

IBA GLOBAL INSIGHT

October 2012

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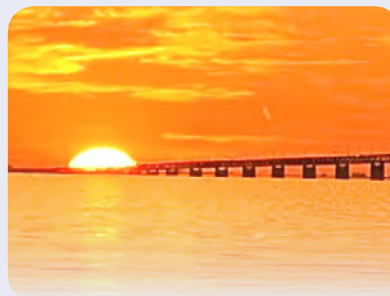
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From the Editor

As this edition of *IBA Global Insight* went to press, the dust was still settling after another remarkable IBA Annual Conference – this year in Dublin. As well as appearances from Ireland's Prime Minister Enda Kenny, former President Mary Robinson, and leading lights across an array of discrete areas of expertise, the IBA played host to several Nobel laureates. They spoke from experience, and with authority, on some of the most pressing issues facing us today.

Professor Joseph Stiglitz received his Nobel Prize for Economics in 2001. He gave the opening ceremony audience the benefit of knowledge accumulated as advisor to President Bill Clinton and the World Bank, among other positions, speaking with acute insight on the financial crisis, its aftermath, and potential ways forward. Mohammed Yunus received his Nobel Peace Prize in 2006 for his work with Grameen Bank, tackling poverty in Bangladesh head on. He spoke in inspirational terms about the failings of traditional finance, how inequality can be addressed, and poverty eradicated. His approach? To understand how traditional financial institutions conduct their business, and do the opposite.

Renowned former French Foreign Minister, Bernard Kouchner, co-founded Médecins Sans Frontières, which was awarded the Nobel Peace Prize in 1999. He is well-known for his hands-on humanitarianism, notably towards the Vietnamese boat people and in Somalia. Reportedly, Nelson Mandela once whispered to him, 'Thanks for intervening in matters that don't concern you.' His views on the rule of law in the 21st century, the current situation in Syria, and the parlous state of the United Nations carry weight.

All three of these leading figures in international affairs were generous enough with their time to be interviewed by the IBA team in Dublin. There'll be more on this in our December edition. In the meantime, films of these and other interviews conducted in Dublin can be viewed on the IBA's website at tinyurl.com/Dublinfilms.

In this edition, we tackle similarly pressing issues. **Cleaning up the City** (page 25) suggests what should be done in response to all the financial scandals. Our cover feature (**Health warning**, page 41) asks whether moves by governments to protect the health of their citizens might herald the end of the tobacco industry or be stymied by the World Trade Organization. In **Environmental law gets radical** (page 34) we suggest that the public interest demands the agenda shifts from breaking key conventions to ensuring they're enforced. Meanwhile, in **Democratising the drug trade** (page 16) we assess dangerous developments in Latin America.

James Lewis

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News

People, not just companies, must pay for financial crime

REBECCA LOWE

A pattern has emerged: Barclays, facing Libor fixing allegations, agreed to a settlement of £290m; Standard Chartered, facing claims it hid Iranian transactions to evade sanctions, agreed a settlement of £340m; HSBC, facing allegations that it laundered Mexican drug money, is seeking to settle with several US agencies as *IBA Global Insight* goes to press.

Meanwhile, a recent survey by *Which?* has shown that 78 per cent of people feel that individuals ought to be prosecuted where banks have broken the law.

Ros Wright, chair of the Fraud Advisory Panel and former director of the Serious Fraud Office (SFO), agrees. Prosecuting people rather than companies should be a priority under new SFO director David Green, she believes, as this is a greater deterrent – and fines are not ultimately paid by the guilty parties but by shareholders. ‘The people commit the crimes, not the company,’ she says. ‘Fining companies is a deterrent, but if you send the directors from Barclays to prison, that is an even bigger deterrent.’

Prosecuting a company is also extremely difficult, Wright points out, as you need to prove wrongdoing by the ‘guiding mind’ of that company, which more often than not is the board of directors.

