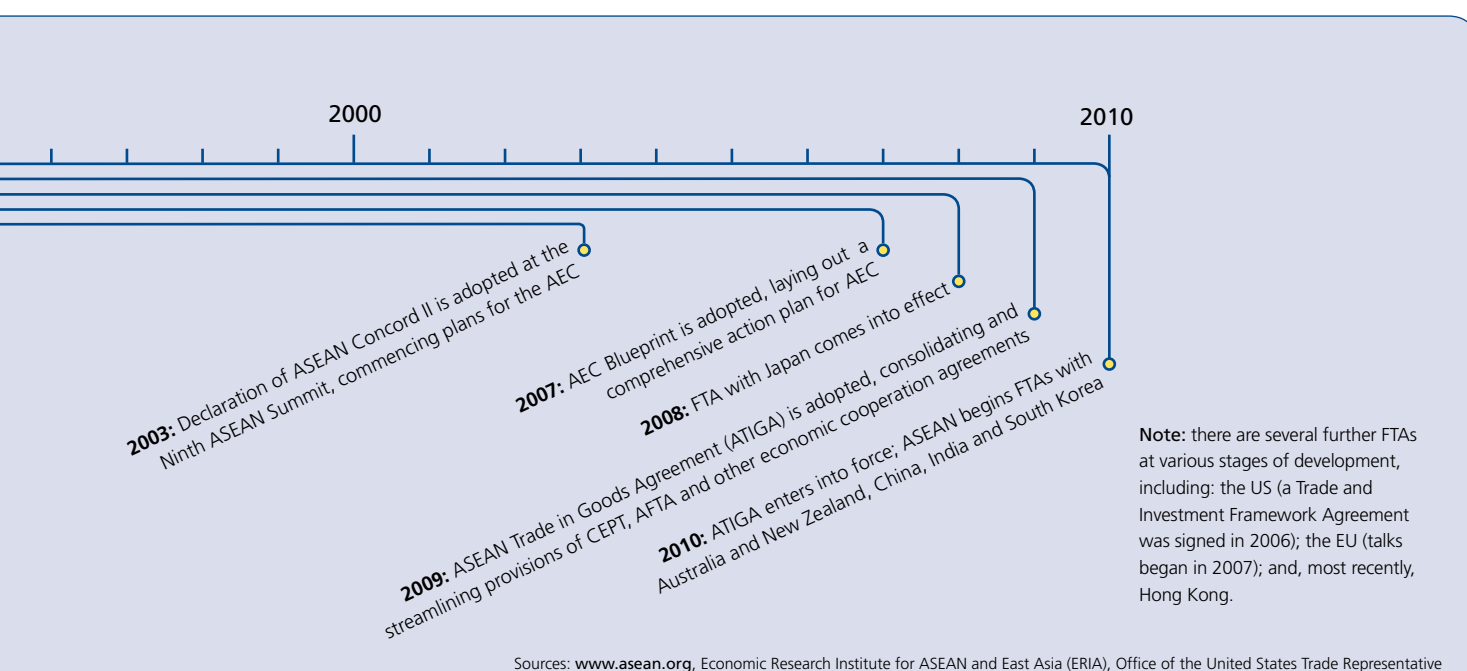


Foreign ministers and secretary-generals of ASEAN and their dialogue partners during the 20th ASEAN Regional Forum in Bandar Seri Begawan, 2 July 2013. REUTERS/Ahim Rani

undertaken to develop unified standards. The ASEAN Corporate Governance Scorecard Project aims at developing a set of domestic rankings and a pilot regional ranking (which is yet to be published). This initiative provides a good example of the issues involved in harmonising law, regulations and standards, and the ways in which these can be dealt with. The development and initial phases of this private sector-led initiative were undertaken by a group of regional experts comprising of a mix of academics and representatives from institutes of directors, and is supported by the regional securities regulators with Securities Commission

Malaysia acting as the secretariat. The project has now been handed over to institutes of directors and shareholder associations in the individual ASEAN member countries.

Professor Mak Yuen Teen from the National University of Singapore worked for two years as the Singapore expert on the initiative, which provides a good example of achieving harmonisation by applying an external standard (another example being the plans to regularise IP law by joining the Madrid Protocol, for trademarks, and the Patent Cooperation Treaty). 'Convergence in this case was achieved by an agreement to use the Organisation for



Economic Co-operation and Development (OECD) principles of corporate governance as a benchmark, supplemented by local ranking initiatives and other international corporate governance codes,' he explains.

Mak continues by describing the challenges involved in accommodating the spectrum of standards found within ASEAN, before giving his opinion on how barriers to integration may be overcome. 'For such initiatives to work, it does require each country to put aside parochialism and think about what is best for the country, their companies, investors and the region in the longer term,' he says. 'What can defeat such initiatives would be if commercial or other vested interests enter into the process.'

No thought for lawyers

Clearly lawyers should play an important role in the future of the AEC, and some analysts have suggested that the bloc should introduce a system whereby lawyers from one ASEAN member country could practise in any of the others. The EU introduced the idea of a European lawyer in 1977. Since then, certain legal professionals licensed in one member state are allowed to practise in other states; thus a German *Rechtsanwalt* may practise in England, and an English solicitor may practise in Germany without further licensing requirements (although those lawyers operating across borders must be instructed and act in conjunction with a locally-licensed lawyer).

Unfortunately, AEC documents do not make any reference to this kind of idea. Nor do they specifically include legal professionals in the plans for provisions on free movement of workers. There are also doubts as to whether such a system could work in ASEAN, as priorities probably lie elsewhere. 'They're looking at things like food standards, the import-export tax regime and so on,' says Dao Nguyen, Managing Partner of Allen & Overy Vietnam. 'In terms of lawyers, I don't think they've thought about it and I don't think they ever will think about it – it's just too different.'

Some say lawyers in the region tend to view each other as competitors rather than identifying with each other as fellow practitioners. 'This manifests itself in some of the protectionist policies that have evolved, such as giving foreign lawyers restricted rights or only a limited number of hours to operate in a country,' says Ang. 'But at the same time, although I don't think there's an overly rosy and unrealistic sense of comradeship, I can see ways in which lawyers can be collaborative: for example in some of the multi-jurisdictional review projects that we

undertake where we regularly work alongside our local counterparts.'

