IBA GLOBAL INSIGHT

June 2011

The Chinese century

Power and responsibility?

China: Increasing power raises governance questions at home and abroad

Threat to competition: Controversial mergers putting regulators under the spotlight

Anti-corruption: Tackling deeply ingrained practices throughout the construction industry

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International Bar Association®
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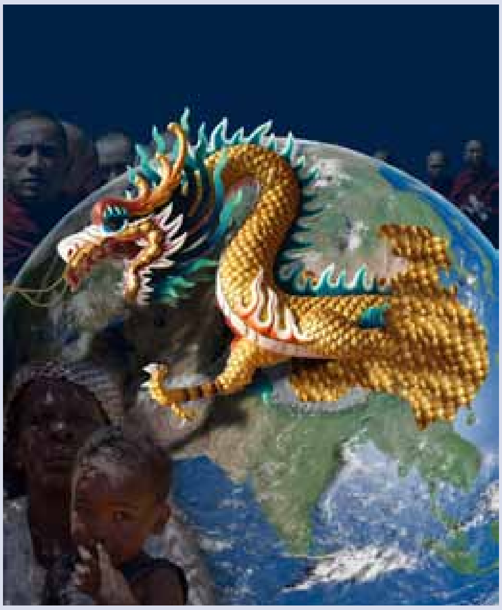

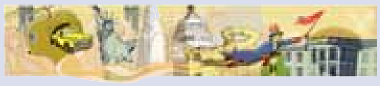

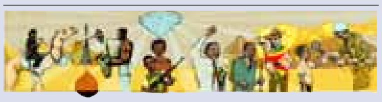

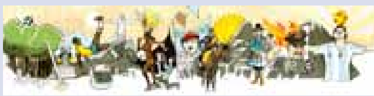

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From the Editor

The term 'The American Century', coined in 1941 by Henry Luce, the publisher of *Time*, effectively conveyed the United States' global dominance - political, economic and cultural. Luce urged America to reject isolationism and instead adopt a role spreading democracy globally. Throughout the three previous centuries, said Luce, 'this continent teemed with manifold projects and purposes. Above them all and weaving them all together was the triumphal purpose of freedom.' China's ineluctable rise suggests it may come to influence the 21st century to a similar degree.

However, Oriental and Occidental views and values differ. While the West's conception of human rights tends to prioritise freedom, Eastern conceptions push equality to the fore. China's renowned wealth, far from pervading its 1.3bn population, is more concentrated on its eastern seaboard and its 'Go West' policy to spread development across the country drives its global search for natural resources. The impact on poverty at home may be positive, but pouring billions of dollars into resource-rich but troubled countries, such as DR Congo, will do little to alleviate African poverty short term, or strengthen the rule of law that might bring hope to that continent in the longer term (see **Riches and responsibility**, page 14).

The impact on China of broader governance issues remains to be seen (see **Asia's wealth of secrets**, page 21). But, for the emerging superpower to take responsibility for addressing the iniquities on its doorstep seems a reasonable expectation (see **Burma: after the Saffron Revolution**, page 25). Nevertheless, Luce, in developing the theme of The American Century, called on the US to 'exert upon the world the full impact of our influence, for… such means as we see fit.' In killing Osama bin Laden in Pakistan, for example, the US is still doing this, (see, page 10 for analysis). It can only be hoped that as the 21st century unfolds, the world's emerging superpower increasingly serves to balance these excesses rather than further undermining international norms of justice.

James Lewis

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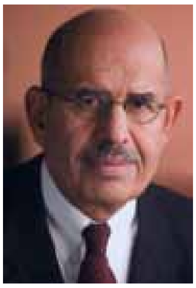
News from the IBA

Nobel Peace Prize winner ElBaradei to speak at 2011 IBA Annual Conference



Nobel Peace Prize Laureate Dr Mohamed ElBaradei will deliver the keynote speech at this year's IBA Annual Conference in Dubai, it has been announced.

A seasoned diplomat, Dr ElBaradei served three terms as Director General of the International Atomic Energy Agency (IAEA), an autonomous intergovernmental organisation under the auspices of the UN. He is a staunch advocate of nuclear disarmament, and promotes open and fair standards for the development of nuclear technology.

In October 2005, Dr ElBaradei and the IAEA were jointly awarded the Nobel Peace Prize for their efforts 'to prevent nuclear energy from being used for military purposes and to ensure that nuclear energy for peaceful purposes is used in the safest possible way'.

In early 2011, Dr ElBaradei emerged as a high-profile opposition figure in the Egyptian protests that culminated in Hosni Mubarak's resignation. He continues to be a voice for change in Egypt's march toward democracy, calling for open dialogue, transparent legal standards and respect for human rights.

The IBA Annual Conference will take place from 30 October to 4 November 2011. It is the opportunity for legal professionals from around the world to meet and discuss key developments across multiple jurisdictions. Register before 29 July to receive the early registration discount at **tinyurl.com/iba-dubai-registration**.

Live IBA webcast with Peter Rees, Legal Director of Royal Dutch Shell

The IBA's first live webcast of 2011, on 24 May, featured an interview and Q&A with Peter Rees QC, Legal Director of Royal Dutch Shell. The interview was conducted by award-winning journalist James Lewis, the IBA's Director of Content.

In his role as Legal Director, Rees is a member of the Executive Committee and has ultimate responsibility for the Shell global legal function. Formerly a partner at Norton Rose and Debevoise and Plimpton, he is a chartered arbitrator and an accredited adjudicator and mediator. Currently, he is a member of the Council of the International Chamber of Commerce UK, the European Council of the London Court of International Arbitration and a fellow of the Chartered Institute of Arbitrators.

The hour-long interview was in-depth and wide-ranging, covering such diverse topics as the challenges facing the energy sector, the increasingly powerful role of the general counsel and the developing sector of corporate social responsibility, particularly following BP's Deepwater Horizon disaster.

To watch a recording of the webcast, visit **tinyurl.com/IBAfilms**.

Social media and the law

Online social networking has entered the legal profession and is here to stay. From journalists tweeting in courtrooms to lawyers searching Facebook for evidence, online social networks are significantly affecting traditional legal practices across the globe.

This is an issue that has been covered extensively in IBA content. See, for example, *The In-House Perspective*, the sister publication to *IBA Global Insight*: **tinyurl.com/IHPsocialnetworks**

The IBA Legal Projects Team is currently conducting a survey to analyse the impact of online social networking on the legal profession. The survey's principal aim is to determine if there is a need for written guidelines to standardise the use of online social networking by members of the legal profession.

Social media and the IBA

The IBA is currently changing the way it delivers news and information to improve user experience for both members and non-members. The website is constantly evolving and gives members the ability to exchange ideas on a wide range of topics via comment platforms and discussion forums. The IBA is now also on Twitter, the social networking website, allowing users to share short messages and keep up–to-date with the latest news, features and events. Follow the Association at **twitter.com/IBAnews**.

Anyone with ideas on how the IBA could develop further in this area is invited to contact Tim Licence, the IBA's Head of Production, Web and Design, at **tim.licence@int-bar.org**.

South Africa invited to form 'BRICS' grouping

RUTH COLLINS

Following its successful hosting of the FIFA World Cup 2010 last summer, South Africa has had much to celebrate. In December, the coveted BRIC group opened its doors to South Africa and invited the country to a meeting in Hainan in April. The decision has been met with some criticism, but the invitation to become the 'S' in 'BRICS' highlights the country's growing importance on the world stage.

Peter Leon, a partner at Webber Wentzel in Johannesburg and Co-Chair of the IBA Mining Law Committee, says there is a clear strategy behind the invitation: 'I think that China's invitation to South Africa was mainly driven by the fact that we are by far the largest economy in Africa and that this is really all about mineral resources.

'South Africa has the largest in situ mineral resources in the world and is by far Africa's biggest minerals producer. Inviting South Africa to join the BRICS was a shrewd calculation by China to provide it with better access to Africa's largest economy and biggest minerals producer.'

According to recent estimates by the Standard Bank Group, bilateral trade between China and Africa is set to exceed US$110bn in 2011 and reach some US$300bn by 2015. With US$373bn GDP, South Africa is Africa's largest economy and is an obvious choice for the BRIC group to gain a foothold in Africa and further expand its global footprint.

Leon believes there is no mistaking why the country has been chosen as the next pit stop on the emerging market trail: 'South Africa is obviously also a gateway to the South African Development Community common market and to Africa in general.'

Read the full article, and further Global Insight web content at: **tinyurl.com/iba-brics**.

China's top court clarifies rules for private antitrust litigation

PHIL TAYLOR

China's highest court has published a draft interpretation governing civil litigation under the country's anti-monopoly law, bringing the prospect of private suits against foreign companies closer and increasing the pressure on state-owned enterprises.

The draft Provisions on Several Issues Applicable to the Trial of Anti-Monopoly Private Litigation Cases represents the first substantive guidance on the Anti-monopoly Law (AML) to be issued by the Supreme People's Court (SPC). As well as dealing with issues such as the possibility of stand-alone and follow-on actions, burden of proof, standing and time limits, they bring much-needed clarification to the widely drawn legislation.

'Judges are likely to feel more comfortable dealing with private actions after publication of the Supreme People's Court's final judicial interpretation,' said Ninette Dodoo, counsel in Clifford Chance's Beijing office.

Analysts have been warning for some time of the potential for Article 50 actions against foreign multinationals once the Supreme People's Court provided guidance.

'The apparent reluctance of the courts to hear such cases when they involve foreign multinationals as defendants may evaporate,' wrote Mayer Brown JSM antitrust lawyers in a recent note.

But Baker & McKenzie special counsel Chunfai Lui said that the courts may find adjudicating domestic conflicts to be 'an easier task' at present. 'From what I hear on the ground, the courts are actually proceeding with caution and in a conservative manner, so agreeing to take on an antitrust complaint against a foreign company involves high stakes where the latter will arm itself with knowledgeable antitrust counsel,' he said.

Meanwhile, Herbert Smith partner Betty Tam told IBA Global Insight that the new interpretation should not put foreign companies in a riskier position.

'This is not so much a question of law but the economy,' she said. 'Foreign companies may be subject to more scrutiny for merger control, not because they do more merger than domestic companies, but because they are compliant and will do the filing when they need to. As for other monopolistic acts, I struggle to think of which foreign companies are more 'monopolistic' than the big state-owned enterprises in China.'

Read the full article, and further Global Insight web content at: **tinyurl.com/iba-china-antimonopoly**.

News from the IBAHRI

UN human rights worker killed in Afghanistan

The death of UN human rights officer Joakim Dungel, 33, has highlighted the challenges still facing soldiers and aid workers in Afghanistan ten years after the conflict began.

Joakim, an IBA Fellow for the International Criminal Tribunal for the Former Yugoslavia, was killed in an attack on the UN Assistance Mission in Afghanistan (UNAMA) on 1 April. Afghan demonstrators enraged by the burning of the Koran by a pastor in Florida, USA, led the assault, which also killed two other UN staff and four Nepalese guards.

The deaths were the tragic consequence of a bloody war that has claimed the lives of nearly 5,500 soldiers and civilians since it began in 2001. Whether the conflict has been worth such a momentous sacrifice is an extremely difficult question to answer. Yet beyond the battleground it is important to remember some of the valuable progress that has been made to strengthen the democratic process and rule of law.

The Afghan Independent Bar Association (AIBA), established in 2008 with the assistance of the IBA's Human Rights Institute (IBAHRI), has played a central part in this process. The AIBA took over duties from the Ministry of Justice, including registering lawyers, setting entry requirements for the profession, providing continuing legal education and enforcing the professional code of conduct. In 2008, there were only 400 registered lawyers in Afghanistan; now there are 1,100, and the number is growing.

The AIBA's focus is now on revising the bar exam, developing legal aid initiatives and tackling problems faced by women in the legal system. It is currently one of the few bar associations in the world that has a minimum quota for female representation, and it requires all lawyers to conduct three cases pro bono every year. Via funding from the British Embassy in Kabul, the AIBA is now running training specifically directed to women lawyers and newly qualified lawyers.

AIBA also produces a bi-weekly newsletter, quarterly magazine and monthly radio programme devoted to rule of law issues, helping to raise the profile of the legal profession in Afghanistan.

With a small membership, AIBA funding is a challenge, and grants from the Swedish Government, the Open Society Institute and United States Agency for International Development have been necessary to keep the Association afloat. Currently, the IBAHRI is investigating the possibility of setting up a trust fund to pay for an AIBA building, to avoid escalating rental costs.

Visit the AIBA website at **www.aiba.af**.

In Memoriam

Thirty-three-year-old Joakim Dungel, a human rights officer for the UN Assistance Mission in Afghanistan (UNAMA), was among those killed on 1 April 2011 in an attack on the UN Assistance Mission in Afghanistan (UNAMA) Operations Centre in Mazar i Sharif, Afghanistan. The attack claimed the lives of two other UN staff and four Nepalese guards.

Before joining UNAMA, Joakim worked for the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL) and the Temporary International Presence in Hebron (TIPH). He was also an IBA Fellow for the International Criminal Tribunal for the Former Yugoslavia (ICTY).

In online tributes to Joakim, colleagues at UNAMA describe him as 'generous and good humoured, with the ability to connect with colleagues, as well as those who could not speak for themselves' and as having 'a passion for justice'.

Joakim's death is a great loss to the international human rights community and he will be deeply missed by those who knew him.

Portuguese human rights training manual launched

The IBAHRI has published a Portuguese translation of its human rights training manual for lawyers.

'Human Rights in the Administration of Justice: A Manual for Judges, Prosecutors and Lawyers' was launched at a training workshop at the Brazilian Bar Association (Ordem dos Advogados do Brasil – OAB) in Brazil on 26 April.

The trainers included Joelson Dias, of OAB's Committee for International Relations; Percílio de Sousa Lima Neto, vice-president of the Secretariat for Human Rights; Professor Carlos Ayala Corao, IBAHRI council member and ex-president of the Inter-American Commission on Human Rights; and Judge Erivaldo Ribeiro Santos, of the National Justice Council and winner of the IBAHRI/Innovare Access to Justice Prize.

The manual was translated pro bono by the Brazilian Bar Associations' Centre for Studies (Centro de Estudos das Sociedades de Advogados – CESA). It will facilitate future training in the field of human rights for judges, prosecutors and lawyers in Portuguese-speaking states.

To download the manual in Portuguese, English, Spanish or Arabic, visit: **tinyurl.com/ibahri-portugaltraining**

Japan earthquake two months on: disaster could prompt a revision of energy policies

Tokyo lawyers have spoken of their concerns about nuclear energy and the economy as Japan struggles to come to terms with the aftermath of the worst natural disaster ever to hit the country.

As recovery efforts gather momentum, hopes are high that the severe damage caused to the Fukushima Daiichi nuclear power plant – rated 5 on the 7-step International Atomic Energy Agency scale – could prompt a revision of energy policies in Japan and elsewhere.

'The failure in the nuclear plants in Fukushima has posed fundamental questions to us about energy, ecology and the economy,' says Akira Kawamura, President of the International Bar Association. 'It is said the amount of liability of the power company, Tepco, could be as much as US$200bn.

'It will force the governments in other parts of world to change their energy policies, which may affect the global economy considerably.'

The Tohoku earthquake and tsunami on 11 March, which left over 27,000 people missing or dead and destroyed thousands of buildings, was described by Japanese Prime Minister Naoto Kan as 'the toughest and most difficult crisis' Japan has faced since the Second World War.

The construction of nuclear power stations has now been frozen by the government, and several other countries, including China, have temporarily suspended approval for new plants.

'People expect that Japan will have to put more emphasis on natural power, including solar energy, but the government has not decided anything concrete yet,' says Futoshi Toyama, Director of the Office of International Affairs at the Japan Federation of Bar Associations. 'People in the Tokyo area will have to make historical efforts for electricity saving for this summer and winter.'

For Toyama and others, impending power shortages and a prolonged economic slump remain a pressing concern. Recovery efforts from the tsunami could cost up to US$235 billion, according to the World Bank, and in its April fiscal report the government admitted that economic recovery had stalled.

'I am not anxious about the recovery so much in terms of the reconstruction of the devastated areas,' says Toyama. 'I am more worried about the economic downturn caused by the natural disaster and the consequent electronic power shortages, which are expected this summer.'

Read the full article here: **tinyurl.com/iba-tsunami**

Media law and freedom of expression website re-launch

The IBAHRI will re-launch its Media Law and Freedom of Expression (MLFOE) website in June, featuring member discussion forums and an 'Expert Legal Opinion' resource.

The discussion forums will provide a space for media lawyers, journalists, students and all other interested parties to share information, discuss and debate current and key MLFOE issues. The 'Expert Legal Opinion' pages will showcase articles written by IBA committee members and other leading experts in the field.

The site also offers up-to-date news relating to MLFOE issues, access to relevant resources and information on upcoming MLFOE events across the world. The site also hosts a blog featuring a weekly round-up of international MLFOE news and posts on wide-ranging topics.

Registration to the MLFOE site is free, but only members can submit information to the site and use the discussion forums. We welcome all IBA members interested in or working in the field of media law and freedom of expression to join and contribute.

Visit the MLFOE website at: **probono.net/medialaw**

IBA Human Rights Institute Venezuela report

The IBAHRI has published the report of its fact-finding mission to Venezuela, which investigated the independence of the judiciary and the alleged human rights abuse of Judge Maria Lourdes Afiuni, currently under house arrest.

The report, called 'Distrust in Justice: the Afiuni case and the independence of the judiciary in Venezuela', highlights the many challenges facing the administration of justice in Venezuela. It recommends the separation of powers to strengthen the rule of law.

The report was launched on 25 April with a panel discussion at the Brazilian Bar Association (Ordem dos Advogados do Brasil – OAB) in Brazil. The IBAHRI had previously visited several stakeholders in Caracas in February, when it was the first international delegation to secure a meeting with Judge Afiuni, who is suffering from cancer.

Afiuni was arrested in December 2009 after President Hugo Chavez accused her of corruption for freeing a banker accused of breaking currency controls. He says her detention is legitimate given suspicions surrounding the man she freed, banker Eligio Cedeño, who jumped bail and fled to the US.

Afiuni, however, insists she released Cedeno in accordance with the law, because he had been in jail for three years without trial, exceeding legal limits.

The IBAHRI panel included the president of the Brazilian Bar Association, Ophir Cavalcante; Belisário dos Santos Junior, former secretary of the Ministry of Justice for São Paulo and IBAHRI delegate on the Venezuela mission; Professor Carlos Ayala Corao, IBAHRI council member and ex-president of the Inter-American Commission on Human Rights; and Alex Wilks, IBAHRI senior programme lawyer.

Read the report here: **ibanet.org/IBAHRI.aspx**.

Bin Laden killing: justice or revenge?

REBECCA LOWE

For the thousands of people who have lost friends and family members in al-Qaeda-sponsored terrorist attacks, it was difficult to greet the killing of Osama bin Laden with anything other than relief – and even, perhaps, triumph.

Yet, since his death on 2 May, bin Laden has continued to be a controversial and divisive figure. Far from being an open and shut case, the killing has prompted a fierce debate over the scope of America's jurisdiction in this matter. Even a figure like bin Laden cannot be subjected to extrajudicial acts of revenge, after all, or the term 'justice' itself becomes meaningless. So, was the killing legal, and, if so, under which law?