The SFO is currently under pressure to get results more than ever. Under Richard Alderman, who stepped down in April, large, complex cases – such as BAE, doggedly pursued under Robert Wardle’s tenure – were abandoned in preference for quick wins and deals with companies. Under Green there are high hopes it will regain the prestige, expertise and morale it has lost. He has already vowed to ‘rebalance the relationship between prosecution and civil settlement,’ and has announced plans to investigate the Libor scandal – an investigation begun in the US a year ago, but never picked up in the UK – and continue investigating property entrepreneur Robert Tchenguiz. The original case against Tchenguiz and



his brother Vincent collapsed after the High Court ruled that search warrants had been obtained on the back of ‘unfair and inaccurate’ information.

One frequently criticised tool in Alderman’s armoury was the civil recovery order, employed to settle cases quickly and cheaply. Both the UK’s judiciary and the OECD voiced concerns with the SFO’s reliance on such orders, believing them to undermine justice and lack transparency. Julian Parker, SFO senior operational investigator from 1996 to 2009, agrees. ‘There is an essential point of public policy here,’ he says. ‘Do we wish to live in a society where well off criminals can buy themselves out of trouble within the criminal justice system [...] or should they be pursued, routinely, with the full force of the law?’

With budget cuts of 25 per cent, Green faces an uphill struggle to revolutionise the office and attract experienced staff – a perennial difficulty given the more attractive private sector salaries on offer. Corporate crime remains a low government priority, and fraud squads across the country have slowly disappeared. It is hoped that by repairing the SFO’s credibility, lawyers will be encouraged to cut their teeth as public prosecutors before entering private practice, as is the tradition in the US. Green has also suggested ‘borrowing’ people on secondment from the Financial Services Authority (FSA) and the private sector.

‘A priority should be getting prosecutors with experience,’ says Robert Wardle, director of the SFO from 2003 to 2008. ‘It would be good to get people with commercial experience in the fraud area – maybe ex-revenue or customs investigators. They understand the commercial realities.’

Better cooperation between the FSA and SFO is imperative if both organisations are to work effectively, says Matthew Cowie, corporate investigations counsel at Skadden and former SFO prosecutor. ‘Perhaps until recently there has been a long history of close cooperation,’ he says. ‘However, with proposed reorganisation, regulators are jostling to define their position in the regulatory landscape and justify their existence and remit.’

There is room for both large criminal cases and settlements, Cowie believes. His investigations between 2004 and 2010, which included BAE Systems and Mabey & Johnson, usefully paid for themselves. ‘Corporates can be a great vehicle for change and self-regulation, and effective enforcement action will always have an effect on the target and the watching corporate world. However, most effective regulators know that without going after individuals and pursuing the long, hard cases, you cannot have credible deterrence.’

Richard Alderman could not be reached for comment.

Read the full story at tinyurl.com/FinancialCrime-People.

Russia's WTO accession brings hope of reform

On 22 August 2012, Russia became the 156th member of the World Trade Organization (WTO). The country has been close to entry several times in the past, but obstacles have always arisen during 18 years of hard-fought negotiations. In December 2011, after a Swiss-brokered deal, Russia's entry was finally approved.

Negotiating Russia's accession to the WTO has by no means been a simple process, notes Salans partner Edward Borovikov, who has been one of the primary lawyers advising the Russian government on joining the WTO since the early 1990s.

'WTO accession negotiations are a very complex process, where parties intentionally agree on extra liberalisation in one area in exchange for less or no liberalisation in another,' he comments. 'I could give you several examples from the Protocol of Accession of China which Russia would never agree upon. And this is logical as the two countries had, and still have, different standing in the trade world, and different economic priorities. Business was consulted and we helped many businesses to understand the consequences of accession, all the pros and cons, and to formulate their position to be delivered to the government.'

Borovikov believes accession will have immediate results. 'My view is that the benefits will be significant already in the short-run, provided that Russia complies with its commitments and makes sure its business is aware of all advantages of the WTO,' he comments.

Russia's accession will be advantageous for both Russian exporters and foreign investors, according to Sergei Lapin, a partner at Nadmitov Ivanov & Partners. 'Apart from the widely discussed but relatively modest import tariff reductions on various products, it will give Russian exporters, subject to restrictions imposed by Russia's trading partners, a chance to contest those restrictions both on the domestic and



WTO levels,' he notes.