Countering the threat of China

ASEAN leaders themselves openly admit that the most difficult areas of the AEC's plans are yet to be addressed. What is more, many member countries are on their own paths toward reform and are focusing on internal issues. Vietnam, for example, acceded to the World Trade Organization (WTO) in 2007 and is still addressing the challenge of implementing its obligations and opening the market in certain sectors. Laos has lots to do after becoming the WTO's newest member in February 2013, while Indonesia continues to battle corruption and Burma has only just come in from the cold.

'Every individual member of ASEAN thinks all the other members should be opening up but is

'Some ASEAN countries, such as Thailand and the Philippines, do not have a competition law to harmonise with other ASEAN countries'

Mochamad Fachri

Hadiputranto Hadinoto & Partners, Indonesia

moving more cautiously on the domestic front,' says Makinson. 'It's a combination of the political will of each country plus the ASEAN road map, which is not terribly firm because of the diversity of the countries.'

When assessing the chances of ASEAN's success, though, it must be remembered that ASEAN has grown and integrated very quickly so far. It has ridden out severe storms including the 1997 Asian financial crisis and the effects of the 2004 tsunami. The huge economic possibilities of the AEC are likely to provide a great part of the impetus necessary to achieving the AEC goals. Countering the economic threat of China will also be a key factor in bringing the ASEAN nations closer together, while lobbying from large regional and international companies will also play a big part in pushing forward the integration agenda. ☒

Phil Taylor is a freelance writer and editor, he can be contacted at phil@phiine.com



Snowden NSA revelations make mockery of Hong Kong resolve on privacy

Hong Kong lawyers considered recent amendments to the SAR's data privacy regime to be merely a knee-jerk reaction to the 2010 Octopus scandal. That was until Edward Snowden revealed the scale of state and corporate intrusions.

STEPHEN MULRENAN

Trade relations were top of the agenda when Hong Kong Chief Executive Leung Chun-ying flew in to New York to meet with the city's Mayor Michael Bloomberg on the morning of 10 June.

But what had promised to be a casual discussion on the challenges facing both cities was soon being hastily rearranged after Edward Snowden, the United States National Security Agency (NSA) whistleblower, was found to be in Hong Kong.

His public justification for selecting the Hong Kong Special Administrative Region (SAR) as his first port of call when fleeing his home in Hawaii on 20 May was his faith in Hong Kong's rule of law, which would allow him to fight the US government in the courts.

His critics argued that it had more to do with the sovereignty of Beijing, with China unlikely to yield to diplomatic pressure from

Washington DC – particularly after presidents Obama and Xi Jinping had recently agreed to disagree on cybersecurity issues.

Snowden's subsequent selection of potential domiciles – Russia, and then, he hopes, asylum in Ecuador via Cuba – would seem to support the theory that he is targeting countries least likely to cooperate with the US. At the time of writing, Snowden remained holed up in the transit lounge of Moscow's Sheremetyevo airport, having flown there from Hong Kong in late June.

For understandable reasons, Hong Kong's media paid very close attention to recent US pressure on China to cease its cyber-attacks and sign up to new rules of internet conduct. And this coverage escalated considerably following Snowden's revelations that the NSA's controversial PRISM programme – through which the US government has secretly collected phone and online data of citizens with the assistance of companies such as

Facebook, Google, Yahoo, Skype and Apple – extended to people and institutions in Hong Kong and mainland China.

‘This has shown the US up to be hypocritical,’ says Gill Meller, legal director and secretary and Executive Directorate member at Hong Kong’s metro system operator MTR Corporation. ‘So Hong Kongers are generally pro Snowden releasing this information.’

Regime change

The issue of how much personal information should be protected has been an important one for Hong Kong in recent years. At the beginning of 2013, for example, the Hong Kong government proposed removing directors’ addresses and ID numbers from the Company Registry in an attempt to better protect their privacy. More recently, and significantly, phase two of Hong Kong’s Personal Data (Privacy) (Amendment) Ordinance 2012 came into effect.

Passed by the Legislative Council (‘LegCo’) on 27 June 2012, and gazetted on 6 July, the ‘Amendment Ordinance’ introduces many changes to the use of personal data, the majority of which came into effect in phase one on 1 October 2012.

Phase two, which took effect on 1 April 2013, concerned provisions relating to the use of personal data in direct marketing, replacing a previous ‘opt-out’ regime with a new ‘opt-in’ one.

This has important implications for every entity intending to conduct direct marketing or cross-marketing in Hong Kong. Under the new regime, an entity can only use or provide personal data to others for use in direct marketing if that entity provides the requisite information and response facility to the subject of the personal data and receives their consent.

Consistent with the Hong Kong government’s recent regulation on the sale of first-hand residential properties, failure to comply carries potential criminal liabilities. ‘And that’s what scares people,’ says Meller. ‘There are so many data principles to comply with, and that is harder to do when it’s principles.’

The issue is a sensitive one for MTR Corporation following its experiences with the Octopus data privacy scandal in 2010.



Octopus was found to have earned HK\$44m (\$5.7m) from 2006 onwards by selling the personal data of 1.97 million cardholders to six companies.

Despite the company technically adhering to all laws and regulations, the scandal prompted public outcry and led to the resignation of Octopus chief executive Prudence Chan.

As the major shareholder of Octopus, MTR and its legal department had to monitor the various investigations that followed.

Traffic and city life in this Asian international business and financial centre.
Credit: Claudio Zaccherini / Shutterstock.com

‘This has shown the US up to be hypocritical, so Hong Kongers are generally pro Snowden releasing this information’

Gill Meller

General Counsel, Hong Kong’s metro system operator MTR Corporation

Group general counsel and company secretary for Hong Kong-based company PCCW Philana Poon says: ‘There was not a lot of faith at the time in what corporates were doing with private information, but I’m sure that everyone had the best of intentions.’

'Hong Kong is a hub for business, but the direct marketing amendment makes it difficult to do business in terms of marketing. The NSA scandal has made it harder for us, as customers are even more cautious'

Alison Ko
General Counsel CSL Limited

Octopus causes panic

While the 1 April provisions have certainly added an additional layer of protection for Hong Kongers, they have also had a significant impact on the ability of Hong Kong-based organisations to inform customers about the arrival, for example, of any new products and services.

'The direct marketing business in Hong Kong is now more difficult,' says Meller. 'Smaller companies may still be doing it, but it has hit the large telecommunication companies hard.'

Chris Cheng is the data privacy expert at PCCW and a member of Poon's team. He took the lead on the company's compliance with all of the terms and conditions relating to the new requirements, as well as educating PCCW's business teams and notifying customers.

'It caused a panic and was a huge exercise,' says Poon. 'We have one million customers in Hong Kong who use a variety of different services. We wanted to notify them without bombarding them, and we expended a lot of resources on that.'