According to US officials, bin Laden's death should be judged according to the law of war. He was an enemy commander leading an armed conflict against their country, they argue, and Congress long ago approved the use of military force as a means of defence against the perpetrators of 9/11 – the Authorization for Use of Military Force Against Terrorists statute was enacted on 18 September 2001. Bin Laden, for his part, has hardly been reticent about his violent desire to destroy Americans and their allies.

Others, such as Christof Heyns, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, and Hans Corell, former Legal Counsel of the United Nations (UN), are less convinced. They argue that the killing should be judged under international law. If any member of al-Qaeda can legally be targeted as a means of self-defence, they point out, it sets a dangerous precedent and amounts to little more than a global assassination policy.

Justice Richard Goldstone, former Chief Prosecutor of the UN International Criminal Tribunal for the former Yugoslavia, chaired the IBA Task Force on International Terrorism. Speaking at the launch of the IBA report, 'Terrorism and International Law: Accountability, Remedies, and Reform' in March, he said: 'The rhetoric of the George Bush administration's "war on terror" has stood in sharp contrast to the belief of many that terrorist threats are the proper purview of policing and criminal justice, rather than military intervention and the law of war.

'Some, nevertheless, have questioned whether contemporary international law is equipped to meet the challenges of modern terrorism.'

Speaking to the International Bar Association (IBA), Hans Corell, a member of the IBA War Crimes Committee Advisory Board, said he did not believe the law of war argument was 'justifiable', as Pakistan, unlike Afghanistan, is not a war zone.

'The point of departure must be that terrorism constitutes criminal acts that should be dealt with through law enforcement. Such enforcement must be conducted in conformity with certain legal standards. This point of departure is fundamental and has been emphatically stressed by many, including by two organisations of former heads of state and government: the Madrid Club and the InterAction Council.'

He added: 'It is important to stress that the term "war on terror" is a very dangerous misnomer that has created much confusion and which has led to violations both of human rights law and humanitarian law. Therefore, if members of al-Qaeda are found not in a zone of combat, they should be subjected to law enforcement.'

Yet, David Crane, founding Chief Prosecutor of the Special Court for Sierra Leone and member of the IBA War Crimes Committee Advisory Board, believes the attack was sanctioned by both the US and international community. He told the IBA: 'I only support the use of force if it is properly authorised under domestic and international law and follows the laws of armed conflict.'

In Crane's view the President is empowered under US law to direct the use of armed force against al-Qaeda, including bin Laden and others. He also refers to additional international authorisations via the UN and NATO that followed soon after 9/11, and

cites the basic international principle of the inherent right of a nation to self-defence, found in Article 51 of the UN Charter. On this basis, Crane said: 'The targeting of Osama bin Laden was a legal action.'

For many, it is impossible to make a definitive legal judgment on the matter until the US has released more information. Doubts have been raised as a result of the inaccurate information given out by US security staff in the days following the killing. David Tolbert, President of the International Center for Transitional Justice, believes the US has an 'obligation' to provide further details, while Justice Richard Goldstone said he was unwilling to speculate as the question 'depends on facts we do not know'.

For Corell, the matter has wider ethical considerations beyond the killing itself, as the actions of the US could set a precedent across the world.

'If these states are seen to act as they please when it suits their interests, it will have a devastating effect on the possibility of establishing two fundamental preconditions for international peace and security: democracy and the rule of law,' he said. 'To describe what happened as "justice has been done" is simply not acceptable – not even in relation to a person like Osama bin Laden. That justice has been done presupposes that the suspect has been tried and found guilty by a court of law.'

Ugandans drop Anti-Homosexuality Bill

The Ugandan Parliament adjourned last month without debating a bill that would have imposed the death penalty for some homosexual acts.

Gay rights groups celebrated the move, but fears remain that the Anti-Homosexuality Bill, first introduced in 2009, could re-emerge when the new parliament meets later this year.

Homosexual acts are already illegal in Uganda, but the bill would increase the penalty for those convicted to life in prison. Those found guilty of 'aggravated homosexuality' – when one of the participants is a minor, HIV-positive, disabled or a 'serial offender' – would face the death penalty.

Anyone accused of failing to report a person they knew to be homosexual could also be prosecuted under the legislation.

On 17 May, the International Day Against Homophobia, the IBAHRI called on lawyers and bar associations around the world to work towards eliminating discrimination against people on the basis of their sexual orientation.

Phillip Tahmindjis, Co-Director of IBAHRI, said: 'The prevalence of anti-homosexual legislation is clearly at odds with international human rights law. International and regional instruments, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Africa Charter on Human and Peoples' Rights, enshrine the protection of human dignity, privacy and equality for everyone'.

There are still many parts of the world where homosexuality is a criminal offence and discrimination on the basis of sexual orientation is commonplace. In 42 out of 54 Commonwealth countries, homosexuality remains a criminal offence.

In 2010, the IBAHRI Council passed a resolution opposing discrimination, violence and other breaches of human rights directed against people on the grounds of their sexual orientation.

Phone-hacking scandal prompts 'public interest' debate

The on-going phone-hacking scandal at *News of the World*, owned by Rupert Murdoch's News International, looks set to be one of the most expensive to hit a British media group, with legal costs predicted to rise into the tens of millions of pounds.

Last week, Britain's largest circulation Sunday newspaper issued an unprecedented apology for tapping into the mobile phone voicemail messages of eight public figures between 2004 and 2006. Currently, 24 public figures are seeking compensation from News International, but law firm Mishcon de Reya, acting for several of the claimants, estimates there could be more than 6,000.

Clive Goodman, the News of the World's royal editor, and Glenn Mulcaire, a private investigator, have both already been jailed for intercepting messages. Assistant editor Ian Edmondson, chief reporter Neville Thurlbeck and journalist James Weatherup were all arrested last month.

Nevertheless, phone hacking and other illegal activities may be appropriate for news gathering in circumstances where there is a strong public interest defence, according to Gillian Phillips, Director of Editorial Legal Services at Guardian News & Media Ltd, based in London.

Under UK law, it is illegal to gain access to another person's telephone under the Regulation of Investigatory Powers Act 2000 (RIPA), regardless of whether the material uncovered is in the public interest.

'I would always be an advocate of including some sort of public interest defence in any legislation of this sort,' Phillips said. 'For example, this is the case under section 32 of the Data Protection Act 1998, where civil liability on the part of the media for breaching the data protection principles depends upon whether the defendant in question can establish a reasonable belief that publication would be in the public interest.

'It seems to me that this acknowledges the important role the press have to play in uncovering corruption and crime, and leaves it to a court to decide if that was acceptable.'

Read the full article, and further Global Insight web content at: **tinyurl.com/iba-phonehacking**

A letter from

SKIP KALTENHEUSER

Will last year's Dodd-Frank Wall Street Reform and Consumer Protection Act find resounding success? Or is the smart money betting banks will ultimately conduct business as usual?

Those seeking to weaken Dodd-Frank – which requires ample rule-making to implement – will mostly come in under the radar. They'll let the Federal Reserve or other bank-friendly regulators slowly chip away at rules enacted by Congress. Piecemeal legislation will then repeal prior rules rendered moot by regulatory exceptions, abetted by challenges before a business-friendly Supreme Court. It's arcane, with plenty of sleight of hand, muddied up by rival business interests jockeying for advantage.

The effort to hamstring the new Consumer Finance Protection Bureau, and to discredit President Obama's choice of its leader, Elizabeth Warren, is a more aggressive bellwether. The White House has ways to sidestep that effort, supported by a Senate still in Democratic control.

If derailment efforts become too blatant, proponents will feel the political hammers, powered by anger at huge backlogs of foreclosed properties that will long depress markets and undermine neighbourhoods in many parts of the nation.

Bart Dzivi, former Special Counsel to the Financial Crisis Inquiry Commission and now a lawyer in California, sees Dodd-Frank as an improvement, but 'still unlikely to reduce the probability of future catastrophic systemic failures.' Dzivi says, 'The root causes of the recent collapse – bank executives with one-way financial incentives to incur substantial risk, and a fragmented regulatory system with divided jurisdiction and lack of accountability – remain largely intact.'

Dzivi contrasts the 'irrational structure of US financial regulatory agencies – ineffective at preventing failures at the largest institutions' with the 'much more effective' Canadian model, in which the central bank does not exercise bank supervisory powers. 'None of the large Canadian banks failed or required a government bailout.'

'If unchecked, bankers will always find a way to exploit banks from the inside, piling up assets that appear profitable in the short term, but are catastrophic in the long term,' says Dzivi. 'As Warren Buffett said, if massive losses occur at a financial company, senior managers should lose substantially all their wealth created by the company.' Not yet.

Another point for pessimism is the revolving door spinning key SEC lawyers into corporate defence firms like WilmerHale, known as SEC West, and lawyers from that firm into prime SEC positions, such as chief of the Enforcement Division. WilmerHale clients include Goldman Sachs, Citigroup, Morgan Stanley and JPMorgan Chase.

Recently Daniel Gallagher went full circle and then some. He started his career at WilmerHale, eventually going to the SEC where he worked on efforts including the elimination of short-selling restrictions and held a leadership role in the Division of Trading and Markets. Last year he returned to WilmerHale, where he's a partner. The White House recently nominated Gallagher to be one of five SEC commissioners. So it goes.

William Black, a former bank regulator and the author of The Best Way to Rob a Bank is to Own One, worries over the dearth of prosecutions after the latest financial crisis, despite data indicating that in 2006 between a quarter and a half of home loans were 'liars' loans', for which the great majority involved fraud. Lenders supplied the overwhelming number of lies.

Washington

Black points to a New York Times column by Gretchen Morgenson and Louise Story which reveals how during the Bush administration, Tim Geithner and Ben Bernanke sought to discourage or limit federal and state prosecutions, enforcement actions and lawsuits.

'Geithner's rationale was that the financial system's extreme fragility made vigorous investigations of the elite frauds too dangerous,' says Black. President Obama reappointed Bernanke and made Geithner Treasury Secretary.

'Giving fraudulent CEOs de facto immunity as the road to financial stability is stupid,' says Black. 'This was not a fraud-free financial crisis,' says Black. 'It's a prosecution-free financial crisis for the elites whose frauds caused the crisis.'

The recent LinkedIn public offering reaped impressive riches for the company. But some observers, such as Henry Blodget of Business Insider, saw its rise to 90 per cent above the offering as an indication of bankers behaving badly, under-pricing the stock. He thinks Morgan Stanley and Bank of America, and their favoured institutional clients, reaped windfalls at the expense of LinkedIn. Greed's still good on Wall Street.

Some grounds for optimism:

A recently released 639-page report from Senator Carl Levin's Senate Subcommittee on Investigations, 'Wall Street and the Financial Crisis: Anatomy of a Financial Collapse', details mischief some speculate may lay the foundation for prosecuting Wall Street executives for lying to Congress about dealings, with clients left holding the bag.

A probe of the mortgage securitisation process, by New York State Attorney General Eric Schneiderman, reportedly includes Goldman Sachs, Bank of America and Morgan Stanley. The investigation would derail an imminent bank settlement by states' attorney generals (AGs) that some regard as advancing without the full scope of investigation warranted. Settlement requires all fifty state AGs to sign on, and Schneiderman is at the sharp end for financial mayhem.

But, remember Willie Sutton, a prolific bank robber in the 1930s? Asked why he robbed banks, he allegedly replied, 'Because that's where the money is.' Creative liberties were taken by the reporter, but Sutton, who enjoyed robbing banks, later endorsed the motive as obvious. The Big Money is still stacking. Political fundraisers salivate over it as the campaign finance arms race revs up. Wall Street is shifting more of its funding to Republicans who've proven user-friendly, and Democratic operatives would like to turn that around. The smarter operatives will frame bank backing of opponents as a liability.

As much as for staking Bin Laden, President Obama will one day be judged by whether he whacks back the startling concentration of political power in the finance sector. A pending executive order requiring government contractors to disclose political contributions would seem a no-brainer; hopefully it will be signed without further suspense.

How about another executive order requiring financial outfits that benefited from public money to fully disclose political contributions that would otherwise slip into opaque organisations that both parties now embrace? Call out the politicians in the bankers' vest pockets.

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Riches and responsibility

China is destined to become the world's largest economy, yet Western criticism of its governance both at home and abroad shows no sign of abating. Are such concerns valid or based on ignorance and envy?

REBECCA LOWE

It was called the Great Drain Robbery: the theft of thousands of manhole covers from across the world, from the UK to Kuala Lumpur, in early 2004. At first the crimes were a mystery – and then it slowly became clear. China's rising demand for scrap metal had driven up prices and created an underground of black market trading. The Middle Kingdom was industrialising, and industrialising fast.

The gaping holes in the ground were perhaps the most visibly striking sign of China's arrival as a key player in the 21st century global economy. Yet now, seven years later, the country has done more than just snatch the world's manhole covers – it has snatched the ground from beneath our feet. With startling efficiency, its economy has grown to become the second largest in the world, leaving Japan and Europe reeling in its wake. By 2030, most analysts believe, it looks set to be number one.

The world can hardly complain; it encouraged China out of its shell, after all, with multinationals excited by the prospect of selling their wares to another 1.3 billion people and civic activists convinced that economic openness would inevitably lead to political and social reform. Yet repressive measures by the Communist Party seem to be worsening, and China continues to attract criticism for its business practices both at home and overseas. It has stepped into the spotlight, yet remained in the shadows, keen to hold its head high while ducking below the parapet. And the West is getting frustrated.

But are concerns about democracy, freedom and corporate social responsibility (CSR) justified? As China's power grows, is the world under increasing pressure to hold its policies to account, or are such efforts unwarranted, and ultimately counter-productive? In short: is China coping responsibly with its newfound riches – and if not, is there anything that can be done about it?

Wealth and wisdom

'It's like the joke in China, that the guy is so poor because he only has money.' Speaking by phone from Shanghai, David Liu, senior partner at Jun He Law Offices, is keen to debunk foreign preconceptions about his country. Far from being ruthless mercantilists,

he stresses, China's main aim over the past three decades has been merely to overcome severe poverty. Now, however, its ambitions are changing.

'The fundamental question comes back to the purpose of the economy, the purpose of life,' he says passionately. 'My thinking is clear on this. China has come to this position because of its people's desire to become rich. That is a fact. But now, after 30 years, people are longing for happiness, to add value to the world.'

It is easy to forget, Liu points out, exactly how poor China was in the late 1970s. The economy was nearly bankrupt and over a third of the population lived below the poverty line. Even when Liu graduated in the late 1980s, he received a salary of only 70 reminbi (US$11) a month.

'The pursuit to be rich is obviously not very concerned with social responsibilities,' he says. 'So that's why you hear a lot of voices on how poor the working conditions are in the southern part of China. A lot more attention is being paid to that now.'

The leadership is certainly going to great lengths to show it means business where CSR is concerned: three new labour laws, introduced in 2008, have led to a huge rise in litigation and arbitration over worker disputes, and the country's 12th five-year plan (2011–2015) outlines definitive commitments to environmental protections and improving people's livelihoods.

The impetus for responsible corporate governance is not solely government-driven, however. Jeff Blount, partner-in-charge of Hong Kong and Beijing at Fulbright & Jaworski, believes the explosion of large state-owned enterprises (SOEs) publically listed on global equity markets may have played an important role in shifting China's focus from raw profiteering to CSR.

'They have had to set a good example in terms of international best practices,' Blount says. 'So public shareholding has had a good leadership effect on domestic companies that are still private, because they see large Chinese companies doing well and having programmes for employees and green campaigns, and they think that's a good example to follow.'

Listed companies are now obliged to publish a CSR code and the Chinese authorities want all SOEs to file CSR reports by next year. Zhang Yi, managing partner of King and Wood's Shanghai office, is confident times are changing, but admits that implementation remains a problem without grassroots support.

'China is paying more attention to CSR now,' he says. 'But, my personal feeling is that it is not enough to have a government requirement, so it is imposed top-down, but to incentivise the people to ensure it will really be implemented.'

Yet for the bulk of businesses, it is clear CSR remains little more than a PR exercise of lip-service and window-dressing. Many companies lack third-party auditors to oversee their records – a particular concern in a country lacking civic organisations to hold the authorities and corporates to account.

'I think there is a fierce debate at the moment as to whether this is anything more than just cynical rhetoric on the part of the state-owned corporates,' says Kerry Brown, head of Asia at Chatham House. 'The way that Chinese companies operate in China isn't hugely impressive in terms of the way they try to fulfil their CSR.'

Overseas investment

Others might go further: for some, the way Chinese companies operate outside China has proved equally questionable. With nearly US$3 trillion of foreign exchange reserves burning a hole in the nation's pocket, it has thrown its energies into exploring investment opportunities across the globe – including, to the West's notable irritation, in several African countries.

Western concerns are manifold. Corporates complain of non-competitive business practices and opaque deals, while civic groups cite inadequate labour and environmental regulations. The Congo has proved particularly controversial: in 2009, a deal to provide US$9bn worth of infrastructure in exchange for 10.5m tonnes of minerals was renegotiated to US$6bn after the International Monetary Fund (IMF) deemed it transgressed the Congo's debt obligations.

Since then, Global Witness has criticised various contractual ambiguities, which seem to favour the Chinese, and raised concerns about the lack of social and environmental protections. It has also reported the disappearance of US$23m of the signature-bonus payment to the state copper-and-cobalt firm, Gecamines.

Locals in the Congo have echoed some of these concerns, their main objection being the Chinese preference for shipping over their own workers, rather than training native labourers.

'There is clearly a great deal that China is doing in Africa that is ethically problematic,' says Rana Mitter, lecturer in Chinese history and politics at Oxford University. Yet he, like many China experts, is keen to point out the positive side of the investments, which have injected much-needed cash into regions that desperately need it. China, he stresses, is learning all the time.

'Quite often the China issue is used by African opposition parties to say, here is another exploiter of our resources,' he says. 'So Chinese behaviour has had to make itself more ethical and suited to the needs of local populations, because otherwise their political allies will be voted out. In a way, the Chinese are having to come to terms with democracy on an international basis in a way that they are not having to do at home.'

> *'It's like the joke in China, that the guy is so poor because he only has money.'*
>
> David Liu
> *Jun He Law Offices*

For some – such as those who detect the faintest whiff of hypocrisy in the idea of the West condemning unethical business practices in Africa – the issue is simple: avoid blanket criticism and hold China to account via international trade agreements. 'In the case of trade by any wealthy country with a relatively impoverished emerging market, there are always going to be stories about overreaching and unfair practices,' says Blount. 'But we can use the existing multilateral mechanisms – the IMF, the Paris Group, the debt relief initiative in Africa – to prevent this.'

Socio-economic to human rights?

As social and economic rights tentatively venture into the spotlight in China, human rights defenders are hopeful that certain 'inalienable' freedoms – independent courts, democratic elections, free speech – may be next on the agenda. Yet such hopes, it seems, are premature. The so-called Jasmine Revolution barely reached the Twittersphere before it was no more, crushed by heavy censorship and the arrest of dozens of leading Chinese activists, including the famous artist Ai Weiwei. Foreign journalists reported being harassed, while six lawyers disappeared from their homes, one of whom recently resurfaced under circumstances suggesting he had been badly tortured.

For campaigners encouraged by recent government statements about democracy and transparency, the crackdown has proved an immense disappointment.