In Lapin's opinion, this will also help open up the Russian market to foreign service providers across a range of sectors and duly 'increase domestic competition; eventually [this] should become beneficial to the consumers,' he says.

This development does however highlight the delay in the US Congress appealing the Jackson-Vanik accord, a Soviet-era trade sanction whose continued imposition on Russia stops it from enjoying permanent normal trade relations (PNTR) with the US. 'Russia is now a member of the WTO and it still grants most favoured nation (MFN) tariffs to US goods, but it is true that US companies do not benefit from the other WTO commitments of Russia,' Borovikov explains. 'I believe US business should handle these issues in the most expeditious way and leave no space for any worsening of economic relations between the two countries.'

It has long been hoped that Russia's entry will help improve the rule of law in the country. 'Firstly, when entering the WTO, Russia gave a number of commitments with respect to transparency of legislation affecting international trade and its privatisation programme,' comments Lapin. 'Secondly, as a result of entry

negotiations, Russia gave a commitment to enter into negotiations on accession to the WTO Government Procurement Agreement, which has quite strict rules against corrupt practices – one of the major problems in Russia.

Finally, among those WTO Agreements which enter into force immediately with respect to Russia are Sanitary and Phytosanitary (SPS) and Technical Barriers to Trade (TBT) Agreements, as well as the Agreement on Customs Valuation, which are also aimed at reducing corruption.'

'One of Russia's main goals of accession was to create a business climate attractive to domestic and foreign investors,' Borovikov notes. 'Without joining the convention [Russia ratified the OECD convention on combating bribery in January 2012], and most importantly implementing it, Russia will not achieve the goal in question and WTO accession will lose its value. Another important front for improvements in Russia is business law, particularly competition law and practice, which still contain ambiguous provisions that negatively affect domestic and foreign investors' decision-making to invest into Russia.'

Read the full story at tinyurl.com/RussiaWTO.

Ground-breaking IBA survey on cross-border legal services



Work on the IBA's survey on cross-border legal services is proceeding well according to IBA President, Akira Kawamura.

The survey, undertaken by the IBA's International Trade in Legal Services Committee, will begin to fill the knowledge gap in relation to the current status of international legal practice and to create an internet-accessible database of the relevant rules in a variety of jurisdictions, according to Committee Chair, Hans-Jürgen Hellwig.

The Committee received an initial report from the project leader, Alison Hook, at its recent retreat in The Hague. She noted that the results from the detailed survey, covering 42 jurisdictions, told us that there is growing interest in the topic among lawyers in private practice, in addition to governments and the World Trade Organisation. 'That interest is likely to increase not only with the renewed focus in Geneva on services trade but also due to the growing understanding amongst governments around the world of the role that services, and professional services in particular, play in economic growth,' Ms Hook said.

As a number of IBA resolutions have recognised, as economies have become more global in outlook, the demand for global cross-border legal services has increased. The IBA has played a leading role in providing guidance for the responsible delivery of cross-border legal services, including through its:

- Statement of General Principles for the Establishment and Regulation of Foreign Lawyers (1998) – see tinyurl.com/RegulationForeignLawyers-1998;
- Standards and Criteria for Recognition of Qualifications of Lawyers (2001) – tinyurl.com/QualificationsLawyers-2001;
- Resolution in Support of System of Terminology for Legal Services (2003) – tinyurl.com/TerminologyLegalServices-2003; and
- Transfer of Skills and Liberalization of Trade in Legal Practices (2008) – tinyurl.com/TradeLegalPractices-2008.

The President also welcomed the Committee's decision to update and re-issue its GATS Handbook (see tinyurl.com/IBAGATSHandbook) – a practical guide for Bars on the requirements of the General Agreement on Trade in Services as it relates to the legal services sector – and Dr Hellwig thanked Professor Laurel Terry for again agreeing to take on that task.



IBA Legalbrief Africa reaches tenth anniversary milestone

This year marks a decade of publication of *IBA Legalbrief Africa* – the innovative electronic news diary that delivers, free and direct to a subscriber's inbox, a succinct weekly round-up of news on Africa, reviews of African nations' draft legislation, and legal judgements passed across the African continent.