Meanwhile, at Hong Kong's first and largest mobile network operator, CSL Limited, the number of customers choosing not to receive marketing materials during the first month of the new provisions was around 40 per cent. This jumped to 60 per cent for new customer walk-ins. 'I don't think the government thought this through carefully,' says CSL Limited's general counsel Alison Ko. 'Hong Kong is a hub for business, but the direct marketing amendment makes it difficult to do business in terms of marketing. The NSA scandal has made it harder for us, as customers are now even more cautious.'

Intrusion or protection

On 24 June, the UK Information Commissioner's Office gave Google 35 days to delete any remaining data it had 'mistakenly collected' while taking pictures for its Street View service, or face criminal proceedings. Investigations

into Google's data gathering began back in 2010, when it emerged that information from unsecured wifi networks was being captured unintentionally through written software code. The company was subsequently fined \$25,000 by the US Federal Communications Commission in April 2012.

Episodes such as this and Octopus have prompted a degree of skepticism among the public regarding the lengths to which corporates might be willing to go in pursuit of profit.

It is, therefore, unlikely that there will be too much sympathy for those companies adversely affected by legislation that might be deemed irritating. And yet, while so much has been done in Hong Kong to push through data privacy laws and protect people from companies, it seems a little farcical if governments are monitoring global data, often garnered by major corporates.

As Hong Kong tries to get the balance right on how much personal information should be protected, other countries have also been forced to address the issue.

The government in Australia has publically refused to acknowledge that it receives information from the US PRISM system. Attorney-General Mark Dreyfus says: 'Our intelligence activities and intelligence relationship with close allies, including the US, protect our country from threats such as terrorism, foreign espionage and cyber intrusions.'

Germany, meanwhile, appears to be more resistant to assaults on privacy, having resisted Google's Street View project in 2010 and allowing far fewer CCTV cameras than many other advanced economies.


Snowden's stated aim, when embarking on his travels on 20 May, was to raise public awareness of government snooping and trigger a debate about how much of this should be accepted.

The issue appears to have polarised opinion: some are relatively blasé about the state having access to so much phone and online data, particularly in a post-9/11 world, others view such surveillance in more sinister terms – references to George Orwell abound.

As with the current focus on the closure of tax loopholes, in order to help balance the books, democracies are under increasing pressure to work together on the issue of data privacy.

Snowden's selection of potential 'homes' on the diplomatic periphery, and the US government's subsequent inability to secure his extradition, suggest that the globalisation of legislation in this area still has some way to go. ☒

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A man with short dark hair and glasses, wearing a light-colored shirt and a dark vest, is looking down at a smartphone he is holding in his hands. He is standing in front of a large window that looks out onto a city skyline. The background is slightly blurred, showing the structure of the window and the distant buildings.

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War on fakes

The trade in fake goods could cost the global economy \$1.7tn by 2015, according to the International Chamber of Commerce. Many countries view counterfeiting as merely a trade concern, but direct links with organised crime and terrorist groups have been unearthed. *IBA Global Insight* investigates an industry thriving in the shadows.

REBECCA LOWE

In 2010, Lebanese police uncovered a vast pharmaceutical operation run by Shi'ite militant group Hezbollah. The organisation had earned hundreds of millions of dollars selling counterfeit Captagon pills across the world. While banned in most countries in the 1980s, the medicine is commonly used as a mild stimulant in the Middle East.

The case, highlighted in a short documentary by the International Institute for Counter-Terrorism (ICT) in May 2013, has raised concerns among senior investigators and intelligence officials that more needs to be done to clamp down on counterfeiting as a potential source of funding for terrorism and organised

crime. 'It's a wake-up call for all of us,' Dr Boez Ganor, ICT founder and former Distinguished Visiting Fellow at Stanford University's Hoover Institution, comments in the film. 'Terrorist organisations already have the operational capacity to manufacture counterfeit medicines and flood the market with them [...]. It's only a matter of time before politically motivated terrorist organisations infiltrate this industry.'

Ganor's fears do not seem misplaced. Counterfeit pharmaceuticals generated global sales of \$431bn in 2012, according to the World Health Organization (WHO), of which nearly 84 per cent had a direct impact on public health. Yet medicine is not the only concern; terrorists



The impact of counterfeiting and piracy will reach **\$1.7tn** by 2015 (BASCAP, 2011)

More than \$250bn in counterfeit and pirated goods move through international trade each year (OECD, 2008)

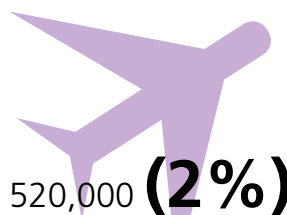
The G20 countries lose **\$120bn** annually to counterfeiting and piracy (Frontier Economics, 2011)

Counterfeiting has grown over **10,000%** in the past two decades (IACC)

80% of consumers across the world regularly purchase counterfeit and pirated products (BASCAP, 2009)



Online global spending was **\$571bn** in 2010, **17%** of which was on counterfeit or pirated goods (IACC, 2010)



520,000 (2%) of airline parts installed each year are counterfeit (Federal Aviation Administration)



88% of high income Russians claim to have purchased counterfeit products (BASCAP, 2009)

2% of all world trade is in counterfeit goods (World Trade Organisation)

In 2011, over **114 million** articles worth over **€1.2bn** suspected of infringing IP rights were stopped by customs at the EU border (EU Taxation and Customs Union)

have long been suspected of profiting from fake goods in a variety of markets. The first World Trade Center bombing in 1993 was reportedly financed by the sale of counterfeit textiles in New York, while in 1996 the seizure of 100,000 fake Nike t-shirts intended for sale at the Atlanta Olympics exposed a massive fundraising operation run by convicted terrorist Sheik Omar Abdel Rahman.

While underlining that it is impossible to gauge the overall financial impact of counterfeiting on terrorism and organised crime, Bill Dobson, Deputy Director of the International Chamber of Commerce (ICC) Business Action to Stop Counterfeiting and Piracy group (BASCAP), believes there has been a marked shift from drugs smuggling to counterfeiting and piracy among criminal gangs over the past five years. 'There is growing body of evidence that says organised crime and terrorist groups are profiting from this business,' he tells *IBA Global Insight*. 'Counterfeiting is a lower risk activity than drugs, in that the penalties are less severe and the enforcement less effective – but the profits are still very high.'