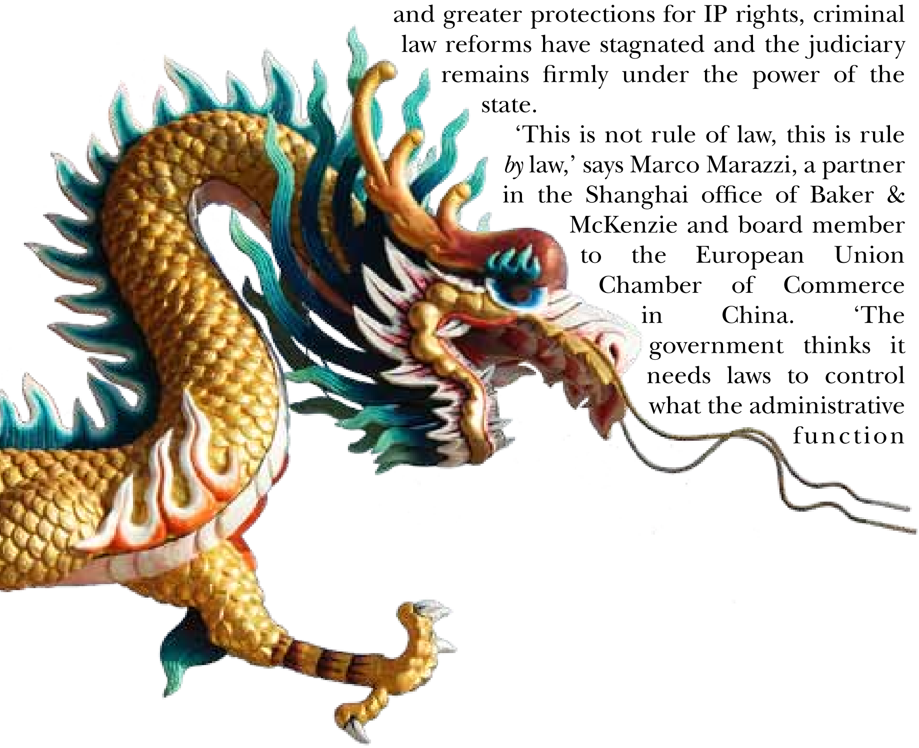
'The thing about Chinese officials is that they are amazingly arrogant and they feel it is appalling that anyone should dare mention these insignificant human rights people, who are not worth a flea off their back,' says Brown. 'The political elite say wonderful things about human rights, while allowing their security agents to unleash murderous viciousness on people who are totally powerless.'

'The way that Chinese companies operate in China isn't hugely impressive in terms of the way they try to fulfil their corporate social responsibility,'

Kerry Brown
Chatham House

For many, it is the decline of respect for the rule of law that is the most worrying aspect of the repression. For years, the situation seemed to be improving, with around 10,000 laws passed over the course of a decade and a growing emphasis on educating lawyers. Yet whereas corporate law is showing signs of improvement, with more functional regulation and greater protections for IP rights, criminal law reforms have stagnated and the judiciary remains firmly under the power of the state.

'This is not rule of law, this is rule *by* law,' says Marco Marazzi, a partner in the Shanghai office of Baker & McKenzie and board member to the European Union Chamber of Commerce in China. 'The government thinks it needs laws to control what the administrative function is doing, not to afford protection of individual rights.'



Mo Shaoping, the lawyer for jailed Nobel Peace Prize winner Liu Xiaobo, agrees: 'Legal principles vanish when facing political power. The reform so far has solved the problem of having no laws, but has not – or really does not intend to – solve the problem of judicial independence.'

Fighting corruption

Despite improvements in corporate law, experts in the region point out that businesses will not be immune from this backlash against legal reform. Without independent courts, they will always be exposed to a degree of instability and risk, dependent on toeing the political line to keep their foothold in the marketplace.

'China's human rights situation is beginning to play a bigger role in companies as they consider their future in the country,' says John Kamm, former President of the American Chamber of Commerce in Hong Kong and founder of the human rights Dui Hua Foundation. Kamm cites the example of an American geologist, Xue Feng, who recommended that his employer purchase a database that he thought was commercially available and was later convicted of trafficking in state secrets. 'As this kind of thing happens more often, companies will get more concerned about the safety of their employees.'

China's increasing censorship will also affect businesses, Kamm believes, by interfering with the 'free flow of communication, on which they rely'. 'Nobody is packing their bags yet,' he says. 'But I know it's beginning to be a problem.'

Yet most corporates, desperate to access a market comprising a fifth of the world's population, seem unwilling to enter the human rights debate. Some analysts believe they missed their moment: the time to speak out was ten years ago, when China was desperate for investment at any price. Yet many – like the lawyer quoted above – hope it is not too late.

'Multinationals are silent about these things because they are frightened of repercussions. This may be the case if one does it, but if many do it, what could China do? They need multinationals, they are the fabric of society. If Siemens leaves, plus all the related companies, you have 100,000 white collar unemployed people on the street.'

According to research at the Chinese Academy of Governance, the number of protests in China hit 180,000 in 2010 – twice the figure of 2006. A main source of anger, it seems, is corruption in local government.

'Corruption is the primary eroding force of the moral right of the state to rule,' says Tim Clissold, CEO of Peony Capital, a Beijing-based investment fund. 'The state thinks it has a right to rule – a Mandate of Heaven – by creating exemplary moral examples. So it's a huge problem.'

The authorities have launched numerous high-profile campaigns to help cleanse the system over the past two decades, but many believe it is fighting a losing battle. 'The Party is a self-governing, self-regulating elite,' says Richard McGregor, *Financial Times* journalist and author of *The Party*, a book about the Chinese Communist Party. 'So even though they have periodic crack-downs on corruption, they are never going to get a real grip on it because institutionally they can't.'

Without freedom to vent frustrations, protests are predicted to spread. As the tax system becomes more sophisticated, the population will almost certainly want a greater say in where their yuan is being spent. Combine this with growing inequality and a generation of workers who no longer remember the hardship of the 1980s, and people's tolerance of the state may reach breaking point.

Ultimately, however, it may be the economy itself that convinces the state to unclench its iron fist. With a security budget now exceeding the military budget, few believe the current level of social control is sustainable in the longterm – especially if the economy stumbles around 2020, as many predict, due to the one-child policy and an ageing population.

According to Fu Hualing, head of law at Hong Kong University, such socio-economic unrest should not be underestimated. 'These protests are not about political rights as such, but an essential part of their claim is to have the right to speak freely,' he says. 'So the direct demand is not political, but the means they are using is highly political.'

'I've been in China for 24 years… and never once has anyone said, "what we need is a democracy"'

Tim Clissold
Peony Capital

Western democracy

So as societal cracks multiply, are we en route to a breakdown of the one-party state? Over the next ten to 20 years, few seem to believe so. Nationalism and pride is high in China, and it is clear the Party still enjoys widespread support among a population that has seen the nation's wealth and status rocket under its guidance.

'I think there is a feeling of tolerance towards the overall story the Party is putting forward, which is that the economy and China's dignity

Rise of the dragon

1949:	Life expectancy is 35 years and infant mortality rate is 20 per cent.
February 1950:	China forms the 'Sino-Soviet Treaty of Friendship, Alliance and Mutual Assistance' with the USSR.
1958 – 1960:	Mao Zedong's Great Leap Forward, which reforms China into a series of communes to stimulate agricultural and industrial production. Famine kills more than 30 million people and a severe economic crisis results.
1966 – 1976:	Mao's Cultural Revolution, designed to remove capitalist elements from Chinese society and undermine intellectualism. Millions are persecuted and displaced.
September 1976:	Mao dies and Deng Xiaoping rises to power two years later.
1979:	China's GDP per capita is US$270 and its Gini Coefficient, measuring income inequality (0 being perfectly equal and 1 unequal), is about 0.3.
1979 – 1981:	Xiaoping's 'period of readjustment', to bring China into the market economy.
1981:	Foreign Direct Investment (FDI) totals US$375m.
December 1984:	Britain signs Hong Kong over to China.
April 1989:	Hundreds of civilians are killed in the Tiananmen Square massacre.
1990 – 2005:	Poverty rate falls from 60 per cent to 16 per cent, leaving 475 million fewer people in poverty.
February 1997:	Xiaoping dies.
November 2001:	China joins the World Trade Organization.

have been improved under their rule,' says Mitter. 'As long as that continues, the people will essentially allow them to continue along that path.'

'I've been in China for 24 years and have had thousands of conversations with ordinary Chinese people, and never once has anyone said, "what we need is a democracy",' adds Clissold. 'Never once.'

For Martin Jacques, author and visiting senior fellow at the London School of Economics, Western-style governance is neither desired nor appropriate for the vast country, which has historically favoured stability over democracy. 'Has the present system worked?' he asks. 'Brilliantly. Has the American system worked? No. No government has managed its economic transformation over the past 30 years better. Most people have seen their living standards completely transformed.'

Certainly, many believe a degree of judicial and media independence may be possible within the confines of a one-party state. 'You could restructure the judiciary so it is not controlled by the local government, and give it an independent budget,' says Hualing. 'Lots of people would say this is achievable.'

Eastern sunrise

In February, Kamm asked a Chinese official why China had voted for the UN sanctions resolution against Libya. 'He said it was because it was "the moral thing to do",' recalls the businessman. 'I practically fell out of my chair. I think it was the first time I had ever heard a Chinese official say that.'

For some, this was a positive sign that China is willing to shed its historical insularity and assert a principled stance on the world stage. Though it is far from the only country to put commerce before conscience, its morally blinkered attitude to human rights abuses in countries such as Burma has done little to endear it to the international community.

Others, however, believe it is not China alone that needs an ethical overhaul.

'One of the biggest questions is not so much what will China do, but how will other countries react?' says Clissold. 'In the States you have a country that is highly democratic and therefore prone to demagoguery and an economy under enormous stress. Add to that a combination of Sarah Palin and Dick Cheney, and who knows what might happen?'

But it is clear that without mutual co-operation and respect, East–West relations may become little more than a diplomatic stalemate – and the West may have far more to lose than a few hundred manhole covers.

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To view an interview with Professor Fu Hualing on constitutional reform in China go to: **tinyurl.com/ibafilms**

2007:	Life expectancy is 73 years.
2008:	FDI is US$148m.
2009:	GDP per capita is US$4,985. Infant mortality rate is 1.3 per cent.
2010:	China overtakes Japan to become the world's second largest economy. Its Gini Coefficient hits 0.47 – the same as the United States.
2010:	Trade between China and Brazil tops US$56bn and China overtakes the US as Brazil's biggest trade partner.
August 2010:	Premier Wen Jiabao begins making a series of announcements about the need for political reform to allow people to solve 'the excessive concentration of unrestrained power'.
October 2010:	China owns US$907bn worth of US treasury securities – more than any other country in the world.
February 2011:	Standard Bank Group Ltd, Africa's largest lender, estimates that bilateral trade between China and Africa will reach US$300bn by 2015, double the 2010 level.
February – May 2011:	Dozens of lawyers, journalists and activists – including outspoken artist Ai Weiwei – are arrested or simply disappear following political protests.
March 2011:	China amasses over US$3 trillion of foreign exchange reserves. The government publishes its 12th five-year plan, outlining commitments to environmental protections and workers' rights.
2020 – 2030:	China's economy is predicted to become the biggest in the world.

Asia's wealth of secrets

As bank secrecy breaks down, financial institutions in the region are facing increasing burdens of compliance.

PHIL TAYLOR

It is called, rather dramatically, 'the last best chance' for US citizens; the final opportunity to avoid potential criminal tax exposure by declaring offshore assets and income at reduced penalty rates: the United States' Internal Revenue Service (IRS) fuelled debate around the world after announcing in February 2011 its second offshore voluntary disclosure initiative (or OVDI) for US taxpayers with undisclosed assets overseas. According to the IRS, this OVDI includes higher penalties than the previous one that ended in October 2009, but 'offers clear benefits to encourage taxpayers to disclose foreign accounts now rather than risk detection and possible criminal prosecution'.

The language used in response to the second OVDI has been almost as dramatic as the wording of the IRS announcement. International law firm Baker & McKenzie wrote in one of its press releases: 'For US persons in Asia who have not been fully compliant, this is the time to act… Now is the time… to deal with any historical issues and past problems, and move on.'

Some Americans in Asia may be feeling they have been here before. There was considerable worry in Hong Kong after the 2009 IRS announcement, for example. The territory has long been popular as an alternative offshore financial centre as it is not a member of the Organisation for Economic Co-operation and Development and so not party to any of the Organisation's tax information sharing agreements. The city has a very well-developed banking infrastructure and it is quick and easy to open a bank account there, while taxes are relatively low. In 2009, many expats with US connections in Hong Kong began to see their home country's long arm looming and started to realise that America is not as far away as it can sometimes feel over cocktails on a South China Sea junk. But worry faded after it became apparent that the IRS, working with the US Justice Department on criminal prosecutions, was particularly targeting non-disclosure of accounts with financial institutions in Europe. Some of Hong Kong's thousands of US expatriate workers joined the initiative anyway, while others breathed a sigh of relief.

It seems, however, that things are different this time: the US Justice Department also made its own, well-timed announcement of its intention to increasingly focus on what is believed to be non-compliance in Asia. It is this combination of announcements that seems to justify the emotive language from some law firms.

Financial crisis zeitgeist

Most experts agree that the 2009 move by the IRS, and many of the similar efforts by its counterparts in other Western countries around the same time, was a symptom of the new, post-financial crisis zeitgeist. The public mood had turned against big banking, and bank secrecy was an obvious political target. 'The financial crisis was a crisis of financial transparency. There was a belief that the abuses that happened in the financial system were due to financial institutions behaving in a way that was non-transparent,' says Marnin J Michaels, a Baker & McKenzie tax partner who practises out of Zurich.

As a result of this feeling, government regulators began to come under tremendous pressure to show they were making real efforts to crack down, in a pro-active way, on banks' excesses. 'It's hard to do that overnight,' says Michaels. 'But regulators can show their effectiveness by showing they are clamping down on undeclared money – and they can do that overnight.'

Voluntary disclosure programmes, or initiatives, quickly became flavour of the month as governments realised that undeclared offshore assets were the perfect target. Tax authorities worldwide made it clear that they would no longer tolerate the use of bank secrecy as a means of tax evasion. The UK had held a tax amnesty in 2007 for those with undisclosed offshore accounts, and in 2009 the Inland Revenue announced its New Disclosure Opportunity – another chance for UK taxpayers with unpaid tax connected to an offshore account to reveal their situation. Almost simultaneously with the moves by tax authorities worldwide, the G20 published a blacklist of what it regarded as uncooperative tax havens. Soon afterwards, various countries agreed to cooperate with foreign tax authorities, and some high-profile Swiss banks promised to put an end to anonymous accounts. Beleaguered governments had been given powerful ammunition to use in reply to their citizens' demands for an end to excessive banking secrecy.

> *'Regulators can show their effectiveness by showing they are clamping down on undeclared money – and they can do that overnight,'*
>
> Marnin J Michaels
> *Baker & McKenzie*

Deep impact

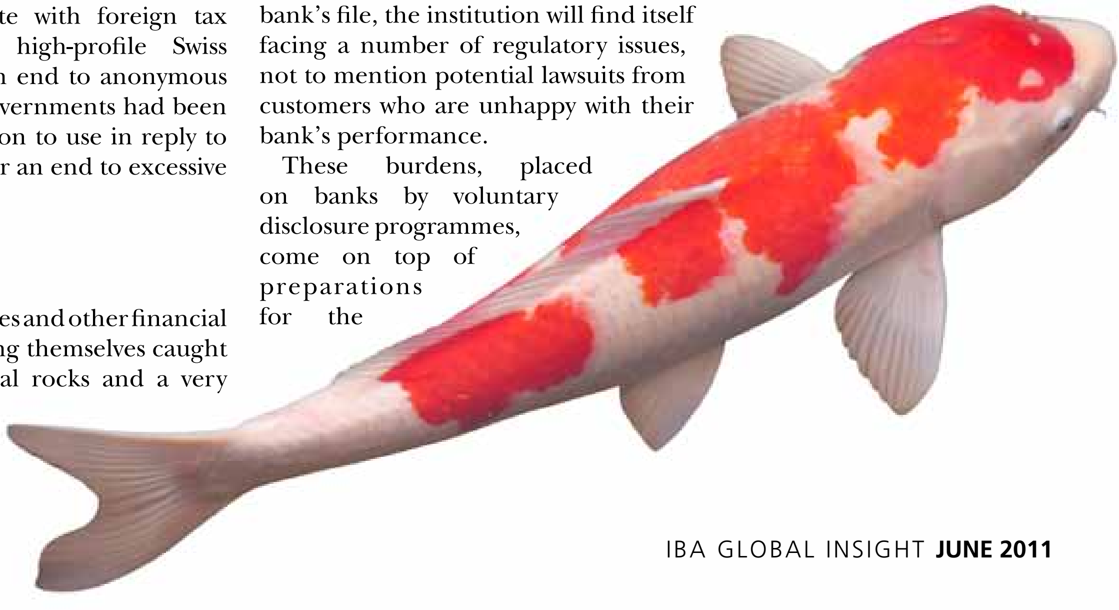
Banks, insurance companies and other financial institutions are now finding themselves caught between several proverbial rocks and a very hard place as they deal with competing issues: complying with the demands of local and overseas regulators, staying profitable and keeping their clients happy while encouraging them to comply with the latest disclosure initiatives. This is particularly true in the context of the US, which imposes global taxation on individuals who are deemed US persons.

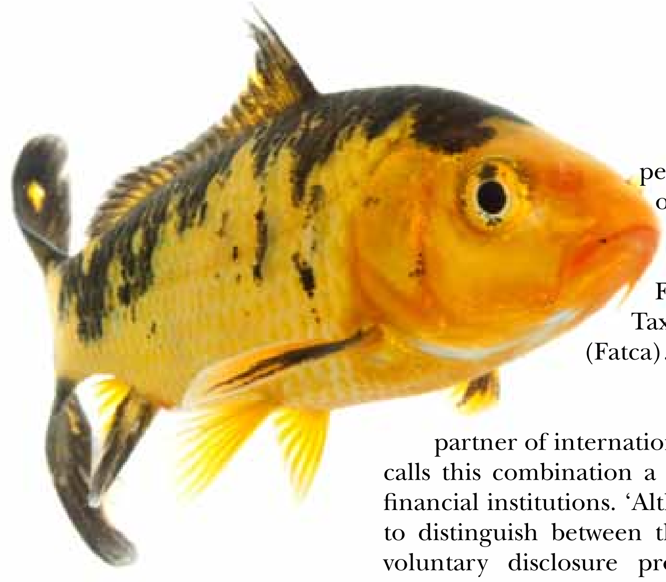
'Even though a person is in another country, if they aid, abet or conspire to assist a US person to evade tax, they can be prosecuted,' says Alan Granwell, a partner of DLA Piper in Washington, DC. As Michaels puts it: 'You have to put your head in the lion's mouth to avoid larger problems. The banks need to encourage their clients to participate – if not, the US may get the information from clients who disclose in any event.

Despite various IRS announcements and other publicity over recent years, Granwell says there is still a lack of general knowledge among US taxpayers overseas of their reporting and filing obligations. This can leave banks wondering how far they should go in actively advising their US-person customers. 'Sending them a generic letter may be very helpful, but it would have to be very carefully crafted. They wouldn't want to be seen as identifying any clients as US taxpayers,' Granwell says.

By playing their part in a customer's voluntary disclosure, banks would need to hand over a considerable amount of information, including details of relationship managers, when a US-person's account was opened and by whom, and any contacts between the customer and relationship managers. If a bank does not cooperate with its client's request to see all the information in the bank's file, the institution will find itself facing a number of regulatory issues, not to mention potential lawsuits from customers who are unhappy with their bank's performance.