The men who made the project possible – Tim Hughes, IBA Deputy Executive Director, and journalist and respected political commentator, William Saunderson-Meyer – explain, in two articles, how and why a newsletter that has become such an important tool for the legal profession and Africa watchers across the world was born. On the *Legalbrief Africa* website (see tinyurl.com/LegalbriefAfrica), they outline how quickly an idea became a vibrant reality. Mr Hughes describes the product as part of the 'drive towards stronger rule of justice and law, served by a thriving, connected, thoroughly well-informed community of African – and pro-African – lawyers.'

Under the benign stewardship of publishers Juta and with funding support from the Open Society Initiative of Southern Africa, *IBA Legalbrief Africa* continues to flourish.

Read the following articles on *Legalbrief Africa*:

- 'An idea was born...' by William Saunderson-Meyer at tinyurl.com/LegalbriefAfrica10-beginnings.
- 'Striving for justice and law' by Tim Hughes at tinyurl.com/LegalbriefAfrica10-striving.

Discontent spreads: EU relations with Hungary, Romania and Bulgaria strained

POLLY BOTSFORD



Political relations are looking unsettled between the EU and its member states outside the eurozone, particularly with some of the recent joiners, Hungary, Romania and Bulgaria.

Hungary is the subject of infringement proceedings brought by the EU for a range of breaches of EU law (such as the forced early retirement of judges – see Hungary – IBAHRI fact-finding report in Human Rights News, page 11) and the Council of Europe's constitutional branch, the Venice Commission, has raised a number of concerns over the country's re-written constitution. In response Prime Minister Viktor Orban addressed a rally in Budapest where he accused the EU of treating it like 'a colony' and said he refused to 'live according to the commands of foreign powers'.

Meanwhile, Romania and Bulgaria are embroiled in an almost permanent stand-off with the EU over gaining Schengen status – permitting free movement between those states. Originally the EU had required them to meet certain technical standards but, once they had, they were still refused entry because there were reservations, mainly from the Dutch, over corruption and organised crime. In retaliation, governments in these countries accused the EU of making up the rules as they went along – and tried

to stop the import of tulips.

Heated sentiment is not confined to national leaders. Romania and Bulgaria witnessed widespread protest against EU-driven austerity measures, particularly when the fiscal treaty was signed earlier in the year, unions protested on the streets of Bucharest.

Yet much of this sentiment has more to do with domestic issues than deep-seated antipathy to the EU. In Bulgaria and Romania, there is actually considerable support for the EU: a Eurobarometer survey from December 2011 showed that Bulgarians, more than any other nation, trust the EU, and Romania is the third most trusting.

Instead, leaders use anti-EU rhetoric to cover up the incompetence of their own administrations whilst the protestors reserve their most virulent frustration for their own politicians.

In Romania, where political instability has been the norm (in April, another new government was introduced after the last one only lasted 76 days) successive politicians promised to deliver Schengen by cleaning up the previous administrations' acts and then failed to do so. Ruben Zaiotti, a blogger for the website www.schengenalia.com and Assistant Professor of Political Science at Dalhousie University in Canada, says: 'the failure to deliver Schengen to the electorate is a huge embarrassment to politicians and so

it is easier to blame the EU than take responsibility.'

Nowhere is this diversionary tactic more used than in Hungary where Orban regularly sounds the populist horn. Péter Köves, senior partner at Budapest-based law firm, Lakatos, Köves és Társai Ügyvédi, and a member of the IBA's European Regional Forum, explains: 'Orban once talked about "the peacock dance" that he does with the EU and how the problems that we now have are caused by the crisis and nothing to do with mismanagement on his part.'

The rhetoric denies the fact that these countries need the EU, as a market for their exports and for hand-outs. Many within civil society in these countries are concerned about the deterioration of democracy and human rights since accession to the EU as authoritarian rule re-emerges (such as in Hungary) or as corruption intensifies (according to Transparency International's rankings, Bulgaria has become more corrupt in recent years). They want the EU to take a tougher stance against recalcitrant member states.