Indeed, in the world of bogus goods, profit outweighs risk in almost every jurisdiction across the world. While some countries have dedicated units for tackling intellectual property (IP) crime, even those with strong legal frameworks rarely put IP infringement at the top of the agenda. 'Counterfeiting is a great way of generating money for terrorist and criminal activities,' says Morag Macdonald, Joint Head

of the International IP Group at Bird & Bird, based in London. 'So why isn't it a high priority? Think about it: if you are an MP, which member of your constituency is going to say you must do something about this counterfeiting problem? These are highfalutin concepts that don't move your average voter.'

'It is a cat-and-mouse game. Those involved in counterfeiting are always trying to be one step ahead. The mouse is constantly changing its colour and outfit: its routine, its concealment methods, its products'

Kunio Mikuriya
Secretary-General, World Customs Organization

Bigger than drugs

Your 'average voter' may not balk at picking up a bootleg Burberry handbag from a Beijing flea market, but industry experts stress it is important to see the bigger picture. While not every counterfeiter is a terrorist or drugs lord, their actions deprive governments of billions of dollars of revenue for public services, encourage low wages and poor working conditions, steal jobs from legitimate markets, and – in the case

of medicine, foodstuffs and electrical goods – expose consumers to dangerous health and safety risks.

The available statistics on counterfeiting and piracy are startling. According to BASCAP, the problem has grown by over 10,000 per cent over the past two decades. The global value of the industry, BASCAP estimates, will hit \$1.7tn by 2015. International trade in counterfeit goods alone – the theft of trademarks, as opposed to pirating (copyright theft) – accounts for over half this figure.

Such statistics should be treated with a degree

several legal commercial activities through which they introduce counterfeit goods to the market, spinning a vast economic web across Europe, Australia and the Americas.

Several recent global operations have uncovered mafia involvement. Interpol-led Operation Black Poseidon in May 2012 led to the seizure of over €120m of products being traded across Eastern Europe by transnational criminal gangs, while Operation Pangea in October 2012, led by Interpol and the World Customs Organization (WCO), resulted in \$10.5m worth of seized counterfeit medicine across 100 countries.

WCO Secretary-General Kunio Mikuriya says customs officials are getting better at recognising the seriousness of IP crime, but concedes that criminal networks remain one step ahead. 'In the past, our major border activities involved seizing drugs, for example, but increasingly we have seen these supply chains abused by organised crime and even terrorists, who infiltrate them for illicit profit,' he tells *IBA Global Insight*. 'And we observe that they are increasingly doing this through IP infringement.'

While the communications networks between customs officials and other agencies have vastly improved over recent years, Mikuriya stresses that there is a long way to go. 'It is a cat-and-mouse game. Those involved in fraudulent activity are always trying to be one step ahead. The mouse is constantly changing its colour and outfit: its routine, its concealment methods, its products.'

'Counterfeiting is a great way of generating money for terrorist and criminal activities'

Morag Macdonald

Joint Head of the International IP Group, Bird & Bird

of caution: they are based on the value of the original goods, and it is not necessarily the case that customers would have bought the original had the fakes not been available (indeed, research has shown that most people are aware they are buying counterfeits). However, BASCAP's figures have been endorsed by the United Nations Interregional Crime and Justice Research Institute (UNICRI) and are based on data from the Organisation for Economic Co-operation and Development (OECD). In 2008, the OECD calculated that over \$250bn in counterfeit and pirated goods move through international trade each year; BASCAP's findings 'fill in the gaps' in this research by accounting for additional costs, such as lost tax revenue and government spending on law enforcement and healthcare.

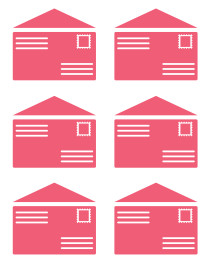
Indeed, few can deny the problem is growing. A 2008 report by the International Bar Association's IP and Entertainment Law Committee highlights how counterfeiting has increased significantly over recent years, while obstacles to tackling the problem remain acute. 'Counterfeiting and piracy should be up there with the fight against drugs,' says Pottengal Mukundan, Director of the International Maritime Bureau, ICC-Commercial Crime Services. 'In some ways it is far more widespread than the drugs problem. It affects so many things – people's livelihoods, the economies of countries, health and safety. So it needs increased priority.'

Organised gangs known to have infiltrated the counterfeiting business include the Chinese Triads, Japanese Yakuza, Russian mafia and Neapolitan Camorra. According to the Italian National Anti-mafia Bureau, the Camorra control

The number of cases of counterfeits detected in postal shipments in the EU rose by

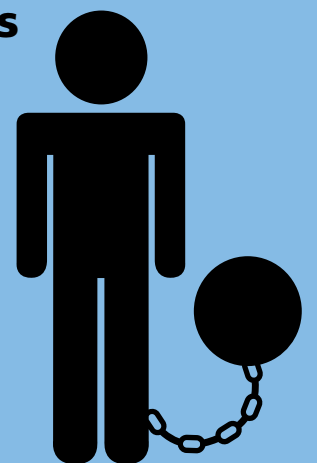
300%

between 2009 and 2010
(European Commission)



Ten years

in prison is the top penalty for selling counterfeit products in the UK and the US



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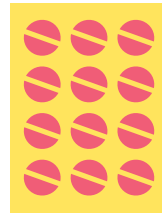
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Between 2008 and 2010 almost **70%** of all counterfeits seized globally came from China (UN Office on Drugs and Crime, April 2013)

In 2011, Google paid **\$500m** to settle US federal charges that it knowingly showed illegal ads for fraudulent Canadian pharmacies



Nearly **60%** of counterfeit medicines seized worldwide from 2008 to 2010 came from China (World Health Organisation)

Between 2008 and 2010, **87%** of all goods seized by US Customs originated in China (US Customs)



In 2011 and 2012, China arrested over **11,000** people in connection with the seizure of \$720m counterfeit goods and destroyed over 14,000 illegal factories

Rise of the machines

The mouse has been significantly helped in its endeavours in recent years by the growth of the internet. Now, rather than being processed in giant shipping containers, millions of small packages are sent via mail and courier services to individual consumers every year. Increasingly sophisticated web designs and photographs have also seen more people being duped, with those buying medicines particularly at risk. Recent years have seen an explosion of online pharmacies, the majority of which are believed to be selling counterfeit drugs. Unlike with luxury goods, few consumers of fake drugs are aware they are not the real thing.