These burdens, placed on banks by voluntary disclosure programmes, come on top of preparations for the





Koi-carp: the Chinese symbol of wealth

pending provisions of a remarkably significant piece of US legislation – the Foreign Account Tax Compliance Act (Fatca). Joe Field, Asia senior partner of international law firm Withers, calls this combination a 'one-two punch' for financial institutions. 'Although it's important to distinguish between the tax provisions of voluntary disclosure programmes and the draconian enforcement provisions of Fatca, they are so intertwined that separating them would be making a distinction without a difference,' he says.

When it comes into force, Fatca will effectively turn banks into overseas enforcers for the US Treasury by obliging them to enquire as to the US-person status of their customers. While the IRS chases after delinquent US persons, Fatca will make it more difficult for those potential tax evaders to avoid detection by asking the banks to disclose details of their US-person customers.

If a foreign financial institution refuses to identify relevant US persons, a 30 per cent withholding tax will be imposed on US-source payments made to those institutions. This tax will also apply to gross proceeds from the sales of securities that could pay US-source interest and dividends as well as to payments of US-source income (even if the US person holds only non-US assets). This could mean taking a significant tax hit even on a loss-making sale of shares.

'The US Government is taking a carrot and stick approach,' says Granwell. 'It's saying, either supply information because you are the one with the closest relationship to the account holder, or we will hit you with a withholding tax.'

The US-centric nature of the law may also lead to counsel dealing with a conflict of laws, as Granwell explains. 'Banks are also highly regulated locally. It may not be appropriate to give information, impose a withholding tax, or close an account under local law,' he says.

All this leaves banks faced with some stark choices: comply and face the difficulties and costs of doing so, do not comply and accept the 30 per cent tax, or disgorge any US-person clients or US investments (although banks doing this may still face US tax hits under pass-through rules when doing business with American institutions).

> *'Even though a person is in another country, if they aid, abet or conspire to assist a US person to evade tax, they can be prosecuted'*
>
> **Alan Granwell**
> *DLA Piper*

Those who decide to comply will have to expend considerable time and money in doing so. 'As counsel representing a bank, my concern would be that there are potential liabilities. Banks will now have to interpret what constitutes a "withholdable" payment,' explains Robert Q Lee, partner and Shanghai office chief representative of Diaz Reus. 'If a bank fails to comply, then it is in an untenable position. But if the bank becomes overzealous, it may become liable to its customer for wrongfully withholding a payment.'

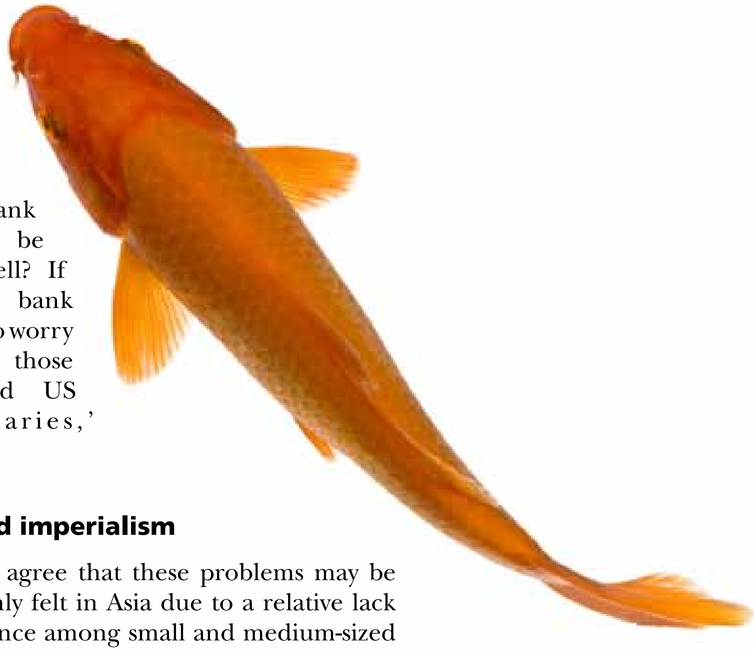
The US Foreign Account Tax Compliance Act

Fatca is widely regarded as both highly significant and extremely complex. It takes effect on 1 January 2013. Chapter 4 is intended to stop US persons from avoiding their US tax obligations by holding income producing assets with Foreign Financial Institutions (FFIs) or Non-financial Foreign Entities (NFFEs) offshore. The definition of an FFI is very broad, and includes banks and other entities taking deposits, custodians and entities holding financial assets for others, and entities engaged primarily in the business of investing – it will therefore encompass funds.

If an FFI agrees with the IRS to report information on 'US accounts', certain income produced through it will be subject to a 30 per cent US withholding tax. An FFI can choose to define a depository account as 'non-US' if the average balance was less than US$50,000 in the year before the institution made its agreement with the IRS.

In August 2010, the IRS issued some preliminary guidance on the implementation of Chapter 4 (Notice 2010-60). Draft Fatca regulations are expected by summer 2011, but no date has been given for the issuance of final regulations.

Source: Deloitte and DLA Piper reports



Due diligence will also be onerous, and several times more detailed than would otherwise be required under qualified intermediary rules. It will not simply be a matter of a bank ticking a box to say it has asked whether their client is, or has ever been, a US citizen. Banks who decide on the other option – simply shutting out US customers altogether – will not find an easy way out, as they will still have problems related to customer identification: not all US persons will come in to a bank branch waving a dark-blue passport or speaking with an American accent. 'Some Swiss banks have said they will not invest in the US and not take on any US clients. That's naive,' says Field. He gives the example of a Norwegian customer who later has a US-person child or grandchild who invests into the United States, thus creating US connections for the bank.

Asia is home to many thousands of people holding US passports or green cards as an insurance policy against political upheaval. Before Hong Kong was returned to China in 1997, for example, many people, facing an uncertain future, made sure they had their US documentation up to date. That decision may now cost them, and their banks, dearly. 'In the eyes of the IRS, those people are simply tax cheats although they don't feel like it,' says Field.

As a highly populous region, and a popular location for expats, Asia also hosts many who belong to a special category of US person: those who may never have lived in America, or hold a passport, but are automatic US citizens and hence subject to American tax laws. A law passed in 1966 that amended Section 301(a)(7) of the Immigration and Nationality Act 1952 means that children born abroad to a parent who was physically present in the US for ten years or more (at least five of which were after his or her 14th birthday) have US citizenship. Consider the situation of a US citizen who lives in the US until she is 25, marries a Chinese citizen resident in Hong Kong and moves back to Hong Kong with him. They then have two children who are born in Hong Kong and live there, not speaking English and never visiting the United States. 'Both of those children are US citizens and are as American as Barack Obama or Sarah Palin,' says Field. 'They have no requirements to confirm or validate their US nationality.'

If those people are unaware of their status and do not renounce their US citizenship between the ages of 18 and 18 ½, they remain liable to US tax until they do so. 'If they don't know that they are American citizens, how is their bank going to be able to tell? If you're a bank you have to worry about all those unintended US beneficiaries,' Field says.

Backward imperialism

Specialists agree that these problems may be more keenly felt in Asia due to a relative lack of experience among small and medium-sized banks in dealing with complex international legal issues. 'Bankers sitting in Hong Kong and Singapore are sophisticated, but they are following their local rules – they are not following US rules,' says Granwell.

Others add that many Asian banks have not yet started taking voluntary compliance programmes and far-reaching laws such as Fatca seriously. 'The perception is it's far enough away that it's not a problem,' says Michaels. (The IRS does not consider the distance to be so great – it has opened criminal investigation offices in Hong Kong and elsewhere in the region.) 'In Asia, maybe a little more than in Europe, there may be less sensitivity to compliance,' adds Granwell. 'It's a question of distance, culture and language issues.'

To mitigate risk, and be as helpful as possible to clients while still complying, analysts recommend bankers' counsel start the process of getting ready for Fatca by identifying their clients. This may be hard to do as detailed implementing guidance on the Act has not yet been released; despite this, it is clear that the law, as it stands, will be very effective. 'Fatca is a very elegant piece of law – it really does what it wants to do,' comments Withers partner Jay Krause, while Granwell calls it 'the most expansive piece of legislation we've ever had, because it applies to the whole world'. Another specialist working on the banks' side says it could, for the same reasons, be described as 'one of the worst pieces of legislation to be revealed in recent times', while yet another calls it 'a kind of US backward imperialism'.

Annetta Cortez, a risk management expert and managing director with Novantas, even suggests that laws such as Fatca could ultimately backfire on the US administration. 'This is one more nail in the coffin as to why any foreign institutions would want to get too heavily involved with the US,' she says.

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Burma: after the Saffron Revolution

The European Union, United States and Canada all maintain sanctions against Burma. But has the right balance been struck? Or have they been weakened by vested interests?

TOM BLASS

On 12 April the Council of the European Union announced that the EU would be renewing – with some caveats – sanctions against the state of Burma (as the ruling regime's detractors describe the country), or Myanmar. Europe first started to impose sanctions in 1989, after the elections that were contested (and won) by Aung San Suu Kyi – and the results were ignored.

Since then, they have been progressively ramped up – especially since the vicious crackdown on the popular uprisings of 2007 that came to be known as the 'Saffron Revolution'. Sanctions now include: an embargo on the sale of arms; asset freezes and travel bans for high ranking officials and their families; and selective investment bans.

UK Foreign Minister William Hague warmly greeted the renewal after it was announced, and said that it was 'the right decision at the proper time'. He further noted that in February, 'the UN Human Rights Council [had] condemned in the strongest possible terms systematic violations of human rights in Burma'.

But the EU rules are not the most onerous: by contrast, Canadian legislation – also introduced as a response to the crackdown on the Saffron Revolution – bans the import and export of all goods to/from Burma: bans all new investment in the country; prohibits the provision of financial services; prohibits the docking of Canadian ships in Burma, and vice versa. The United States also forbids any investment – and its sanctions regime is, also very much stronger than that of the EU. Meanwhile, while the UN may have condemned human rights abuses in the country, the issue of sanctions has yet to even come up for discussion in the Security Council.

Free trade v human rights

Sanctions, of course, are only one step in a complicated dance between Burma and an international community which is not, on this particular issue, united. On 16 January, a committee of the Association of South East Asian Nations (ASEAN) – of which Burma is a member – urged sanctions-imposing governments to review their policy.

Representing the group, Indonesia's Foreign Minister Marty Natalegawa argued that the much-publicised release of the National League for Democracy (NLD) figurehead Aung San Suu Kyi (whom many Burmese regard as the rightful and elected leader of the country), and the elections held in December, signalled a change of direction for Burma, which (they said) deserved to be encouraged, not punished. They also argued that sanctions were hindering the country's development and starting to hit even those they were intended to assist.

Indeed, even with the European Union – a bloc that has demonstrated apparent conformity in other areas of foreign policy (including the imposition of sanctions on the Islamic Republic of Iran) there is disagreement, with Member States responding with varying degrees of alacrity to pressure by business to dilute or remove the sanctions in place.

Thus, as the situation stands there is a polarisation between a human rights lobby that believes current sanctions should be maintained and do not go far enough; and a free trade argument that would do away with them altogether.

As an occasional lecturer in ASEAN economics, Edward Sim, a trade lawyer based in Singapore, understands this conflict keenly. The elections, he told the IBA, 'though of a dubious nature,' had sparked debate within Asia – and within Burma – as to the continued effectiveness of the sanctions. And, he says, despite international opposition to the regime, regional appetite for trade is growing – and will be increasingly difficult to censure:

'Western sanctions affect non-Western companies because they either cannot or will not invest in companies which themselves do business with Myanmar – thus Asian companies who wish to maintain good standing with Western companies avoid the country. Nevertheless, there are many Asian companies which are willing to do business with Myanmar.'

Sim adds that since sanctions were first imposed some 22 years ago, a crucial new factor has emerged in the form of increased Indian and Chinese economic power, which provides the Myanmar regime with new sources of investment and market, thus diluting the efficacy of Western sanctions.

Nonetheless, there is almost no doubt that the sanctions already in place – however imperfect – are having an effect on the regime. In September 2009, over a year before the 2010 elections, Burma's then Prime Minister Thein Sein (now President) said as much, telling the UN General Assembly that 'immoral' and 'indiscriminate' sanctions, which were in themselves 'a form of violence', had been an impediment to development and economic progress in the country.

Supporters of the National League for Democracy also argue that the organisation's leader is unlikely to have been released otherwise, and that the election – though roundly condemned as a sham by most international observers, was likewise, a signal that Burma was responding to pressure; but where government and opposition might differ from each other is in their characterisation of the effects of the various embargoes placed.

Dr Maung Zarni, a Burmese exile and academic, points out that the whole issue of sanctions is complex and multi-faceted. 'Take the European position for example. For one thing – there is a general lack of appetite for sanctions within the European Commission's Council for External Affairs. But the other reason is commercial interests, and in particular, energy security.'

'As the former colonial power in Burma, the UK has a very influential role in the debate'

Dr Maung Zarni
Burmese exile and academic

Energy economics

By a significant margin, the largest EU investor in Burma is the French oil company Total, which has been in the country since 1992 producing gas for sale to Thai power company PTT – generating some US$450 million in revenue for the Burmese junta. Total, and other European companies in the energy and oilfield services sector have never been alleged or imputed to have broken sanctions. But Zarni and Burma opposition supporters generally, attribute the failure to include the petroleum sector among those sanctioned by the EU to the French Government's support for Total's commercial objectives. Likewise, German companies (including Siemens, which supplies turbines to Total in Burma) have a long track record of trade and investment; while according to Zarni, Spain and Italy are anxious to protect commercial interests in the greater Mekong region, if not in Burma itself.

And Zarni adds that Britain's position towards Burma is less uncompromising than William Hague's pronouncement cited at the beginning of this article appears: 'As the former colonial power in Burma, the UK has a very influential role in the debate. On the one hand it is very supportive of Aung San Suu Kyi and the NLD. But it's playing both sides when it comes to the issue of sanctions. It is now the number one giver of aid to Burma [having recently pledged a commitment of £185 million over the following four years] and this is very valuable to the new generation of generals – it's a very strategic donation.'

With regard to the recent sanctions review – the British delegation within the EU has always been 'reluctant' to push France and Germany on the inclusion of the energy sector, says Zarni, adding, 'This was true even when Gordon Brown was Prime Minister, despite the fact that Brown was very sympathetic to the opposition cause and to Aung San Suu Kyi personally.'

European resistance

Mark Farmaner of the UK Campaign for Burma told *IBA Global Insight* that his organisation's soundings taken throughout the diplomatic community in Europe had also suggested that the Commission was under significant pressure to show restraint on the sanctions issue from certain Member States. In April, the UK's *Independent* newspaper published details of a European trade delegation to Rangoon, which included over 20 companies, among them security firms, jewellery retailers, banks and health care providers.

Farmaner argues that while these companies may not have been breaching the sanctions per se, they do breach the spirit in which they were drafted. But it is also true that shortly after her release, reports emerged that Aung San Suu Kyi had stated that she would listen to all

Deploring and condemning but failing to protect and act

While human rights campaigners and Burma watchers commended the European Union for essentially renewing sanctions against the country, there was disappointment that it did not press the United Nations General Assembly (UNGA) to initiate a Commission of Inquiry (COI) into human rights abuses – as was recommended in March 2010 – and again in 2011 by the UN Special Rapporteur, who has reported 'gross and systematic human rights abuses in the country, potentially amounting to war crimes, and crimes against humanity.' To date, 12 EU countries have declared their support for a COI, and it was hoped that the EU statement on Burma would back their call.

The International Bar Association will shortly be launching a campaign intended to press the UNGA harder on the issue. IBA Burma project lawyer Shirley Pouget told *IBA Global Insight* that she believed that the release of Aung San Suu Kyi, and the apparent transition to a civilian regime, represented a 'masquerade' that had been skilfully orchestrated so as to 'ease international pressure and action' – and that it was already proving to be effective.

Pouget also outlined some of the reasons why such an inquiry is necessary. State-sanctioned widespread and systematic violations of human rights; including arbitrary killings, forced displacement of civilians, forced labour, rape and grave sexual violence and torture, are well-documented – and became the focus of increased international scrutiny and condemnation in 2007, when the regime brutally cracked down on a wave of public protest ('the Saffron Revolution').

Since then, says Pouget, the government has initiated a 'roadmap' to change, which though ostensibly an indication of engagement with democratic forces and the rule of law, in reality disguises the continuing brutality – and insularity – of the regime.

She notes, for example, that recently released budget figures allot almost 20 per cent of spending to defence – and only 4.57 percent and 1.3 per cent to the ministries of education and health respectively (while transparency campaigners allege that many hundreds of millions of dollars of revenue are siphoned out of the country, and into private banking accounts), and that in November, the regime introduced a law legalising conscription of between two and five years into the armed forces – with strict penalties for non-compliance.

In his most recent report on Burma (which stressed that the elections were neither free nor fair, in the eyes of the international community), the Rapporteur noted that the government had taken a number of steps to limit the freedom of expression for parliamentarians, including prison sentences for those making speeches 'endangering national security or the unity of the nation'.

He also noted that over 2,000 political prisoners remain in detention, and that torture is being used routinely. (A particularly concerning case is that of news editor Nyi Nyi Tun, who, imprisoned for 13 years under an unlawful association law, was tortured for six days in an attempt to extract a confession to a series of bomb attacks. He is currently partially paralysed as a result of multiple beatings and sexual violence.

Speaking on behalf of the International Bar Association Human Rights Institute, Pouget argues that while the international community has responded swiftly to the situation in Libya, in the case of Burma, 'the same states are content with watching, deploring and condemning,' but failing to 'protect and act'.

sides of the argument before formulating her position on the sanctions issue, an indication of a divergence of opinion (or, what Ed Sim describes as 'mixed messages' within the opposition as to what would best encourage the Burmese Government to move towards further reform.

Indeed, Maung Zarni's own outlook has changed considerably since he first left Burma. As a student in the United States in the mid and late 1990s, he was an instrumental player in the worldwide Free Burma movement. In 2003, he broke ranks with Aung San Suu Kyi, and began to argue for greater engagement with the regime and fewer sanctions. This culminated in his return to the country in 2005 in an attempt to develop a political dialogue with moderates within the regime.

'Western sanctions affect non-Western companies because they either cannot or will not invest in companies which themselves do business with Myanmar'

Edward Sim
Singapore-based trade lawyer and lecturer in ASEAN economics.

But since then Zarni, who now lives in the United Kingdom, says he has concluded that the regime has no interest in dialogue, and hence he has reverted to robustly criticising the Burmese Government. In his conversation with *IBA Global Insight* he condoned an increase in economic pressure on Burma through sanctions – though he maintains (as does, he points out, the NLD) the belief that a blanket embargo is not the right way forward.

Critics of sanctions will always charge, as indeed they did throughout the apartheid period in South Africa, that they 'hit' ordinary people while leaving malefactors unharmed. Then as now, commercial agendas tend to lurk beneath seemingly altruistic policy positions – particularly where those that possess them stand to make money from making them stick. Even if they're not entirely devoid of validity, the following points do need to be considered.

Sanctions not to blame for Burma's economic ills

Ninety-five per cent of investment into Burma is made into the oil and gas sector, which is capital intensive and employs few people. It does not generate any significant secondary industry, the oil and gas produced is sold to generate export revenues and very little is employed for the betterment of the Burmese people. There is almost no transparency with regard the destination of royalties, taxes and signature bonuses paid to the state, almost all of which appear to bypass the national budget. One advocacy group EarthRights International, has estimated that a trans-Burma pipeline operated by Chevron, Total and Thailand's PPT, earned the regime US$5billion in 2009 – all of which, it says, was held in Singapore banks, mostly under individual accounts.