‘Over the past four years we’ve seen a dramatic shift from brick and mortar locations to online shopping. It’s a tremendous challenge’

Robert Barchiesi

President, International Anti-Counterfeiting Coalition

‘Over the past four years we’ve seen a dramatic shift from bricks and mortar locations to online shopping,’ Robert Barchiesi, President of the International Anti-Counterfeiting Coalition (IACC) tells *IBA Global Insight*. ‘It’s a tremendous challenge.’

The growth of counterfeits online has prompted a spate of legal cases against internet companies. Luxury brands including Tiffany, Louis Vuitton and L’Oréal have argued that online portals such as eBay and Google should be liable for products sold through their sites – and enjoyed mixed success. While US and UK courts have generally held the internet giants liable

only when they fail to address specific instances of counterfeiting, several French rulings have ordered online companies to pay substantial damages to the sellers.

In July 2011, the Court of Justice of the EU (CJEU) sought to inject some order into confusion. In a case brought by L’Oreal against eBay, the CJEU was asked by the UK High Court to clarify whether online marketplaces such as eBay should be held liable for trademark infringements by its users. The Court ruled yes – but only if they play an ‘active’ role in the promotion of products, such as optimising their presentation.

Davies Collison Cave partner and IP specialist Chris Jordan, Vice Chair of the IBA IP Committee, believes online companies need to be ‘more pro-active’ in dealing with counterfeiters. ‘Internet-based marketplaces are not taking enough responsibility for stopping this,’ he tells *IBA Global Insight*. ‘If they were serious about the problem of counterfeiting, they would suspend or permanently cancel the accounts of people who had been found repeatedly selling counterfeit goods.’

While the Googles and Guccis of the world wrestle over legal liability, the rogue traders have been able to slip nonchalantly through the loopholes. Some progress towards a consensus has been made, however, outside the confines of the law courts. In May 2011, a European Commission Memorandum of Understanding (MoU) that established an anti-counterfeiting code of practice for the web was signed by 33 e-commerce platforms and major brand owners. In April 2013, a report by the EC stated the agreement had been working ‘satisfactorily’.

A more creative approach has been taken by the IACC, in collaboration with several major credit card companies and with support from the White House. The IACC Portal Program, launched in January 2012, aims to make internet counterfeiting less profitable by shutting down

the payment processes. The system is simple: companies flag up sites they believe to be infringing their IP; a trained attorney reviews them and relays the 'slam-dunk' cases to the credit card company; the credit card company completes its own checks and potentially terminates the account.

To detractors fearful that such proactive policing may result in over-stringent censorship, the IACC points out that all alleged infringers have a right to dispute the claims – and, to-date, this has reportedly happened only twice from 6,200 claims.

By encouraging the credit card companies to fine banks that allow unscrupulous merchants to conduct business, the IACC hopes to slowly squeeze counterfeiters out of business – hardly an easy task, considering the internet has grown by 425 per cent to over two billion users since 2000, 500m of whom shop online. Yet the system has already resulted in the shutting down of 1,500 merchant accounts, and Barchiesi is confident such voluntary agreements are one of the most effective means of enforcement. 'Our opinion is that everyone loses in the courts, as there is tremendous cost to both the rights holders and the marketplace to litigate. So if there is a way to have these voluntary cooperative agreements, we feel that's the way to go.'

Transnational problem

While the character of counterfeiting and piracy is rapidly changing, one variable has remained constant: the source. China, the world's biggest workshop, produced 67 per cent of all counterfeit products seized between 2008 and 2010, according to the WCO. Such stark statistics naturally provoke criticism from trade allies. Yet, contrary to popular belief, China is far from an IP infringer's dream. Beijing has some of the world's most comprehensive IP laws, and over the past two years the government has arrested over 11,000 people in connection with the

seizure of \$720m goods.

Indeed, according to Macdonald – who confesses she may have 'radical views' on the subject – China is one of the very few countries that views IP crime as a priority. 'I think the Chinese Government, when trying to restructure its economy, looked at the countries that protected their IP rights and saw that you had a much better chance of inward investment if you took the issue seriously. So they have done that from the outset.'

However, China still faces huge challenges. With 9,000 miles of coastline to police, many of the smaller ports fall under the radar of the customs authorities. Beijing also has limited control over local and provincial governments, which have direct oversight over the counterfeit trade in their communities. Often such trade can be a source of employment for the community, and local officials may have vested economic interests that deter them from taking action.

Even when raids do take place, says Chinese IP specialist Paolo Beconcini, often the means of manufacture will remain untouched, and the fines are generally so low as to be meaningless – around €100 or less. Beconcini, a partner at CBM law firm, has lived in China for 12 years and experienced the problems first hand. In a recent case, he says, the police declined to investigate an illegal factory because it was a Friday afternoon – and by Monday morning the building was empty.

'It's like the Spanish Crown in the 17th century over northern Italy,' he says. 'You have a lot of laws because nobody respects them. Here, local politicians have a lot of power. If you're asking the mayor of a large province to close a market, you better have a very good argument to persuade him, because he will be the one making money from it.'

A further problem, says Beconcini, is the implementation of international treaties. As of March 2013, 159 countries had signed up to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), under

Global sales of counterfeit medicines hit \$431bn in 2012, of which nearly **84%** had a direct impact on public health (World Health Organisation)

Up to **82%** of anti-malarial drugs in Africa are suspected to be counterfeit (UN Office on Drugs and Crime, 2013)



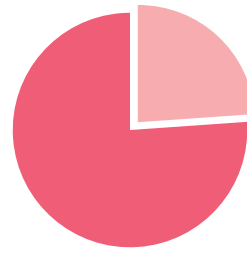
Up to **50%** of medicines sold through rogue websites are fake (World Health Organisation, 2006)

Sheik Rahman, who ran a vast t-shirt counterfeiting operation raided by the FBI in 1996, is currently serving a **240-year sentence** for plotting to bomb New York City landmarks





60% of seized postal parcels at the EU border contained counterfeit medicine in 2010 (European Commission, 2011)



In Russia, counterfeits account for **24%** of key retail goods sales (BASCAP, 2012)

Operation Pangea, led by Interpol, led to the seizure of **2.4 million** illicit and counterfeit pills, originating from 38 countries, the shutting down of **13,500** websites and the inspection of **45,000** packages.



Up to **41 billion** fake cigarettes are said to be produced by North Korea each year, earning the government annual revenues of up to \$720m (Poseidon Research, 2006)

the auspices of the World Trade Organisation (WTO). Yet cultural and language barriers mean judges outside the large metropolitan centres are often ignorant of China's accountability under international law. 'In many cities, the judges won't speak English and won't even have heard of the existence of some international treaties. It is not easy to be heard.'

'Counterfeiting is a lower risk activity than drugs, in that the penalties are less severe and the enforcement less effective – but the profits are still very high'

Bill Dobson

Deputy Director, International Chamber of Commerce Business Action to Stop Counterfeiting and Piracy (BASCAP)

Yet China is far from alone here. While all members of the WTO are required to abide by their TRIPS obligations – which include providing trademark, copyright and patent protections, alongside specific remedies and dispute resolution procedures – many, including Russia and India, have failed to enforce the regulations effectively. Even in the US and EU, where IP enforcement is better resourced, few counterfeiters are prosecuted and civil damages are rare.

For some, the TRIPS agreement itself, which entered into force in January 1996, is in dire need of reform. 'This agreement was negotiated in the 80s and 90s, and since then there has been an evolution of the supply chain,' says Mikuriya. 'We now have e-commerce and new technologies, and we need a more detailed and

up-to-date legal power to address these issues.'

One recent attempt to create a new treaty was the Anti-Counterfeiting Trade Agreement (ACTA), designed to establish international standards for IP enforcement outside existing forums such as the WTO and UN. It was originally signed by nine countries and an additional 22 EU member states, but was rejected in July 2012 by the European Parliament due to criticism of its patent and copyright provisions, which many felt were overly draconian.

To bolster international efforts at reform, BASCAP and UNICRI have targeted two key areas: proceeds of crime (POC) legislation and free trade zones (FTZs). POC laws aimed at IP infringers, says Dobson, would deprive criminals of ill-gotten gains, which could then be invested in law enforcement, while a crackdown on FTZs would help stymie the 'alarming trend' of such zones being used to facilitate the manufacture and sale of counterfeit goods.

Mikuriya agrees. 'Free trade zones are often promoted as a source of economic development, and we agree with that. But being free from customs duties doesn't mean being free from control. They shouldn't be abused for criminal activities.'

Scattergun approach

However, not everyone shares the belief that counterfeiting is a burgeoning evil that needs urgently to be vanquished. Professor David Wall, Head of the School of Applied Social Sciences at Durham University, believes the anti-counterfeiting lobby deliberately conflates different issues to create 'shock and awe campaigns' that help market their products. In his view, 'safety critical' goods should be prioritised ahead of the luxury industry.

'The way these companies have approached the issue is a scattergun approach,' he tells *IBA Global Insight*. 'We need to break it down. The



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2,500 fake airbags were seized in the first nine months of 2012 by the US Immigration and Customs Enforcement (US Customs)

In parts of Asia, Africa and Latin America, counterfeit medicine may amount to **30%** of the market (World Health Organisation)



Over **40** women were hospitalised

after taking abortion pills sold on the 'Women on Web' website because the medicine failed or they haemorrhaged (British Journal of Obstetrics and Gynaecology, 2008)

159 countries are members of the World Trade Organisation and TRIPS, as of March 2013



issues relating to some of the fashion luxury goods are very different from those relating to safety critical goods like aircraft parts and fake hip replacements.'

Rather than viewing all counterfeiters as equal offenders and chasing them into the shadows through raids and seizures, Wall suggests trying to understand their manufacturing processes and business models better to improve intelligence. This, he believes, may help lead the authorities beyond the frontline mules to the kingpins behind the scenes. 'Someone is in charge of the manufacturing; someone is commissioning and bankrolling the project; someone is agreeing contracts with manufacturers; someone is in charge of quality control. It is a complex issue that few people understand. By just closing it all down, all you tend to get is the low-hanging fruit.'

Others are – perhaps predictably – sceptical of Wall's position. Mukundan points out that distinguishing between 'safe' and 'unsafe' counterfeits merely encourages rogue outfits to focus on the former, while Mikuriya believes most counterfeiters tend to straddle both. 'When we coordinate operations and find counterfeit pharmaceutical goods, we will often find other counterfeits, including those from the fashion industry,' he says.

Such arguments seem convincing, but Wall's opinions are far from uncommon. Promoting the cause of global luxury brands is not easy PR, and the general public is unlikely to be galvanised by their collective call to the barricades. Indeed, with multinational giants forming a critical mass in the anti-campaigning campaign, it is easy to frame the debate as a David and Goliath battle between rich and poor.

'The problem of counterfeiting is linked to a sociological problem, which means that many poor people's earnings come from it,' says Sergio Rangel, associate coordinator of Olivares & CIA's anti-piracy and anti-counterfeit department, based in Mexico. 'The government wants to be very careful not to send a message to Mexican

society and the rest of the world that they are putting poor people in a position where they can't earn money for their livelihoods.'

21st century crime

Most people in Mexico see counterfeiting as a victimless crime, says Rangel; the key, therefore, is education. He is not the only person to think so. Campaigners across the board, from Hermes to anti-corruption NGOs, believe that if people realised the true social and economic impacts of counterfeiting, they would quickly become more responsible in their buying habits – and politicians would follow suit.