Says Zarni: 'Sanctions may be responsible for ten per cent of Burma's economic misfortune. But the government itself is definitely responsible for the other 90 per cent. If it wanted to, it could create a business-friendly environment, where the rule of law applied and where there was no corruption, to encourage investment from countries not affected by sanctions. It could use some of its oil and gas revenues for education, health and housing. But it has not done any of these things.'

It is of course legitimate to argue that sanctions are not the only form of non-military pressure available for pursuing policy change within a third-party state. There are both more radical – and softer – alternatives available to the international community. Indeed, the EU statement made on 12 April appears to reflect this, making a number of carefully-tailored alterations to the sanctions regime – including a suspension of the asset freeze and visa ban against 'certain members of the civilian members of the government.' It also lifts the ban on high-level visits to Burma.

These steps are intended to promote dialogue with the government and a new political space. The EU says that in doing so it has 'listened carefully to a broad range of stakeholders'; and thus it is little surprise that it has arrived at a political fudge. Democracy campaigners would like to see sanctions stepped up, and argue that the European Union should set benchmarks for political progress before considering any further relaxations.

What is clear, is that the regime is anxious to be unshackled from sanctions – but according to Maung Zarni, this is not only for economic reasons: 'The regime has plenty of people it can work with, who can provide capital, investment, and so forth: China, the Russians, India. But what it desperately needs is credibility. It is like a Mafia boss who has all the money he could wish for, but now craves respect. That is a very powerful psychological driver.'

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A letter from t

ANDREW WHITE

The violent death of the world's most infamous terrorist made front page headlines in Saudi Arabia, the country of his birth. 'A rotten tooth removed from the world's mouth', screamed prominent Arabic-language daily Al Watan; 'Bin Laden's luck finally runs out', smiled English-language title Arab News, alongside a file photo of the mujahid sat cross-legged in a cave, trademark AK-47 propped against the wall behind him.

Osama bin Laden's videotaped invectives, shot in the caverns of Tora Bora and later the compound in which he died, were intended to incite Muslims to jihad against the West.

But bin Laden also raged against the Saudi royal family, accusing them of having betrayed Islam and become agents of America: the House of Saud allowed US forces to base themselves in the Islamic holy land during the liberation of Kuwait in 1990, and has signed numerous multibillion-dollar arms and oil deals with Western governments.

Arab Spring

A decade after the fire and fury of 9/11, bin Laden's death came at a time when he was probably further than ever from achieving his goals. The interests of Washington and Riyadh are more closely intertwined than at any time since the hijackings, and the Arab Spring represents a rejection of everything bin Laden lived and fought for.

The peaceful demonstration is the antithesis of Al-Qaeda's philosophy of violence: street protests have succeeded where suicide bombers failed, and autocratic regimes have been toppled by demands for democracy, not the reestablishment of a caliphate. And yet, while bin Laden's execution represented a glorious coup for US President Barack Obama, it will have been no more than a momentary distraction for Saudi's King Abdullah.

For Saudi's ruling family the real threat lies in the Arab Spring, the transformation of the Middle East which has alarmed them to the extent that they are now doing whatever they can to help bring the uprisings to an end. Washington may have called the shots on Middle East regime change in the first decade of the new millennium, but Riyadh is running the show in 2011.

It has taken Saudi time to find its feet amid the swiftly shifting sands of the Arab Spring. In January, policymakers in the kingdom watched through the cracks between their fingers as Tunisia's Ben Ali regime crumbled to dust.

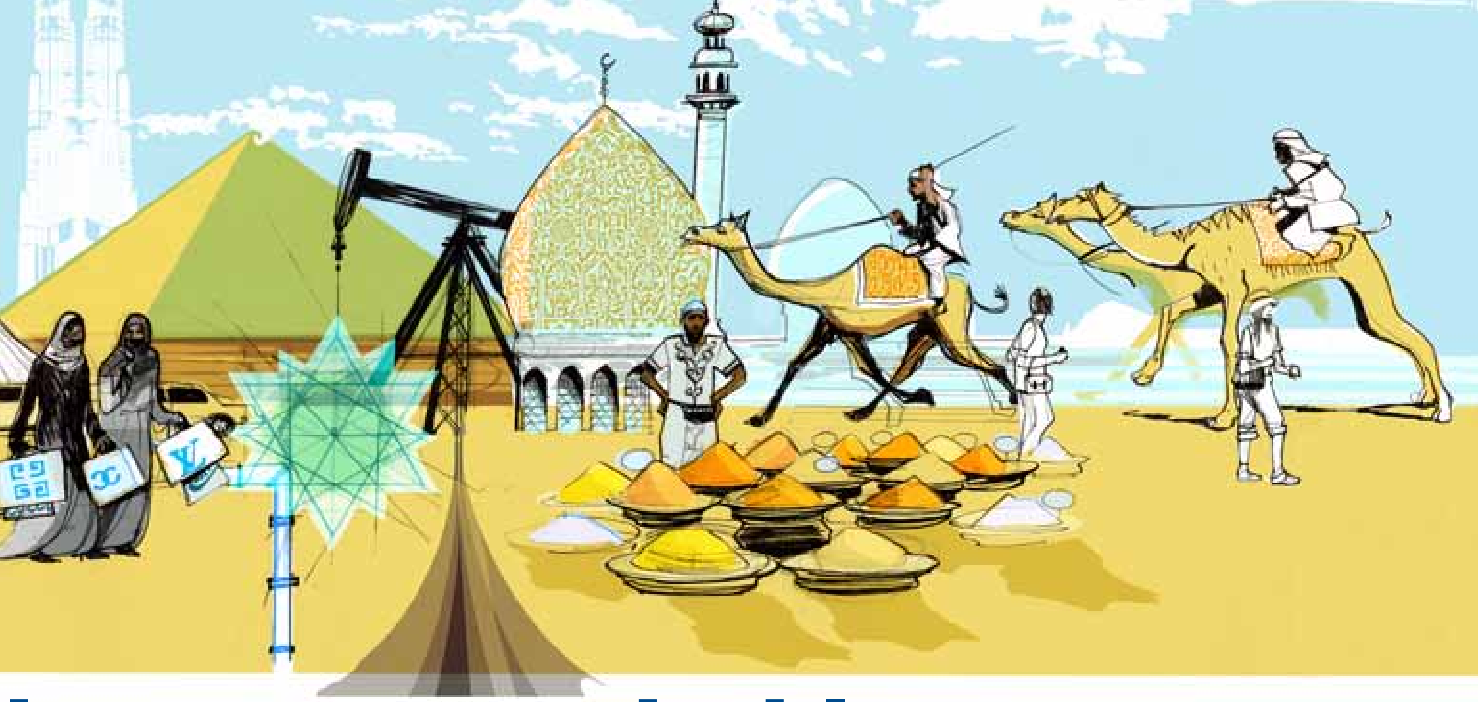
A month later they tried to buy Hosni Mubarak out of trouble, offering to cover the loss of American aid if Egypt's then-President ordered a crackdown that prompted the US to withdraw financial support. The US has handed Egypt an average of US$2bn in aid annually since 1979, and most of that aid has gone to the Egyptian military – in 2010 alone $1.3bn went to strengthen Egyptian forces versus $250m in economic aid.

As a result, and unfortunately for Saudi, the generals weren't prepared to back a reeling ruler at the risk of alienating their wealthy long-term patrons in Washington, so the offer was ignored.

Riyadh's prospects are brightening, however, as the Arab Spring rolls inexorably into the summer. Rebels and reformers in Libya and Syria now find themselves fighting a war of attrition against government forces that are better armed, fed and watered.

In Syria President Bashar Assad has been allowed to deploy heavy artillery and disable mobile phone services, while even Libyan leader Muammar Gaddafi is still able to attack rebels with sniper and mortar fire.

In its annual report published in mid-May, Amnesty International said the Arab Spring stood on a knife-edge as those demonstrating for change



he Middle East

faced a 'serious fightback from the forces of repression'.

Saudi is playing a significant role in that fightback, as was illustrated by its direct and devastating intervention in the tiny Gulf island state of Bahrain. King Abdullah sent more than 150 troop carriers rumbling over the causeway which separates the two countries.

'It is a repressive regime supported by another repressive regime,' warned a spokesperson for the Bahrain Centre for Human Rights, just days before those same security forces opened fire into crowds of unarmed protestors.

In Libya, although Saudi is a member of the NATO coalition, it has ensured that none of the fighter planes it has procured at great expense from the US and UK, have seen combat.

Hundreds of Saudi F-15, Tornado and Typhoon jets crowd military runways on the outskirts of Jeddah, while American and European warplanes patrol the skies above Tripoli.

Riyadh has even worked to disrupt the efforts of those fighting against the Gaddafi regime: in early May, for example, the acting foreign minister of Libya's rebel government, the National Transitional Council (NCT), was forced to cancel a visit to Qatar after Saudi refused permission to fly over its airspace.

Doha has emerged as a key ally of the NCT, giving the rebels diplomatic recognition and sending warplanes to join the NATO operation in Libya, but the Saudi stance meant that the rebel delegation only made it as far as Cairo International Airport. After a 20-hour wait, the rebels gave up and returned to Benghazi.

Finally, perhaps the most startling sign of Riyadh's discomfort comes in its backing of Syria's President Assad. In late March, when anti-government protests first spilled beyond the southern city of Deraa, King Abdullah called Assad and offered his political support – a remarkable reconciliation in light of Syria's long-term strategic alliance with bitter rivals Iran, a regime which King Abdullah repeatedly urged the US to attack.

According to classified cables, in April 2008 the Saudi ruler advised US diplomats to 'cut off the head of the snake'; now it is standing firmly behind a regime which is taking military direction from Iran's Revolutionary Guard, and is openly reinforcing its ranks with Iranian troops.

Saudi's fortification of autocratic regimes across the Middle East is continuing unabated, under American eyes which will be quietly relieved that Syria and Libya show no signs of descending into religious civil war.

There's more hardware coming, too: in September 2010 it was revealed that the US and Saudi had struck the biggest arms deal in history, the kingdom paying more than US$60bn for an inventory which included 84 F-15 jets, 70 Apache gunships, 72 Black Hawk helicopters, 36 light helicopters and thousands of laser-guided smart bombs.

Washington hopes that this arsenal will be deployed in the event of conflict with Iran. But in the wake of Saudi's steadfast support of military action by fellow authoritarian regimes across the Arab world, America should pray that those weapons are at no point used against the youth in revolt. After the euphoria of Abbottabad, any Saudi-backed bloodshed risks the naissance of a new generation of bin Ladens, disillusioned by the complex alliance between the Great Satan and the birthplace of Islam

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Threats to competition

Regulators look set to approve two controversial deals – Rupert Murdoch's proposed takeover of BSkyB and AT&T's T-Mobile deal. *IBA Global Insight* analyses the far-reaching implications.

JONATHAN WATSON

When Rupert Murdoch's News Corporation unveiled its plan in 2010 to take full control of UK satellite broadcaster BSkyB, there were protests from rival UK media companies. The companies behind two national newspapers, the *Daily Telegraph* and the *Daily Mail*, united with the owners of newspapers on the opposite side of the political spectrum, the *Guardian* and the *Daily Mirror*, to urge the Business Secretary Vince Cable to consider blocking the move.

In their letter to Cable, the companies argued that an integrated News Corporation/BSkyB operation, which would include *The Sun*, the *News of the World* and *The Times* newspapers along with book publisher HarperCollins, could have 'serious and far-reaching consequences for media plurality'. The document was backed by a memo prepared by law firm Slaughter & May, setting out the legal arguments for the minister to intervene.

Allegations that journalists at the *News of the World* (NoW) employed private detectives to intercept messages left on the mobile phones of celebrities, politicians and sports stars only served to add to the controversy. Andy Coulson, the editor of the NoW at the time the alleged phone hacking took place, had since gained significant political influence as Prime Minister David Cameron's director of communications.

The *Financial Times* also urged Cable to take action, arguing that 'together, News and BSkyB would be a truly formidable beast' and that the merger would 'threaten plurality in several ways'. Media analyst Claire Enders described the merger as the UK's 'Berlusconi moment'.

Cable subsequently decided to issue an intervention notice under the 2002 Enterprise Act ordering the UK's media regulator, Ofcom, to investigate whether there could be a public interest case to answer over the proposed

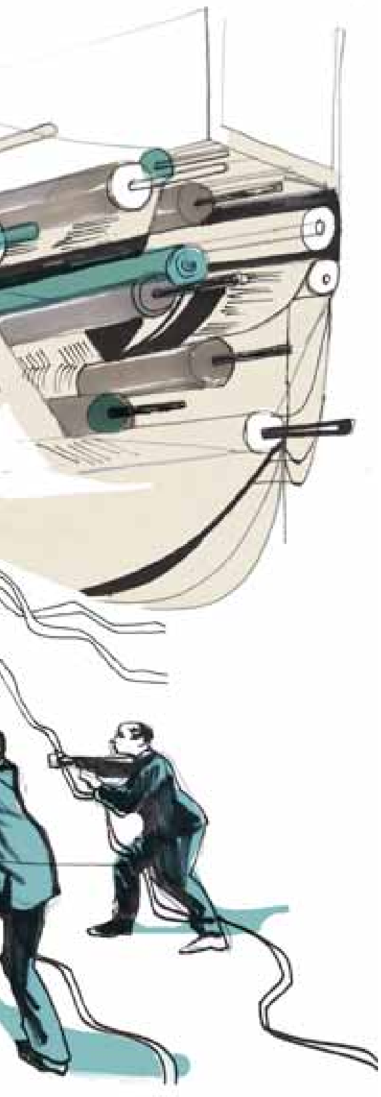


Illustration by Alex Green

deal. If Ofcom were to raise concerns, this could have led to a lengthy and more detailed investigation by the UK's competition authority, the Competition Commission.

EU regulators disappointed the deal's detractors by giving it their seal of approval in December 2010. 'I am confident that this merger will not weaken competition in the UK,' said Joaquin Almunia, the member of the European Commission responsible for competition. However, he added that its effects on media plurality would be a matter for the UK authorities.

This news was somewhat overshadowed, to say the least, by the revelation on the same day that two undercover reporters had secretly taped Cable admitting that he had 'declared war' on Rupert Murdoch. This made it impossible for him to continue as the ultimate arbiter of whether the deal should proceed, and that part of his job was handed over to Jeremy Hunt, the Secretary of State for Culture, Media and Sport.

Ofcom's report on the proposed deal, which Hunt published in January 2011, identified potential threats to media plurality and recommended exposing the merger to a Competition Commission investigation. Hunt said that he was 'minded' to accept this recommendation, but gave News Corporation extra time to address Ofcom's concerns.

> *'Just because people get upset politically, that does not mean they have a case'*
>
> Alexandre Verheyden
> *Jones Day; Vice-Chair, of the IBA's Communications Law Committee*

Deal or stitch-up?

To counter what was perceived as the main threat from the takeover, the potential undermining of the editorial independence of the award-winning Sky News channel, News Corporation undertook to spin off the channel. Under the terms of the company's proposal, the loss-making service would be independently governed and funded under a long-term promise of payments from News Corporation, in an effort to ensure its journalism would not suffer. In March, Hunt announced that he intended to accept News Corporation's undertakings, rather than refer the deal to the Competition Commission. A brief consultation on the proposal was launched, but at the time of writing, few were expecting Hunt to change his mind.

The proposal was described by some as an 'elegant' way of avoiding a long, costly investigation by lawyers. 'The secretary of state in this case was careful to do everything in line with Ofcom's concerns, and having addressed those absolutely straight down the middle with the solution of hiving off Sky News, he can say he's saved everyone a full Competition Commission inquiry and met Ofcom's concerns,' says Michael Grenfell, an antitrust, competition and regulatory partner with Norton Rose.

Alan Davis, competition partner at Pinsent Masons, told the *Guardian* that the proposed solution was 'a very sensible approach'. He argued that it was 'consistent with the approach the Office of Fair Trading or the European Commission would take, a policy to encourage merging parties to come forward as early as possible with any remedies. Referral to the Competition Commission is costly and extremely time-consuming and often has a chilling effect on the deal.'

Other observers were less impressed, arguing that concerns remained over whether Ofcom had been given enough time to produce its report. In addition, some lawyers have noted that Hunt accepted the undertakings from News Corporation in closed sessions without providing an opportunity for them to be discussed before an independent and transparent inquiry.

Robert Bell, head of EU and competition law at Speechly Bircham, suggests that Hunt has left himself open to criticism that he unduly hurried the process because political considerations were in favour of avoiding a Competition Commission inquiry. 'It is vitally important that political imperatives do not compromise due process in the media plurality review system,' Bell told *IBA Global Insight*. 'In politically charged cases such as this, it is infinitely preferable for a full and transparent inquiry to be held before the Competition Commission.'

One way of strengthening public scrutiny of media mergers, Bell says, might be to take certain decisions away from the Secretary of State and leave them to Ofcom and the Competition Commission. This would mirror the reforms to the general UK merger regime under the Enterprise Act, when the secretary of state lost their role in standard merger cases. However, the practical problem would be constructing a definition that only catches relevant cases.

Dynamic requirement

One of the key lessons of the saga seems to be that reforms are needed. Hunt admitted as much in March when he said that the UK's media plurality review system 'may not be as robust as it should be'. Ofcom Chief Executive

Ed Richards has added that as existing law only allows for a plurality review when a merger situation arises, there is no way to break up a media company deemed to have become dominant through organic growth.

Richards thinks a dynamic system is needed in which a plurality review could be triggered because of a change in audience levels or viewing share. In theory, that would allow any media group to be subject to an investigation that could lead to enforced disposals or other measures designed to promote media plurality.

Grenfell thinks that proposed reforms of the competition regulation regime currently being discussed in the UK may help introduce greater flexibility in this regard. 'One of the reforms they've proposed is that the new competition authority in a market investigation should be able to consider public interest issues alongside competition issues,' he says. 'That may well be a way of saying that you should be able to look at media plurality as a market investigation – not just where you have a merger, or a transaction as in this case, but at any time at all if concerns arise. That would cover concerns that News Corporation has become too powerful.'

Alexandre Verheyden, a partner based in the Brussels office of Jones Day and Vice-Chair of the IBA's Communications Law Committee, sees an unavoidable trend towards vertical integration. 'Just because people get upset politically, that does not mean they have a case,' he says. Although News Corporation is undoubtedly powerful, 'the written press is not the only medium available to people,' he says. 'Although the shrinking of the newspaper market may suggest reduced plurality, if you take some distance, this is not the case.'

Verheyden says that the News Corporation/BSkyB proposal is a controversial one partly because competition law does not worry about wider public interest issues. It simply analyses a legal problem. 'The political rationale for any given deal does not really matter that much,' he says. 'You either restrict competition or you don't, and if you don't, competition law can't do much about it.'

US$39 billion deal

Another large deal that has proved controversial this year is US telecoms giant AT&T's offer to acquire rival telecoms firm T-Mobile USA for US$39 billion. If, and it's a big if, the transaction goes ahead, the new company would leapfrog Verizon to become the largest mobile operator in the US.