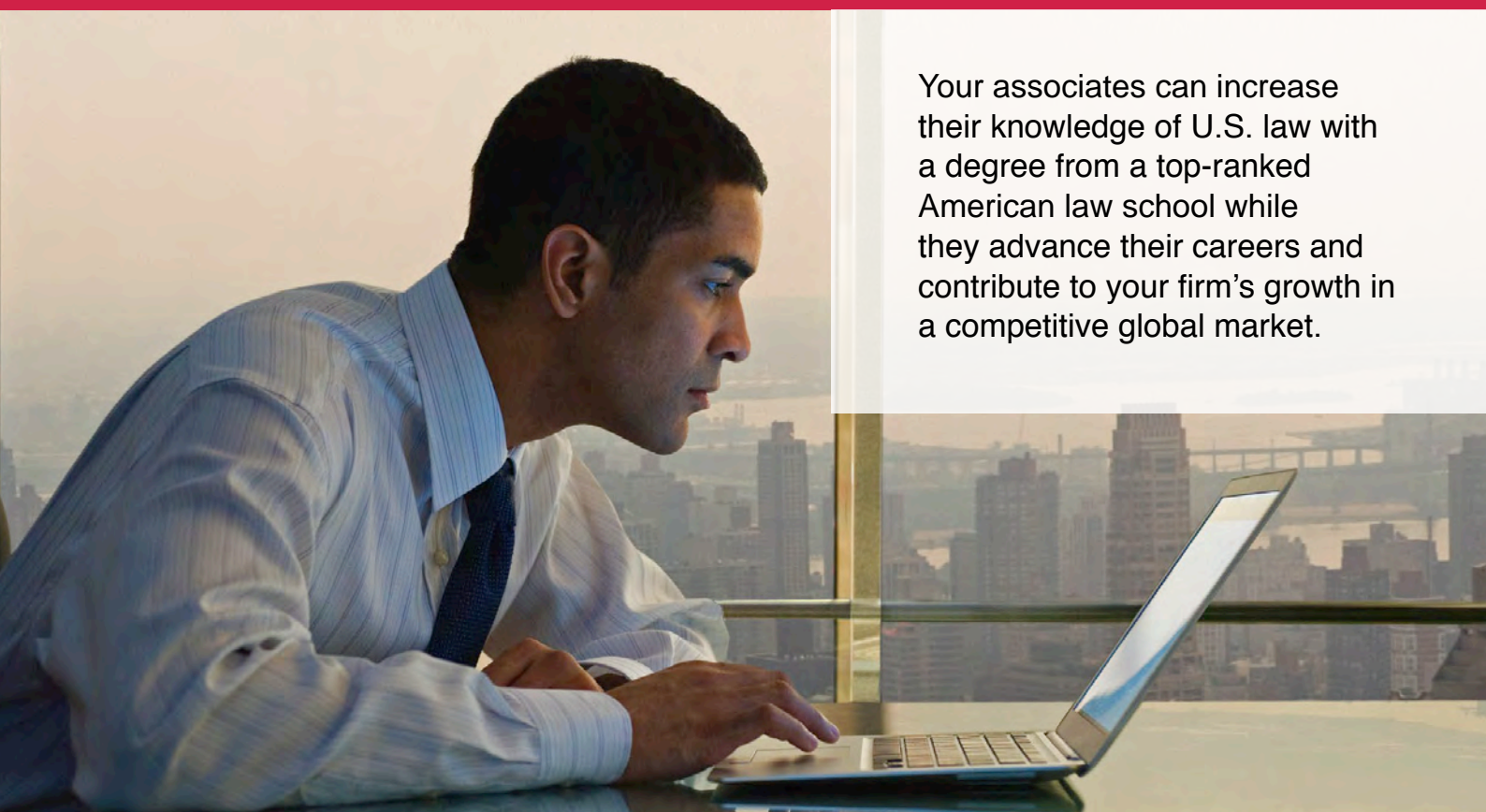
Some efforts have been made at a grass roots level. Last year, the US International Trademark Association (INTA) partnered with Street Law, a non-profit organisation that teaches about democracy and human rights, and the Constitutional Rights Foundation to create 'Unreal', an anti-counterfeiting campaign directed at schoolchildren. More imaginatively, Proctor & Gamble in 2005 launched a campaign in Saudi Arabia, in which they petitioned the Grand Mufti to proclaim on whether the sale of counterfeit goods was permissible under sharia law. Following careful consideration, he declared it was not – prompting a huge surge in factory raids and seizures.

While most people are likely to be somewhat less reverential towards their leaders' pronouncements on such matters, targeting the hearts and minds of the public may yet prove the strongest weapon in the anti-counterfeiters' armoury. Public awareness engenders political will – and without both, global coordination and regulation will remain weak. 'You have to address not only manufacturers and trade, but also civil society itself,' says Mikuriya. 'You need to change their mind-set so they understand that counterfeiting is a great crime of the 21st century.' ☒

Rebecca Lowe is Senior Reporter at the IBA and can be contacted at rebecca.lowe@int-bar.org

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Mandela and Mugabe: two very different liberation leaders

Nelson Mandela fighting for his life on his 95th Birthday has prompted a worldwide focus on a remarkable legacy that contrasts starkly with the abuses in Zimbabwe and Mugabe's attempts to cling to power.

KAREN MACGREGOR

Given deep cleavages of ethnicity and privilege, and centuries of virtually continuous conflict between groups, it is perhaps not surprising that South Africa is a nation that abounds with ironies. One of the greatest is that a man dismissed as a Communist terrorist by Western leaders turned out to be one of the greatest defenders ever of Western values of constitutionality and individual freedoms.

As Nelson Rolihlala Mandela fought for his life in a Pretoria hospital on his 95th birthday, 18 July 2013, thoughts in South Africa and around the world turned to his legacy. Meanwhile north of the border in Zimbabwe, Robert Mugabe (89) – a very different kind of liberation leader, once revered but now reviled by the West – was gearing up for another, likely dubious election that he hoped would extend his 33-year rule by a further five years.

It is cherished principles of democracy, human rights and the rule of law, embodied in Nelson Mandela, that will be his enduring moral and intellectual contribution to humanity – celebrated worldwide every 18 July after the United Nations in 2009 declared this date Nelson Mandela International Day in recognition of his 'values and his dedication to the service of humanity'.

For Africa, Mandela broke the mold of post-colonial leaders who came to power during the 1960s, but transmogrified from liberators into oppressors, impeded development for decades, and trampled upon human rights and the rule of law across the continent. Think Malawi's Hastings Banda, Uganda's Idi Amin, Guinea's Ahmed Sékou Touré and Zaire's (Congo's) Mobutu Sese Seko, among others at the time and later.

By contrast, on coming to power Mandela and his African National Congress (ANC) contemporaries

entrenched human rights and the rule of law in a progressive constitution, and inspired ordinary people across the continent (if not political leaders) with the hope of a different, peaceful and egalitarian Africa at a crucial time – during the post-Cold War 1990s when many African nations were taking steps towards true democracy.

For South Africa, which Mandela rescued from the brink of civil war and from 1994 led for five years as its first democratic president, his legacy is also one of peace and reconciliation as a man who, after 27 years in prison, forgave his oppressors. He recalled after being released in 1990: 'As I walked out the door toward the gate that would lead to my freedom, I knew if I didn't leave my bitterness and hatred behind, I'd still be in prison.'

Most famously, perhaps, Mandela put the idea of reconciliation into practice by visiting Betsie Verwoerd, widow of apartheid's architect Hendrik Verwoerd, and by donning the Springbok jersey – at that stage for many a symbol of white exclusion – when presenting the trophy to South Africa at the 1995 rugby world cup, which the country hosted.

Nicknamed Madiba, the name of his clan, Mandela's ability to unite South Africans at key moments became known as 'Madiba majic'. It was during his tenure that the Truth and Reconciliation Commission, led by Desmond Tutu, did its cathartic work.