In a recent filing with US regulator the Federal Communications Commission (FCC), AT&T and T-Mobile's parent company Deutsche Telekom argued that the merger was necessary to reach the Obama administration's stated goal of bringing next-generation wireless internet access to 97 per cent of Americans. The companies also claimed the deal would make it easier for them to offer faster and cheaper wireless services to customers.

Inevitably, however, the deal has attracted plenty of criticism. Many have argued that it will create a wireless duopoly, with two companies – AT&T and Verizon – sharing 80 per cent of the market. There is the possibility, which some would see as a likelihood and perhaps an absolute certainty, that the deal would raise prices, while stifling economic growth and innovation and swelling the ranks of the unemployed.

Sprint, the third largest wireless provider in the US, argues that the transaction 'would reverse nearly three decades of actions by the US Government and the courts that modernised and opened US communications markets to competition. The wireless industry has sparked unprecedented levels of competition, innovation, job creation and investment for the American economy, all of which could be undone by this transaction.'

The regulatory issues raised by the proposed deal are easier to articulate than to solve, says Judith O'Neill, former Chair of the telecoms department at Greenberg Traurig and now an entrepreneur in an emergency mobile alert company. She also represents North America on the IBA's Communications Law Committee. 'First and foremost for the FCC and the Department of Justice (DoJ) is the impact on competition in the mobile telecommunications and possibly mobile internet markets. This, of course, is the first area to which all would look in considering if such a bold merger were at all capable of approval by the regulators. At least one commentator has said that if this merger is approved, one would have to wonder what the purpose of the DoJ or the FCC actually is.'

However, O'Neill also says that if the deal is approved, the market share of the new entity is estimated to be about 40 per cent. 'In EU studies by consultancy Ovum, the EU mobile market is discussed as being entirely competitive because no single operator typically has more than 40 per cent market share,' she says. 'This would support

'It is vitally important that political imperatives do not compromise due process in the media plurality review system'

Robert Bell
Speechly Bircham

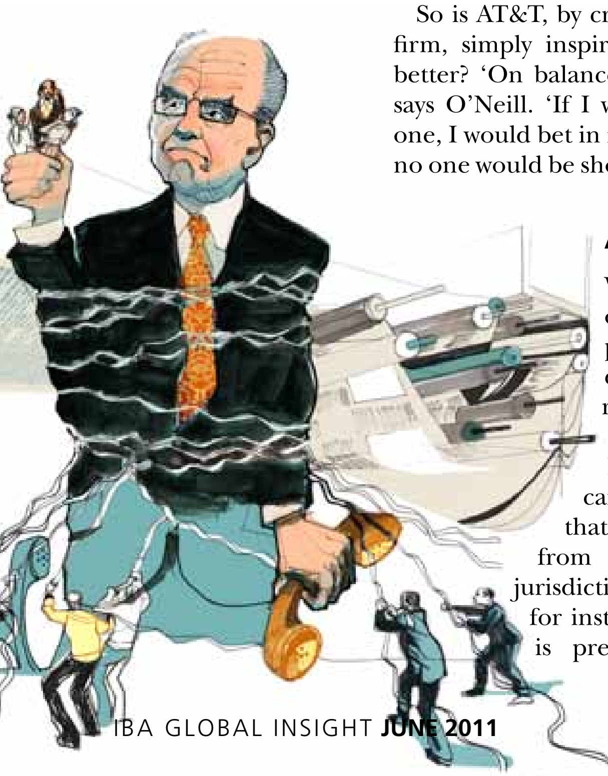
the argument that the US mobile market remains fully competitive if this merger is approved.'

Among public interest groups reacting to the transaction, Public Knowledge offered what appeared to be the consensus view, asserting that the wireless market, currently dominated by four big companies, would have only three at the top, says Patrick S Campbell, a partner in the communications and technology department at US law firm Paul, Weiss, Rifkind, Wharton & Garrison. 'They also said that the consequence of the AT&T/T-Mobile deal would be higher prices, fewer choices and less innovation,' he says.

Campbell believes that while the deal will face high regulatory hurdles at the DoJ and the FCC, 'most analysts agree that the companies' willingness to consider significant divestitures of overlapping spectrum and their pledge to extend broadband to 95 per cent of US households may tip the scales in favour of merger approval'.

Would a duopoly necessarily be such a bad thing? In a recent article published in the IBA's journal, *Business Law International*, A Neil Campbell of McMillan in Canada and J William Rowley QC of 20 Essex Street Chambers in the UK note that in the *Trinko* decision of 2004, the US Supreme Court recognised that monopoly may be good as well as bad. 'The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only lawful; it is an important element of the free-market system,' the Court said. 'The opportunity to charge monopoly prices – at least for a short period – is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth.'

So is AT&T, by creating a monster telecoms firm, simply inspiring its competitors to do better? 'On balance, this is a very tight call,' says O'Neill. 'If I were forced to bet on this one, I would bet in favour of FCC approval but no one would be shocked with either decision.'



Abusive dominance

With such a wide range of business deals taking place across the globe, it is difficult to pick out specific regulatory trends. In many countries, multinationals have encountered merger, cartel and dominance laws that are significantly different from those prevailing in the jurisdictions they know. In Brazil, for instance, a dominant position is presumed to exist once a firm has a 20 per cent market share, while in China, new competition laws adopted in 2008 are designed to operate in a 'socialist market economy' and are very different again.

However, there are plenty of indications in many jurisdictions of competition regulators who do not shy away from action. The Japan Fair Trade Commission took action against Intel in a high-profile decision in 2005, for example, and amendments to Japanese competition law in 2006 expanded the tools available for enforcement in general and monopolisation in particular. The Korean Fair Trade Commission (KFTC) also took action on the international cases involving Microsoft and Intel and concluded two major abuses of dominance cases involving large domestic firms in recent years (carmaker Hyundai and SK Telecom).

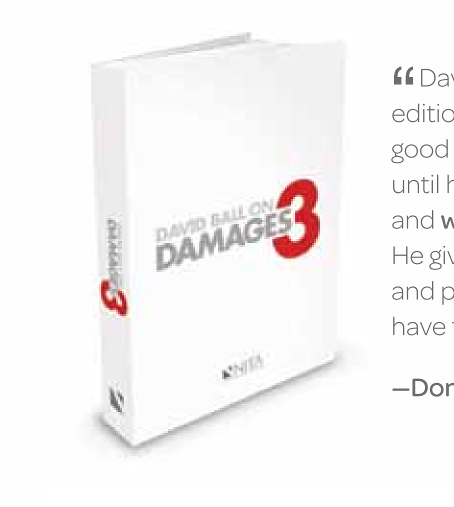
Google is one of the latest companies to face antitrust complaints in South Korea as mobile phones using its Android software gain dominance. NHN and Daum Communications, operators of South Korea's two largest internet search sites, have filed complaints against Google with the KFTC for blocking local phone carriers and manufacturers from embedding their search applications in devices using the Android operating system.

In the EU, the European Commission launched an investigation into allegations of anti-competitive practices by Google in November 2010, at the behest of several internet companies, including Ciao, a shopping site owned by Microsoft. Since then, Microsoft has taken an anti-competition complaint against Google to Brussels, claiming that Google has used its dominant position in the search market to restrict the growth of Microsoft services.

All this follows a 2004 Commission ruling that Microsoft had unfairly advantaged its Windows Media Player software over other streaming technologies by embedding it into the Windows operating system. The company was fined €497 million, followed by a further €899 million in 2008 for failing to comply with elements of the original ruling. To date, the largest fine levied by the Commission is just over €1 billion, imposed on Intel in 2009. The microchip maker was found to have offered financial incentives to manufacturers to favour its products over those of its rivals.

While developments in the UK and US may provide some indication of a more relaxed approach from regulators, multinationals would be unwise to assume that this is a global trend.

Jonathan Watson is a journalist specialising in European business, legal and regulatory developments. He can be contacted by e-mail at **watsonjonathan@yahoo.co.uk**.



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Uncovering corporate killing

The remarkably short but controversial US Alien Tort Statute is forcing a much needed focus on corporate accountability for complicity in human rights crimes.

NEIL HODGE

Resuscitated after lying dormant for nearly 200 years and at just 33 words long, the Alien Tort Statute (ATS) has long been a source of contention. Ever since it was first used as a way of pursuing damages against corporations that faced allegations of human rights abuses from foreign plaintiffs, US courts – and corporations – have tried to define the legislation's terms and establish its limits.

'[T]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'

As part of the Code of Laws of the United States that codifies US federal laws, the ATS says that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." While some lawyers say that the statute lacks specificity, others believe that its ambiguity is its key strength. "The ATS means an end to corporate impunity for brutal human rights abuses – and that's exactly why corporations don't like it," says one lawyer.

The ATS is widely hailed as affording the best chance for plaintiffs anywhere in the world to bring a legal complaint against companies specifically for human rights abuses: most other developed countries only enable plaintiffs to bring cases for corporate negligence – for example, the UK has awarded damages to South African workers for asbestos exposure and mercury poisoning when their parent companies, Cape Plc and Thor Chemicals Holdings, were based in the UK.

Resuscitating justice

Originally part of the 1789 Judiciary Act, for the first 200 years of its existence the ATS was essentially unused, providing jurisdiction in only one case. The 'modern era' of its use began in 1980 with *Filartiga v Pena-Irala,* when the Second Circuit Court of Appeal – one of 13 courts of appeal in the US – allowed two Paraguayan nationals to sue a former Paraguayan official for acts of torture and murder in violation of international law. This landmark decision has opened the door to more than 100 suits for human rights abuses over the last 30 years, committed by government officials and the foreign companies with operations there that aided and abetted them.

Virtually every major corporation doing business in politically unstable or conflict-torn regions has faced ATS litigation, the 'granddaddy' being a consolidated action brought in 2002 in the Southern District of New York against more than 50 US and foreign companies (with Ford, Daimler, General Motors and IBM as marquee defendants) that did business in South Africa during the apartheid period. The case is still pending on appeal.

While no ATS suit has resulted in a monetary judgment against a major multinational corporation, several large companies have reached settlements. In the case of *Doe v Unocal* that began in 1997, Burmese villagers sued the California-based energy giant for its direct complicity in abuses committed by the notorious Burmese military, Unocal's partner in a natural gas pipeline joint venture. In September 2002, a federal appeals court held that the plaintiffs had presented evidence that Unocal knowingly provided substantial assistance to the military in its commission of forced labour, murder and rape, while the military secured the project and built project infrastructure. Accordingly, the court held that Unocal could be held liable for aiding and abetting the military's abuses. In March 2005, the company agreed to compensate the plaintiffs.

In 2007 the families of jailed Chinese dissidents accused Yahoo!, the global Internet company, of abetting the torture of pro-democracy activists by releasing data that allowed China's Government to identify, arrest and imprison them. The company settled. Fruit company Chiquita was sued in 2007 after it admitted paying money to paramilitary groups in Colombia who were responsible for killing 173 people between 1975 and 2004. As part of a deal with prosecutors, the company pleaded guilty to one count of doing business with a terrorist organisation and agreed to pay a US$25m fine in exchange for an assurance that court documents would not reveal the identities of the group of senior executives who approved the illegal protection payments.

> *'One who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form.'*
>
> Judge Pierre Leval

Ending accountability?

But a recent decision might make it more difficult to bring some of these types of cases to court. On 17 September 2010 a two-judge majority of the Second Circuit Court of Appeal in the case of *Kiobel v Royal Dutch Petroleum Co* held that corporations cannot be found liable under the ATS.

The plaintiffs, who are residents of the Ogoni Region of Nigeria, filed a putative class action complaint in September 2002 against defendants Royal Dutch Petroleum Company and Shell Transport and Trading Company PLC through a subsidiary named Shell Petroleum Development Company of Nigeria. The complaint alleged that throughout 1993 and 1994, Nigerian military forces shot and killed Ogoni residents and attacked villages – beating, raping, and arresting residents and destroying or looting property – all with the defendants' assistance. The plaintiffs alleged that the defendants provided transportation to Nigerian forces, allowed property of the Royal Dutch Company to be used as a staging ground for attacks, and provided food and pay for the soldiers involved in the attacks. The lower district court dismissed some – but not all – of the plaintiffs' claims for lack of specificity. Both parties appealed that decision.

Alternative strategies to the ATS

As the door on corporate liability under the ATS may be closing, other avenues are being explored. Last November, an association representing Congolese citizens filed a class action in a Montreal court against Canadian company Anvil Mining Limited after a 'flawed' Congolese military tribunal acquitted all nine Congolese soldiers for war crimes and three expatriate former employees of Anvil for complicity in war crimes.

It is alleged that the company, by providing logistical assistance, played a role in human rights abuses, including the massacre by the Congolese military of more than 70 people in the Democratic Republic of Congo in 2004.

Patricia Feeney, executive director at Rights and Accountability in Development (RAID), a UK-based human rights and advocacy group, says that 'we hope that this case will set a precedent and show corporations that they cannot escape human rights abuses that they have been complicit in'.

In Quebec, civil procedure allows a non-profit organisation to act as plaintiff in a class action, as long as one of the organisation's members is a member of the class action. Over the last few years, Quebec courtrooms have been the venue for attempts – from both Canadians and people abroad – seeking justice for crimes committed abroad. The Congolese case is the latest example. There have also been cases against Iranian authorities, a Rwandan genocidaire, and a Canadian housing developer building settlements in Israel.

The Canadian Centre for International Justice, a charity that works for genocide victims, said there has been little success, so far, in attempts to hold accountable Canadian companies operating abroad. 'Accountability measures for corporations operating overseas have not necessarily been strong,' says Matt Eisenbrandt, legal coordinator for the centre.

But some lawyers are taking a more pragmatic approach. As ATS litigation becomes more difficult, some lawyers hint that the best tack to take might be to drop trying to claim against companies for human rights violations in US courts in favour of pursuing corporate negligence claims, either in the US, or in other jurisdictions such as the UK or Australia.

As one lawyer, who did not wish to be named, says: 'I do not believe that plaintiffs will cease to attempt to pursue claims against corporations for human rights abuses because of the *Kiobel* judgment, nor do I regard taking action against companies for negligence as a secondary option, particularly if the damages awarded or agreed are of a similar amount. Victims want justice, and that is usually reflected in the level of damages awarded rather than prison sentences.'

According to Severin Ian Wirz, an associate at law firm Hughes Hubbard & Reed, although corporate liability was not the main issue on appeal, the decision highlights some important issues: first, that the two-judge majority held that the ATS requires federal courts to look to international law to decide whether corporations are liable in civil law under the ATS; and secondly, that international law clearly indicates that corporations are not subject to liability.

Wirz says that the majority surveyed corporate liability under various international sources, including findings by the International Military Tribunal at Nuremberg, as well as the International Court of Justice, the signing of the Rome Statute, and various contemporary international war tribunals, such as those for Rwanda and the former Yugoslavia. The court found 'no historical evidence of an existing or even nascent norm of customary international law imposing liability on corporations'. Concluding that not even a single case existed where a corporation was ever subject to any form of liability under international law, the majority reasoned that there could be no corporate liability under the ATS. As a result, says Wirz, 'the majority concluded that the case lacked jurisdiction, and dismissed all plaintiffs' claims'.

Recognising the potential impact of the decision of the majority, Judge Pierre Leval, concurring with the majority in judgment only, stated: 'The majority opinion deals a substantial blow to international law and its undertaking to protect fundamental human rights. According to the rule my colleagues have created, one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form.'

In the months following the judgment, lawyers have tended to view the decision as an indication of how ATS cases are likely to proceed in future – that companies will escape legal and financial redress for their part in human rights violations. Richard Meeran, partner at law firm Leigh Day & Co, says that 'if this ruling stands and is adopted by other US courts, it will be a severe blow to foreign plaintiffs seeking redress for human rights violations around the world. The ATS is the only law of its kind to allow plaintiffs to pursue allegations of human rights abuses against corporations'.

At the moment, this ruling only applies directly in the Second Circuit, which covers the states of New York, Connecticut and Vermont, but it contradicts earlier judgments. For example, another appeals court, the Eleventh Circuit, previously ruled that corporations could be sued under the ATS and its ruling applies in Florida, Georgia and Alabama. Everywhere else is still up for grabs. However, the danger, say lawyers, is that *Kiobel* will be influential to other courts.

And the *Kiobel* judgment has already been followed. The ruling was adopted a month later by an Indiana federal court in the *Flomo v Firestone Natural Rubber Company* case, which alleged that the company had used forced child labour on rubber plantations in Liberia. While the court agreed that corporations cannot be sued under the ATS, the judge disagreed with *Kiobel* in one respect, says Marco Simons, legal director at EarthRights International, a US-based environmental and human rights advocacy group: she said that the court does, in fact, have jurisdiction over an ATS case against a corporation.

'This matters, because a court without jurisdiction usually must dismiss a case without deciding any other issues,' says Simons. 'In the *Flomo* decision, the judge stated that she would soon issue a subsequent decision that outlines additional reasons for dismissing the case – something she could not do if the court lacked jurisdiction,' he says.

The *Flomo* and *Kiebel* decisions are not the only times that US courts have sought to limit the ATS. In 2001, Coca-Cola faced a lawsuit by the Colombian trade union Sinaltrainal (National Union of Food Workers) alleging it collaborated with Colombian paramilitary forces to commit murder and torture. The case against the company was thrown out by the Miami district court because the murder occurred outside the US and was thus considered too far removed (physically and causally) from the company's Atlanta headquarters. However, the district court allowed the case to go forward against two Coca-Cola bottlers.

In 2004, the Supreme Court attempted to narrow the types of cases that could be brought under the statute. In *Sosa v. Alvarez-Machain*, the Court dismissed an ATS suit for arbitrary detention filed by a Mexican national who had been abducted at the direction of the US Government and brought back to the US to face trial. In an opinion by Justice David Souter in which all nine justices concurred, the Court held that federal courts should exercise 'great caution' in allowing private plaintiffs to bring civil suits for violations of international law.

> *'If this ruling stands and is adopted by other US courts, it will be a severe blow … The ATS is the only law of its kind to allow plaintiffs to pursue allegations of human rights abuses against corporations'*
>
> Richard Meeran
> *Leigh Day & Co*

The Court also said that ATS suits should be limited to those violations of the law of nations recognised in 1789 – assaults against ambassadors, violations of safe conduct, and piracy – and a 'modest number' of other offences 'on a norm of international character accepted by the civilised world' and defined with a similar 'specificity.' In Justice Souter's words, the door for recognition of new causes of action was 'still ajar subject to vigilant door-keeping' by federal judges.

Supreme Court bias?

The Supreme Court has also emphasised that federal courts should consider other 'limiting' factors, including whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued; if the defendant is a private actor such as a corporation; whether the claimant had exhausted local remedies available in the country where the alleged violation had occurred; and whether the executive branch had expressed a view about the impact of the litigation on US foreign policy.

Furthermore, in the judgment on the *Presbyterian Church of Sudan v Talisman*

'Virtually every major corporation doing business in politically unstable or conflict-torn regions has faced ATS litigation'

Energy, Inc case – also issued by the Second Circuit in October 2009 – the court imposed a higher pleading standard, requiring that 'the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone'. In this case, which involved allegations against a Canadian oil company that it assisted the Sudanese government to forcibly move civilians residing near oil facilities, the court concluded that 'plaintiffs have not established Talisman's purposeful complicity in human rights abuses'. In reaching that conclusion, the Second Circuit stated that 'the standard for imposing accessorial liability under the ATS must be drawn from international law; and that under international law a claimant must show that the defendant provided substantial assistance with the purpose of facilitating the alleged offenses'.