Among the many critical things Mandela did for South Africa was to drive home the point that a true democracy cannot survive if nations' leaders set themselves, overtly or covertly, beyond the reach of the law. In 1998 Louis Luyt, a boorish Afrikaner nationalist, subpoenaed the president in an effort to have set aside a government-appointed commission of inquiry into corruption in rugby.

Mandela could have invoked the privilege of office and refused to attend. It is an action that is the norm in politics: everyone from Bill Clinton to Tony Blair has at some stage availed this almost universal protective mechanism. Instead, determined to stress that even presidents are accountable, Mandela endured hours of hostile questioning in the witness box with quiet dignity.

It is then a bitter irony for a lawyer who led a nation to reconciliation, to end his days as the subject of law suits by family members squabbling over his assets, memory and burial. George Bizos – Mandela's fellow student, friend and lawyer – commented recently: 'If he were in better health, I imagine he would be heavily disappointed by the family disputes that are playing out for the world to see.'

The man or the moment?

Nelson Mandela the man should not be disconnected from the apartheid era in which he lived. There were tens of thousands of South Africans who struggled against apartheid and suffered as a result. Equally, across Africa ordinary people took up the fight for freedom from colonial rule, often at the cost of their lives.

Mandela came to power post-Cold War, when developing nations were no longer pawns of the West or the Soviet Union, their leaders propped up as long as they played a strategic geo-political role. In that sense, Mandela's 27 years in the enforced isolation of a prison cell, meant that he came unencumbered by the baggage of history, while keenly aware of its lessons in Africa, where the delivery of independence had been less than the promise.

Democracy had come to Eastern Europe and was gaining ground in Africa, globalisation and interdependence was on the rise – the world had become a very different place since the 1960s. The Africa that Mandela conceived was a huge break from the past, it would be no more business as usual.

An early indicator was when he forced the temporary suspension of Nigeria from the Commonwealth, because of its execution of activist and writer Ken Saro-Wiwa. Similarly, in Zimbabwe there was a noticeably cool relationship with Robert Mugabe, who after great promise had become dictatorial, suspending civil liberties and laying siege to the judiciary. While Mandela was careful not to be too critical in public, his evident disapproval soured relationships between the two countries, especially since Mugabe clearly was jealous of losing the mantle of pre-eminent liberation leader to Mandela.

But while Mandela is a man of his time, there is little doubt that there are very few leaders – if any, now or in the past – who could have attained his moral standards, wisdom and goodness, or translated them into actions in the way he has. It is for this reason that he is revered, in Africa and across the world.

As president, Mandela at times seemed naïve but his focus on healing and his stature enabled South Africa to get on with the crucial tasks of embedding democracy and growing the economy. He set an example for African leaders who cling to power, by stepping down after one term rather than the two he was constitutionally guaranteed.

'It is cherished principles of democracy, human rights and the rule of law, embodied in Nelson Mandela, that will be his enduring moral and intellectual contribution to humanity'

He donated his Nobel Peace Prize money to charities and contributed part of his presidential salary to a trust fund to assist children, rather than taking the route of so many other leaders who use their positions to amass personal wealth. On retiring from political life, he continued to mediate in conflicts. In 1999 the Nelson Mandela Foundation was established and he spent his time tirelessly raising money for it and other charities until in 2004, aged 85 and in failing health, he announced that he was 'retiring from retirement' and told the world: 'Don't call me, I will call you.' Mandela's presence continues to calm South Africa.

The Nelson Mandela Centre of Memory, established in 2004, focuses on three areas – the Life and Time of Nelson Mandela, the Dialogue for Social Justice and Nelson Mandela International Day – as well as working with institutions that are part of the Mandela legacy, the 46664 Campaign (his prison number), Nelson Mandela Children's Hospital, Nelson Mandela Museum and Robben Island Museum. Every year on his birthday, many South Africans spend 67 minutes doing charitable work, one minute for every year of Mandela's service to the country, and are extolled to 'Make every day a Mandela day'.

These are the physical manifestations of a legacy that, along with the personality and intellect of a great leader, will live for generations beyond Mandela. The resilience of a legacy is of course best judged when the passage of time has provided necessary distance. It is nevertheless true that despite the revisionists who are already at work disparaging the virtues of compromise and reconciliation that Mandela espoused, at a critical juncture of South Africa's history – and as an example to Africa – an extraordinary man made possible a break from a country's tortured past. ☒

Karen MacGregor is a freelance journalist. She can be contacted at editors@africa.com

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- Tailor what you study to your career path and/or practice area
- All modules are practice-led with contributions from leading global law firms

You choose how to study

- Study your LL.M at a time and place that suits you

Full-time LL.M in London

- Starts in September 2013 at our London Moorgate centre
- Three workshops per week – 2.5 hours each
- Supported by i-Tutorials, online test and feedback exercises and independent learning and research

S-mode modules

- Start in January or July each year
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- Nine units per module
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- Modular course design enables you to determine your own pace of learning
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'It has exceeded my expectations...this course in its entirety is the best study experience that I have had.'



'The i-tutorials are very easy to use and informative, an excellent way for busy practitioners to learn.'

Module

Business, finance and the legal services market
International intellectual property practice
International commercial legal practice
International public companies practice
International capital markets and loans practice
International mergers and acquisitions practice
International antitrust practice
International business organisations
International arbitration practice
International joint ventures

First available start date

January 2014
January 2014
January 2014
January 2014
January 2014
January 2014
January 2014
January 2014
January 2014
January 2014

For further information, and to register please email: llm@lawcol.co.uk

www.law.ac.uk/llm



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The energetic and prosperous city of Boston is renowned for its cultural facilities, world-class educational establishments, and its place at the forefront of American history. As New England's social and commercial hub, home to a number of major national and international businesses, and one of the oldest operational sea ports in the western hemisphere, Boston is a fitting and inspiring setting for the International Bar Association's 2013 Annual Conference.

WHAT WILL BOSTON 2013 OFFER?

- The largest gathering of the international legal community in the world – a meeting place of more than 4,500 lawyers and legal professionals from around the world
- More than 180 working sessions covering all areas of practice relevant to international legal practitioners
- The opportunity to generate new business with the leading firms in the world's key cities
- A registration fee which entitles you to attend as many working sessions throughout the week as you wish
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KEYNOTE SPEAKERS INCLUDE:



Madeleine K Albright *Former US Secretary of State, Opening Ceremony Keynote Speaker*



Justice Stephen Breyer *Associate Justice, US Supreme Court*



Paul Volcker *American Economist and former Chairman of the Federal Reserve*



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