Simons at EarthRights International concedes that 'there's no escaping the fact that the *Kiobel* judgment is a terrible decision'. However, he believes that it shows that relying on the courts as the primary means of protecting rights is never a complete solution. 'Sometimes the courts can help. Often, however, they are hostile. Beyond the US, we need to expand the scope of accountability for human rights abuses, both geographically and institutionally. If Shell were subject to a strong accountability regime in Nigeria – or even in England, or the Netherlands, where it is headquartered – it wouldn't matter whether it could be sued in the US. Since only a handful of the world's corporate actors can be sued in the US, the ATS was always only a start. Losing it would be a setback, but not one that couldn't be offset by victories elsewhere.'

Other lawyers agree that while the Kiobel decision may make it harder to bring a case under the ATS, it is not impossible. Michael Lynch, litigation partner at law firm Kelley Drye & Warren, says that the *Kiobel* decision has left the door ajar on corporate liability. 'The court explicitly qualified its opinion as not concluding that corporations were 'immune' from liability under the ATS,' says Lynch. "The language of the court also suggests it took a more narrow approach – if and when something becomes a norm of customary international law, it conceivably could be the basis for liability under the ATS. What that means is if norms of customary international law evolve in such a way that corporate liability becomes acceptable under the ATS, the protections afforded corporations by *Kiobel* may be irrelevant.'

Wirz also believes that the judgment is not as wide-reaching as many seem to think. First, he says, the judgment only says that corporations are not valid defendants – it does not rule out individuals, such as company directors, being pursued under the ATS for corporate abuses committed abroad. Secondly, the judgment is limited to the Second Circuit Court of Appeal – other US federal courts of appeal can still interpret the ATS differently, which means foreign plaintiffs could still try to prosecute corporations in the US (and be successful) in the remaining 12 circuit courts. And thirdly, he says, no one is likely to appeal the decision, largely because the Supreme Court is regarded as more pro-corporation now than it has ever been in its history.

Last December, the *New York Times* ran an article that said that under the present Chief Supreme Court Justice John G Roberts Jnr (who has completed five terms), the Supreme Court has ruled for business interests 61 per cent of the time, compared with 46 per cent in the last five years of the court led by Chief Justice William H Rehnquist, who died in 2005, and 42 per cent by all courts since 1953.

'I would doubt that anyone would attempt to take this case all the way to the Supreme Court, especially when the court is deemed to be increasingly corporation friendly,' says Wirz. 'Any decision taken would effectively become the law of the land, and I think that people would prefer to still leave the ATS ambiguous everywhere outside the Second Circuit Court of Appeal,' he says.

Simons is unsure whether an appeal will go to the Supreme Court, or whether any subsequent rulings in other courts will add the clarity that human rights lawyers want to see in the ATS. As he says: 'I've always thought that Congress should pass a one-sentence statute stating "unless otherwise expressly indicated, corporations and other legal persons are civilly liable to the same extent as natural persons".'

Neil Hodge is a freelance journalist specialising in legal and business issues. He can be contacted at **neil@neilhodge.co.uk**.

A letter from

KAREN MACGREGOR

Given the choice between a bunker in Abidjan and a lecturing post at Boston University, most people would choose the latter. But Côte d'Ivoire's recently deposed leader Laurent Gbagbo turned down an invitation from US President Barack Obama to join the African Presidential Archives and Research Center (APARC) African Presidential Lecture Series (formerly known as the African President-in-Residence Program), aimed at providing career alternatives for African leaders and drawing on their experience to learn about democratisation on the continent.

Instead, after losing run-off elections on 28 November 2010, Gbagbo clung to power through violence. He lost the war and has been under house arrest since being captured on 11 April 2011 in a bunker at his residence in Abidjan, Côte d'Ivoire's biggest city. He is being investigated by prosecutors over human rights abuses committed while he was in power, along with some 200 leaders from his regime. Gbagbo will be defended by French lawyer Jacques Verges, who lists Nazi war criminal Klaus Barbie and Carlos the Jackal among his former clients.

The International Criminal Court plans to investigate crimes against humanity in the country, where post-electoral conflict claimed some 3,000 lives. The UN human rights office is also probing civilian killings. Switzerland has frozen Gbagbo assets worth US$81m. With the swearing in of President Alassane Ouattara, the man who won the election, on 6 May, Gbagbo has lost power and ill-gotten gains, and faces an uncertain future.

So are there lessons to be learned?

One was offered by Paul-Simon Handy, director of research at the Institute for Security Studies in Pretoria, in an article written just before Gbagbo's arrest. He argued that Côte d'Ivoire had reached a point where 'legitimate use of controlled violence' was necessary to end the conflict. With diplomacy exhausted, only war could bring about peace and, paradoxically, save civilian lives in a rapidly-deteriorating humanitarian situation featuring gross human rights violations, assassinations, destruction of property, use of heavy weapons in urban areas and the displacement of an estimated one million people.

One reason, Handy wrote, was that Gbagbo would never resign, pressured by his entourage and his influential wife Simone, his conception of politics and a background of having to fight for everything he acquired. Secondly, the balance of power had moved against the poll 'spoiler' and his troops. The African Union (AU) gave Gbagbo until 24 March to step down. Within days of the deadline expiring, Ouattara's forces marched south supported by nearly 10,000 UN troops and French forces. Their decisive victory, 'though highly undesirable in a democratic setting, might have the merit of laying the groundwork for a long-term peaceful resolution of the Ivorian conflict.' So one lesson could be use of force when necessary rather than what Handy called the 'dogmatic pacifism' of many African elites, which can be 'an excuse for inaction'.

UN forces had been in Côte d'Ivoire since 2004, to keep peace and facilitate implementation of a 2003 peace agreement that followed an armed uprising and growing tension between the mostly-Muslim north and the south. Responding to the post-election turmoil, the UN Security Council passed a Responsibility to Protect (RTP) resolution authorising the use of force to safeguard civilians. Institute for Security Studies researchers David Zounmenou and Dimpho Motsamai contended that the post-electoral debacle in Côte d'Ivoire was one of the most complex crises and intricate cases of peace-building in Africa since the Cold War. There were 'lessons to ponder regarding leverage and opportunity in conflict resolution; how to enforce commitment and compliance to peace agreements; and the use of requisite mechanisms to complement existing conflict prevention approaches.' Analysts have suggested that Africa prioritise by building capacity in both rapid reaction and long-term multinational peacekeeping for crisis situations.

Another lesson might be the growing role of African multilateral organisations in resolving political conflict. There are examples of ineffectiveness on the part of

Africa

the AU, but it and the Economic Community of West African States (ECOWAS) were consistent in supporting Ouattara as the democratically-elected president, in line with UN certification of the electoral process. Handy wrote that the credibility of the UN, AU and ECOWAS would have been 'at stake if a jurisprudence concerning Gbagbo was created at a time when the African continent is going through a high number of crucial elections'. A strong signal needed to be sent to potential spoilers tempted by 'blatant electoral manipulation á la Gbagbo'.

Indeed, Africa and the international community have rarely displayed such agreement over a political crisis. The UN was swift to act, supported by the European Union, which imposed sanctions. Angered by Gbagbo's use of violence, which was destabilising the volatile region, ECOWAS also implemented sanctions. West Africa uses the CFA franc and a central bank, and the region handed control of the Ivorian currency to Ouattara. Dr Knox Chitiyo, Africa analyst for the UK think tank the Royal United Services Institute, pointed out that while this brought hardship for Ivorians it also made it clear that 'Gbagbo's days were numbered. Non-recognition of Mr Gbagbo's representatives piled on the psychological pressure. This shows that sanctions – especially "tight" sanctions applied by neighbouring countries – can work,' he wrote for the BBC.

The crisis also vividly illustrated the key role in elections of political and legal institutions. African countries have taken major strides in improving the conduct of elections but, Chitiyo commented, there are continuing problems with immediate post-election periods, especially if the result is disputed. In Côte d'Ivoire, key electoral stakeholders made serious mistakes.

The UN and Ivory Coast's electoral commission had run the election well and declared a legitimate winner. 'But swearing in Ouattara as president at the Golf Hotel may have exceeded their mandate.' Gbagbo claimed that polls in northern Ouattara-supporting areas were rigged, although the UN said there was no evidence of this. The Constitutional Council made a major error in quickly voiding thousands of votes cast for Ouattara and swearing in Gbagbo. 'Although the council has the constitutional power to swear in a new president, it had no authority to re-inaugurate the losing candidate,' said Chitiyo, and Gbagbo had clearly exceeded the presidential term limit of ten years.

'All the stakeholders thus boxed themselves into a corner. With neither man willing to budge and no higher authority available in Côte d'Ivoire to decide and implement the decision, the stage was set for a violent showdown.' The lesson was that Côte d'Ivoire – and other African countries – needs an independent judicial body with the mandate to resolve post-electoral disputes and the tools to implement decisions.

Gbagbo has been ousted and Côte d'Ivoire, once a haven of peace and one of West Africa's most prosperous nations, has begun to return to normal. Banks and businesses have reopened, exports have resumed, and despite reports in May of people being killed by retreating militia, conflict has subsided. Gbagbo has urged supporters to stop fighting and help to revive the economy, and Ouattara said he would form a unity government with Gbagbo's party and restore full security to the country by June. The road ahead will be rocky. Côte d'Ivoire's 21 million people remain divided along ethnic, religious and economic lines, and are deeply traumatised. There has been talk of a truth and reconciliation commission, but Ouattara has also made it clear that Gbagbo should face justice. However, with a clear victor and international support, democracy for the country – and for Africa – could emerge the winner. And lessons have been learned.

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Strategic manoeuvres

Despite fewer law firm mergers recently, Norton Rose is joining forces with Ogilvy Renault of Canada and Deneys Reitz of South Africa. *IBA Global Insight* assesses the key considerations when taking such major strategic moves.

DIANA BENTLEY

Though the merger market has been active for some time, Hildebrandt Baker Robbins, the US-based legal industry consultants, reported that completed mergers involving US firms were down in 2010. But Lisa Smith, head of Hildebrandt's law firm strategy and Tony Williams, principal of Jomati Consultants, both remark that interest and discussion is increasing: 'From the instructions I've got, I expect increased merger activity in 2011 and 2012,' Williams notes.

But the merger market is also changing. Stephen Denyer, regional managing partner for Europe at Allen & Overy and Chair of the IBA Law Firm Management Committee, says the committee is seeing a wider range of mergers occurring. 'Several years ago people were focused on the mega mergers between large international players that were expanding their practices due to the liberalisation of markets, and you still get those. Now we're seeing more mergers at all levels, which I think is the result of the markets becoming more competitive. Firms are positioning themselves in the best way they can in their market – say in a particular practice area or in a local or regional sense.' The economic downturn has prompted some new configurations of practices too. Consultant Laurent Marliere of law consultant Scipion's Brussels office reports that in Belgium, Spain, Italy and France, small groups of partners have been leaving large law firms and establishing their own practices – and Marliere foresees some mergers between these new firms to create larger organisations.

In-house power

Solid business considerations fuel interest in mergers. One looming large is the desire to achieve a greater geographical spread. 'In the US there's been a growing recognition in many large and mid-tier organisations, that the higher growth is going to be outside the US. So US firms will be looking to merge with firms in other countries,' says Tony Williams. 'And firms are also being more tightly controlled by in-house departments keen to secure better service and cost control, and panels of lawyers are being reduced. The greater a firm's spread in terms of geography and practice areas, the more likely it is to remain on a panel.'

The globalisation of business was a big factor in the merger that produced SNR Denton, says partner Howard Morris. 'We have a large financial practice in the UK and in the Middle East but the missing element was New York. The question was, could we build our financial practice without a presence there? Generally our clients could only give us work where we had offices. If we didn't have offices in all the places where they do business, we were leaving money on the table. And we didn't have the bodies to put in any new office we might open. We'd opened an office in Singapore and it had been a struggle to find the right team.' Conversely, for Sonnenscheine Nath & Rosenthal, he says, the lack of a London office and a presence in the Middle East was an issue. 'Clients want to see that you've got the resources to run a number of big deals at the same time.'

'Several years ago people were focused on the mega mergers between large international players… Now we're seeing more mergers at all levels which I think is the result of the markets becoming more competitive,'

Stephen Denyer
Allen & Overy; Chair of the IBA Law Firm Management Committee

James Bateson of Norton Rose also says the need to expand internationally has fuelled his firm's three mergers. 'The legal services market will be transformed in the future,' he says. 'The market is changing dramatically with the increasing globalisation of business and the shift in the balance of power that will come with the rise of the Asian economies. Although we may not end up with a "big 4" as you have in the accounting profession, there will be a defined number of truly global firms to service international clients.' The firm looked at where countries like China were investing, which included Australia, Canada and South Africa. But these were also developed legal markets, says Bateson, and building your own presence in these places can be challenging. Lovells and Hogan & Hartson also both shared an ambition to be at the top of the international market, says HoganLovells co-chair John Young. 'For this to be a reality both firms had to look at having enhanced critical mass in a wider range of jurisdictions, new clients and increased business opportunities.'

Economies of scale can also be achieved through mergers and there are other advantages, says Stephen Denyer: 'A bigger firm can compete well in the recruitment market and invest more in support services, get more people with leadership skills who can take the firm forward and create a bigger brand.' A key consideration too is the speed with which firms can grow through mergers as opposed to organic growth. 'You can significantly enhance your competitive position quickly,' says Lisa Smith. It's also a matter of money. As Norton Rose and SNR Denton assessed, opening your own offices is expensive and you have to wait for the business to grow. 'If you've done your due diligence properly, when you merge you should know what you're getting. Lateral hires can be expensive too and you're not so sure what they can deliver,' says Smith.

Time wasters

A merger is not a strategy in itself, consultants and lawyers insist, and it needs to be underpinned by a compelling business case. Firms should first decide where they want to take their organisation, then identify which firms meet their criteria. Some of the questions they can ask themselves when looking for possible merger partners include what level of cultural understanding there will be between the firms, whether the practices are compatible or complementary, what conflicts may arise, whether the merged firm will be able to provide a seamless service for clients and what the financial and managerial arrangements may be. 'Most firms are aware of these tricky questions but the rigour with which they need to be addressed may come as a surprise,' notes Tony Williams.

Before merging with Sonnenscheine Nath & Rosenthal, Denton Wilde Sapte discussed the proposal with some clients, which Howard Morris says was a good idea as firms can lose sight of the fact that the merger is for the ultimate good of the client. Most firms will start merger discussions after entering confidentiality agreements to protect them in any exchange of data. They then adopt a phased approach. 'First assess the strength of the business case for the merger, then your ability to get the deal done. You need to ensure there aren't significantly different views on all the deal points. You can withhold exchanging some information until you assess if the deal is achievable. Then you can assess the balance sheets and do an in-depth analysis,' says Lisa Smith. Firms also have to consider the possible impact of the merger on the referral process as they may have outbound and inbound referral arrangements that can be disrupted. This is particularly so in international mergers where vital regulatory, accounting and tax issues must also be addressed.

There is normally no payment involved in a merger. Differences in remuneration between the partners of firms can be handled through the compensation system or by having different profit centres. James Bateson of Norton Rose reports that his firm uses the Swiss Verein structure, a legal structure that can be used to organise professional business associations that are based in different countries. 'It's a very flexible system and means that you can have different profit centres in different countries,' Bateson advises. 'You can combine business operations quickly so you can focus on developing your services.'

Many firms can benefit from having an external adviser who can provide research and experienced, detached comment and advice on a proposed merger. Dentons sourced research on the US legal market from a consulting company. 'In the last few years we'd been approached increasingly by US firms. We decided that we didn't know enough about the US market and the research helped us decide if we were interested in the market and what firms would meet our criteria there,' recounts Howard Morris. 'Firms can be flattered if they're approached to do a merger but even if a merger is a good idea the approaching firm mightn't be the best candidate,' advises Tony Williams. 'You can ask a client if there's enough excitement in it for them to really want to do the deal and stop them getting carried away. Some people don't want to back out as they fear it would be a waste of the time already invested. You can encourage them out of that.'

Bad publicity

Many firms start managing a merger with a small, focused team. 'You need a dedicated group regardless of the firms' size made up of key opinion formers with a clear agenda and allocation of responsibilities,' advises Stephen Denyer. 'You should agree with the other firm on the ground rules for mutual due diligence and for the proper disclosure of clients, financial data and other issues.' As discussions progress, the circle can be broadened as more people will need to have a stake in the deal if the merger proceeds. Although Dentons spoke with clients about a possible merger, Howard Morris stresses the importance of keeping plans confidential as discussions can be affected if they are subjected to comment in public and aborted plans can generate negative publicity.

In SNR Denton's case, the merging firms began with a series of talks and when they met no significant obstacles, partners were then brought in to test the proposition and see if it should go forward. They then began the due diligence process and the examination of financial data. 'You must generally assess if the firm is well managed and if their information is reliable,' says Morris. 'But the most important matter is culture and that's hard to subject to due diligence. You need to see if you have the same values and attitudes. Sonnenscheine Nath & Rosenthal was collegiate in its style and had people we could get on with, and that was crucial. Then we reached out to each other and got to make connections before the launch.' James Bateson at Norton Rose also confirms the importance of the cultural fit. 'You have to understand your own culture first. Then see how the potential merger partner deals with its clients and staff. How are they perceived in the market?' In the HoganLovells merger, early discussions between members of both management teams sought to identify areas where the firms could work together while practical issues were also explored. Management and other members of the firms met and presented to each other at partners' meetings in London, continental Europe, Washington DC and New York as well as by video conference.

> *'The market is changing dramatically with the increasing globalisation of business and the shift in the balance of power that will come with the rise of the Asian economies'*
>
> James Bateson
> *Norton Rose*

Integration is also a vital phase that determines the success of the merger. Time and good management skills are needed to implement mergers effectively. 'You can spend as much energy on integration as on the merger itself,' remarks Lisa Smith. 'This hasn't been so well appreciated but now firms are getting better on integration planning.

Notable mergers announced or completed in 2010

Hogan & Hartson (US) and Lovells (UK) = Hogan Lovells

Hogan & Hartson and Lovells merged on 1 May 2010. Post-merger the firm has 40 offices, 826 partners and 2,100 other lawyers and fee earners, which takes it into the top ten global ranking. Now the US accounts for 46 per cent of its total billings, Continental Europe 24 per cent, London 24 per cent and Asia and the Middle East six per cent. But the firm has plans to grow in several markets including California, Asia and the Middle East.

Sonnenscheine Nath & Rosenthal (US) with Denton Wilde Sapte (UK) = SNR Denton

These two firms merged on 30 September 2010 and the estimate for their combined turnover was then US$750 million. The combined firm now has 60 offices in 43 countries. Since the merger there have been 40 new lateral partner appointments and it is now one of the world's top 25 firms.

Norton Rose (UK) with Deacons (Australia), Ogilvy Renault (Canada) and Deneys Reitz (South Africa) = the Norton Rose Group

Norton Rose merged with Deacons (Australia) on 1 January 2010 and the merger with Ogilvy Renault and Deneys Reitz has been effective since 1 June 2011. Before Norton Rose's merger with Deacons the firm had 30 offices, a total of over 1,800 lawyers, including 432 partners. The combined firm has 38 offices, over 2,500 lawyers including over 740 partners. Turnover is also being boosted by the mergers. After the merger with Deacons the group's turnover for 2009/2010 was US$670 million while the turnover for the enlarged group is estimated to be US$1 billion. It is now one of the world's top ten firms.

Hammonds (UK) and Squire, Sanders & Dempsey (US) = Squire Sanders Hammonds

This merger took effect on 1 January 2011 and resulted in a firm with combined revenues of US$625 million. More than 95 per cent of the partners of the firms voted in favour of the merger, which has resulted in a firm with 36 offices in 16 countries, 460 partners and a total of 1,275 lawyers worldwide, taking it into the top 25 in the world.

This includes nuts and bolts work like merging technology and shaping new websites, joint client visits and marketing.' Agreement on the post-merger managerial roles will have to be made. Hogan Lovells has opted to have two co-CEOs, one from each legacy firm and its elected supervisory board is also co-chaired by people from each firm.

At SNR Denton, Howard Morris says integration has been key and good communication is essential. The merging firms went public after partners had approved the merger. Then deadlines were set with certain things having to be achieved by given dates. Efforts were made to help clients feel comfortable with the new brand. Inside the firm says Morris: 'People get used to things being the way they are so change can be hard. But when we were looking at what procedures to adopt and we found that we did things differently, we didn't consider who was right or wrong. We focused on best practice and that was a good way to find a solution. There may be a new paradigm you need to follow.' Norton Rose have allowed themselves plenty of time to achieve their mergers. Two announced last year will be completed this month, evidence of its belief that a realistic time scale is needed to complete the work the mergers entail.

Nothing is risk free. Staff and clients are the assets of a law firm and both can abandon the merged organisation. Some mergers fail. The business case may not have been as strong as it should have been, culture clashes can occur and unchecked egos can cause disruption, the execution of a merger may be weak and the two merged firms may continue to operate as two entities, which is not healthy. But whatever the pitfalls, many mergers appear to be successful. 'We can now provide a full service for clients that we couldn't do before. We're getting work now that we would not have got before too. Denton Wilde Sapte was in the top 20 in the UK, the merged firm is in the top 25 in the world,' says Howard Morris. Thankfully, for the firm managers, Morris says: 'Everyone in the firm believes in the good sense of what we've done.'

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Deconstructing corruption

Corruption remains endemic in the global construction industry. *IBA Global Insight* assesses international efforts to tackle deeply ingrained practices.

MARIA SHAHID

As coalition forces continue to target Libya, and Gaddafi stubbornly clings to power, very little seems certain in this unsettled part of the world. The country's many infrastructure projects have for now come to a standstill. History would advocate that political instability and wars will invariably lead to years of reconstruction and rebuilding, with the construction sector playing a pivotal part. Corrupt practices inevitably follow, according to global anti-corruption agency, Transparency International (TI). The organisation's latest Bribe Payer's Index (BPI), from 2008, showed construction to be the sector most prone to corruption globally. Chandu Krishnan, the executive director of TI UK, suspects that little is likely to change in the forthcoming 2011 BPI, due to be published later this year.

Construction lawyer, Neill Stansbury, formerly a Project Director at Transparency International, dealing with construction and engineering, formed the Global Infrastructure Anti Corruption Centre in 2008, together with his wife, Catherine Stansbury. He explains much of the corruption in the sector arises from the complexity of the projects involved: 'there are so many project phases, so many professionals and so much work is concealed. It creates an environment where corruption is quite easy'. On the organisation's website he sets out numerous reasons for the prevalence of corruption, including:

- the 'complex contractual structure' with 'every contractual link [providing] the opportunity for someone to pay a bribe in return for an award of the relevant contract';
- the 'uniqueness of the project' where 'the lack of comparison on projects makes it easier to inflate costs';
- a 'lack of transparency' with 'commercial confidentiality' taking precedence over 'public interest';
- government involvement: the industry is heavily regulated with numerous permits being required. 'Where there are insufficient controls on how government officials behave, their power – combined with the structural and financial complexity of the projects – makes it relatively easy for officials to extract bribes';
- and finally, and perhaps most importantly, 'acceptance of the status quo', where 'bribery

'There are so many project phases, so many professionals and so much work is concealed. It creates an environment where corruption is quite easy'

Neill Stansbury
Global Infrastructure Anti-Corruption Centre

and deceptive practices seem to have become so ingrained in some parts of the sector and in some territories, that in many cases they have become accepted as the norm'.

It all adds up to a pretty grim picture, and so intrinsic to the culture of the industry, that it is difficult to imagine that things will change quickly.

Prone to bribery

In its December 2010 factsheet, the Organisation for Economic Co-operation and Development acknowledges that construction, infrastructure projects and property development are some of the areas that are 'particularly prone to foreign bribery'. Part of the impetus for change is coming from the growing pressure on the 38 signatories to its Anti-Bribery Convention, dealing with the bribery of foreign officials, to comply with their Convention obligations.

Construction lawyer, John Starr, of Boyes Turner has just given a seminar to his clients on the forthcoming introduction of the Bribery Act in the UK, which is due to come into force in July, and brings the country into line with the OECD Convention, following initial delays with the accompanying guidance. Starr explains that for those involved in the construction sector the fear of prosecution under the Act is very real. The key offences in the Act relate to the bribery of another person; to that of being bribed, and, finally, the bribery of foreign officials. Given the complex sub-contracting structures involved in construction projects, one of the sections of the new Act causing particular concern to the sector relates to the new corporate offence of failing to prevent bribery by intermediaries, contractors, joint venture partners and subsidiaries. Another relates to the criminalisation of 'facilitation' or 'grease' payments of relatively minor amounts to public officials to speed up certain activities: 'Facilitation payments are a common practice in this industry,' explains Norton Rose construction lawyer, Chris Hill. Confusion has surrounded the issue of what exactly would count as a facilitation payment. The latest guidance from the UK's Ministry of Justice, together with the joint guidance published by the UK's two prosecution bodies, the Serious Fraud Office (SFO) and the Crown Prosecution Service, goes some way to clarifying the issue: 'You won't be prosecuted for a one-off facilitation payment,' explains Sam Eastwood, head of business ethics and anti-corruption at Norton Rose. 'Even the TI recognises that zero-tolerance is not going to work in practice in countries such as Russia. What you must do is have a strategy in place for facilitation payments; you must account for them openly'.

The UK Act goes further than even the US equivalent, the Foreign Corrupt Practices Act, in many respects, in including provisions that could catch foreign companies with a listing on the UK Stock Exchange within its provisions. However, the UK is by no means alone in starting to initiate anti-corruption measures. In the 2008 BPI China, along with India, Mexico and Russia, was found to hold the dubious honour of being one of the countries most likely to engage in bribery when doing business abroad. It has since cracked down considerably on corruption with the introduction of measures to combat the bribery of foreign officials, which, according to legal commentators such as Eastwood, is likely to be enforced 'rigorously'.

Enforcement: so where's the stick?

While the Convention obligation to bring in laws to prevent overseas bribery is being taken increasingly seriously, enforcement remains disparate. A global Enforcement Report in 2010 by TRACE found that of 109 bribe recipient countries, only 48 had initiated an international bribery enforcement action of some kind. The same TRACE report went on to find that on an industry by industry basis, the largest percentage of enforcement activity existed in the 'extractive industries' (some 20 per cent), compared with a mere 10 per cent in the construction and engineering sector.

Eastwood believes that the real impetus towards enforcement will come from increasing political pressure. He points to a recent report by the OECD criticising Canada's regime for enforcement of the Corruption of Foreign Public Officials Act. In it the organisation states that although the number of investigations had increased 'Canada's ability to successfully prosecute these investigations will be in jeopardy unless the Public Prosecution Service of Canada is given the resources it needs to prosecute the large volume of cases that may soon follow the investigations'.

In the UK at least, if history is anything to go by, prosecutions are only likely to follow whistleblowing, or where the contracts involved have a high monetary value, with prosecution bodies continuing to be reactive to events. Globally too, proactive, industry-wide probes are far from the norm. The possible exceptions being the construction, infrastructure, oil and gas probe carried out by the US Department of Justice (DOJ) in relation to the Panalpina investigation, following allegations of illegal payments being made to Nigerian officials through Panalpina, a Swiss shipping and logistics management company. In the UK there is no real evidence of a similar sector-specific probe.

Nevertheless, Stansbury remains optimistic that 'there has been a step change in enforcement in a lot of countries'. Discussing the Bribery Act, he maintains that one of its key messages is a 'change in intent, with a government saying "we are going to prosecute"'.

Globally, he points to the enforcement taken against German engineering company, Siemens AG, following its settlement with US and German authorities in 2008 totalling some US$1.6 billion. This included a four-year debarment of its Russian subsidiary, Siemens Russia, following a World Bank investigation into the Moscow Urban Transport Project, financed by the bank, and a voluntary two-year shut out from bidding on Bank business for Siemens, and all of its subsidiaries and affiliates. Hill agrees that the Siemens case 'was a watershed for European companies' in terms of taking note of the need for compliance measures in their organisations.

Gary DiBianco is in charge of corporate investigations at Skadden's London office, and has been involved in numerous investigations under the US Foreign Corrupt Practices Act; he explains that DOJ and SEC investigations under the FCPA increased significantly in the mid-2000s, and that there were relatively few active FCPA probes before that time. One of the most notable cases in the construction and infrastructure sector was a US$579 million settlement by engineering and construction company, Halliburton, and its former subsidiary, KBR, in 2009. KBR admitted to bribing senior Nigerian officials between 1994 and 2004 to win contracts worth more than US$6 billion for a joint venture to build a liquefied natural gas plant in Nigeria. Under the terms of the settlement, both companies must retain an independent compliance monitor to review and report on the design and implementation of their compliance programmes.

Skadden's Matthew Cowie, a former prosecutor at the SFO, believes that there has also been a step change in enforcement on this side of the Atlantic. He points to the first corruption conviction of a corporate in relation to engineering firm, Mabey & Johnson as being a prime example of this; a case in which he was involved as case controller while at the SFO. Following an investigation by the fraud prosecuting body, in September 2009 Mabey &

India focus

India is another country ranking low in the 2008 BPI. A 2005 TI report found that over 60% of the country had first-hand experience of paying a bribe or 'using a contact to get a job done in public office'.

Many state-funded construction projects are carried out by 'construction mafias' consisting of groups of fraudulent public officials, materials' suppliers, politicians and construction contractors. Bad construction, combined with the substitution of materials (such as mixing sand in cement while submitting expenses for cement) often leads to roads and highways being dangerous, with many being washed away during the monsoons.

A survey published by KPMG in 2011 backs these findings, showing that the perception of corruption is highest in the construction and real estate sector. The report notes that with a government planning on investing around USD 1 trillion in infrastructure between 2012 and 2017, the regulatory environment of the country does not seem to have kept pace with the disproportionate growth of the sector.

TI's Krishnan explains that part of the problems stems from the inexperienced nature of the industry, which is often unaware of its compliance obligations. In addition, the volume of projects that companies are bidding on, often leads to unrealistic prices and deadlines being agreed, which are not met. Any delays and cost overruns are dealt with by paying bribes to the necessary authorities.

The country already has a number of initiatives in place to deal with corruption, including the Prevention of Corruption Act 1988, although this, along with the Central Vigilance Commission, are believed to be ineffective to deal with corruption in the private sector.

The country is a signatory to the United Nations Convention Against Corruption (UNAC), and at the 2010 G20 summit signed the anti-corruption action plan, requiring it to ratify and implement UNAC. The government is currently working on a law which will specifically target the private sector.

'Even Transparency International recognises that zero-tolerance is not going to work in practice in countries such as Russia.'

Sam Eastwood
Norton Rose

Johnson was convicted of offences of overseas corruption and breaches of UN sanctions, and agreed to pay fines totalling £6.6m. More recently, in February 2011, two directors of the firm were found guilty of making illegal payments to the Iraqi Government, in breach of UN sanctions, in order to secure contracts to build steel bridges in the country.

Compliance initiatives

Under the UK Bribery Act, one of the main defences available to corporations accused of failing to prevent bribery relates to having 'adequate procedures' in place, designed to prevent persons acting on their behalf from paying a bribe.

The guidance published alongside the Act sets out six guiding principles to being able to fulfil the criteria for the defence, and has been scrutinised in great detail both by corporates and their lawyers so as to ensure sufficient measures are in place to fall within the defence.

There is no similar guidance under the FCPA, the DOJ very recently being quoted as rejecting 'some sort of formalistic solution from a script that says if you check the following six boxes you're guaranteed this outcome'. Nonetheless, there is a clear culture of compliance already in place in the US, with the construction sector in particular seeing itself as targeted by the FCPA.

For Stansbury, compliance or 'management control' is a key part of his work: 'The core of GIACC's work is that we don't point fingers. We accept that there is a problem, and that we tackle it at two levels. First, we work closely with engineers around the world to raise awareness that there can be change. We've signed alliances with quite a few professional engineering institutions globally. We say to them that you could become the ethical leaders of your country. If, alongside quality training, you require ethical training for all engineers registered with you, you can begin to change the practice of the country. Secondly, we are encouraging proper management procedures: anti-corruption should form part of these procedures as much as safety and control.' GIACC's Project Anti-Corruption System (PACS) recommends a number of measures to be integrated into the management of a project. These include the appointment of an independent assessor, the need for each party to a project to provide contractual 'anti-corruption commitments' and the appointment of a compliance manager.

He rejects the notion that his is a longer-term solution: 'Things can happen a lot quicker than you think; there is currently a significant culture shift'. He points to the British Standards Institute's anti-bribery standard (BS10500), which is due to come up for further public consultation imminently with a view to being brought into effect by the end of the year. 'It's all about making this a management control issue,' he enthuses. 'It will be an iconic measure of how a company is performing in this area.'

Stansbury remains resolutely optimistic about the shape of things to come: 'I believe that we are making progress. We have a real chance of making a change.' With a flurry of increased compliance initiatives being undertaken by global corporates, under the watchful eye of their lawyers, as well as a growing wariness of doing business with high risk jurisdictions, such as Libya, his optimism may not be that misplaced.

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A letter from

BRIAN NICHOLSON

Despite the legal niceties spelled out in the Constitution and copious laws, Brazil's public and private sectors rub shoulders in a vast and murky twilight zone. Rarely has this been more explicit than in the recent ousting of the CEO of Vale, the Brazilian-based mining giant. Vale is a US$170 billion private corporation with half a million stockholders. Its shares are traded in São Paulo, New York and Paris. But in early May senators in Brasília grilled Finance Minister Guido Mantega about what one opposition leader called the government's 'blatant' interference.

So, does Dilma Rousseff, Brazil's new leftist president, plan to emulate Venezuela's Hugo Chavez, an inveterate meddler? Probably not. But the episode can hardly help as Brazil seeks tens of billions of dollars in private investment prior to the 2014 World Cup and the 2016 Olympic Games.

In early April, controlling shareholders in Vale issued a laconic statement advising that CEO Roger Agnelli would be replaced by Murilo Ferreira as of 22 May. After two paragraphs extolling Ferreira's qualifications – 30 years' experience in mining, most recently running Vale Canada, a major nickel producer – the shareholders offered a brief 'appreciation' for Agnelli's performance and contribution to Vale's success. Well they might. Since taking over in 2001, Agnelli multiplied billings ten-fold to US$40 billion and profit five-fold to US$15 billion. Market capitalisation soared no less than 25-fold from US$7 billion as Agnelli turned the company into the world's largest iron ore producer, second largest nickel producer and a global rival to BHP Billiton and Rio Tinto. Total shareholder returns in the period 2002–2010 were 39.8 per cent, compared with 29.1 per cent and 20.9 per cent respectively for those two rivals, Vale said. So why would shareholders kick out an obvious winner? The answer lies in the aforementioned twilight zone.

Privatised in 1997, Vale never truly escaped government influence. Brasília retains a golden share to veto, among other things, moving the company offshore, selling key assets like mineral deposits, and modifying shareholders' voting rights. Ample potential control, perhaps, but nothing about kicking out the CEO. The mechanism for this lay in the share structure.

A 52.3 per cent majority of Vale's voting stock is held by Valepar, a holding company in which the government indirectly has 60.5 per cent control through Previ, the pension fund of employees of the state-owned Banco do Brasil, and the Brazilian Development Bank. Anyone less familiar with Brazilian history might wonder why the country's largest pension fund would want to fiddle with the management of such an apparently profitable investment. But most of Brazil's bigger pension funds are sponsored by state companies, and have a habit of participating in projects of interest to the government – more twilight zone. However, under a shareholders' agreement Valepar needs a two-thirds majority to topple the Vale CEO, meaning that the government was still around six per cent short. It needed support from another major Valepar shareholder.

'I spoke with shareholders, including Previ,' Mantega told Brazilian legislators, admitting that he also met with Bradesco, a private bank that holds a substantial minority stake in Valepar. Press reports, strenuously denied by Bradesco and the government, suggested that Bradesco was perhaps swayed to the government's side by considerations of its

Latin America

other links with the public sector – it has for example a lucrative deal running a retail bank for the Postal Service, under a partnership due for renewal this year.

'There was blatant interference by the government in Vale,' said Senator Alvaro Dias, leader of the opposition Social Democratic Party. 'When the government was putting pressure on Vale, directors threatened to resign en masse, upset about what they called the 'Venezuelisation' of the company.'

All of which begs the question: why would the government want to get rid of the demonstrably successful Agnelli? Once again, the answer appears to lie in the twilight zone. The Workers' Party (PT) to which Rousseff and her predecessor Luiz Inácio Lula da Silva both belong has never fully accepted the privatisation of Vale, saying that it and other state companies were 'given away' by the previous Social Democrat government. More recently, Lula took umbrage at Vale's order for 19 giant bulk carriers in Chinese and South Korean shipyards. Agnelli said Brazilian yards cost double and would take far longer to deliver – logistical efficient is critical for Vale, whose main customer, China, is 45 days away, while Australian mines can ship to China in 15 days.

Lula also complained that Vale suspended expansion plans and fired 1,200 workers during the recent global economic crisis, which caused a sudden slump in iron ore demand. Furthermore, the company was far too eager to export iron ore rather than investing in value-adding processing, even though Vale is a world-class mining company and Brazil has several large steel companies, not to mention current excess smelting capacity.

Most economists would argue that boosting regional development, promoting specific industries, creating or retaining jobs and adding value to exports are all worthy goals, but ones that a government should achieve in other ways. Leaning on private companies to distort their investment and operational priorities is not the best option.

'He (Lula) expressed his dissatisfaction publicly, and Sr Agnelli simply ignored it, continuing to do what he thought was necessary,' Mantega told legislators. 'The government likes Vale and wants it to be successful, because we receive taxes on the profit… But it's not just a matter of making a profit; the company also has to contribute to the national interest.'

Possibly with an eye to his own future, Agnelli apparently chose to go quietly. 'I understand Lula's position… The company's mission is to generate results and gain capacity to invest more, but the government's mission is completely different,' he told journalists while showing them round the brand new 400,000-ton Vale Brasil, freshly delivered from Daewoo Shipbuilding in South Korea and claimed to be the world's largest ore carrier.

For Miriam Leitão, a leading economic commentator, the question now is how Vale will be managed going forward. 'Given that there was such an explicit intervention, who will dare to take decisions that displease the government? Vale has to win back the confidence of major investors that it really still is a private company.'

Brian Nicholson is a freelance journalist. He can be contacted at **brian@minimaxeditora.com.br**.

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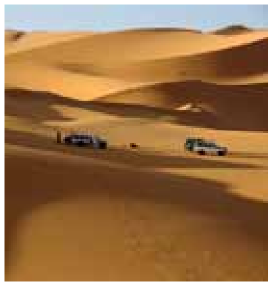

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