Krasimir Kanev, chair of the human rights organisation, the Bulgarian Helsinki Committee, says: 'the threat to democracy and human rights has happened since accession to the EU. Pre-accession, these countries had to behave and they were trying to meet certain conditions and were being monitored. Now that we are in, they say, we can go back to our old ways.'

Kanev argues that the moment may have been lost and that there is little that the EU can do now. He may be right – not just because member states are reluctant to interfere on the internal affairs of their neighbours but because the EU has, right now, far bigger and more immediate problems to address.

Read the full story at tinyurl.com/DiscontentEUFringes.

Human Rights News

A tough first year for South Sudan

TOM BLASS

In August, a little over a year after South Sudan's declaration of independence from the North, the two Sudans tentatively agreed a deal that might just ensure that the newly established Nation reaches its second birthday.

Professor Steven Chan, OBE, an Africa specialist and academic at the School of Oriental and African Studies (SOAS) in London, has been closely following South Sudan's baby steps from its declaration of independence in July 2011. He describes progress as a 'mixed bag... as the international community always knew it would be,' and points to continuing issues in the country, such as lack of transparency, lack of infrastructure, and the continued militarised footing of the South Sudanese government.

Unfortunately, the sharing of oil resources between South Sudan (which controls production) and Sudan (which controls transit) has been far from harmonious. In January 2012, a combination of skirmishes in the border areas, and wildly differing notions as to the price the South should pay the North for transiting oil to international markets, led to the South closing down production, to the economic detriment of both parties.

Under the terms of the early August agreement, a price for oil transit at just under \$10 per barrel was agreed and Juba is to pay Khartoum around \$3bn as a one-off payment to compensate for unpaid transit fees to date. The agreement is some way from being sealed: the two sides are also seeking to reach a deal on border security.

'There are a number of militia leaders who, under the terms of the peace deal, were not included within South Sudan and have been effectively left to hang out to dry in the border areas of the North. That's certainly a cause of tension,' Chan told *Global Insight*, adding that within South Sudan



itself, 'political leaders' have built constituencies based '...on violence and cattle rustling,' with long term implications for security and political inclusion.

Despite the near-overwhelming political and economic obstacles presented to South Sudan, the United Nations Development Program (UNDP) has praised the moderate progress that has been made, not just in the past year but since the commencement of the Comprehensive Peace Agreement brokered in 2005. Singled out in the UNDP's report are the establishment of government ministries and state governments, the tripling in the number of children attending primary school, and the construction of up to 6,000 kilometres of roads.

Nonetheless, as the UNDP also points out, the remaining challenges are significant. Pressing development needs, corruption and human rights abuses all require careful attention.

South Sudan does enjoy substantial championing by the international community, which worked hard to secure its existence. There are political reasons for this at play; the United States maintains the deep suspicions of

Khartoum that it has long harboured. But support for the South will be corroded if Juba fails to tackle its governance.

This it knows. In June, the country's Stetson-wearing President Salva Kiir sent a letter to 75 serving and former government employees asking them to return a total of \$4bn, which, he said, they had stolen. Juba's parliament suspended accused serving officials pending resolution of the accusations. The uncompromising letter read:

'We fought for freedom, justice and equality... Yet once we got to power, we forgot what we fought for and began to enrich ourselves instead of our people.'

The optimism attendant at South Sudan's birth has yet to be exhausted, but will soon be looking for a source of renewal. Chan believes the future is in the balance: 'There are some very serious people in the government who are working hard to overcome difficulties, which anyone would find extremely challenging. But there are also greedy opportunists with guns.'

Read the full story at tinyurl.com/SouthSudan1.

Ocampo: Libya has the right to try Gaddafi

REBECCA LOWE

Libya should be granted the right to try Saif al-Islam Gaddafi in domestic courts, the former chief prosecutor of the International Criminal Court (ICC) has said – despite the fact that the country is yet to convince the Court that it can grant the former dictator's son a fair trial. Under Libyan law, Gaddafi could face execution if found guilty.

Gaddafi and former intelligence chief Abdullah al-Senussi are wanted by the ICC for two counts of crimes against humanity – murder and persecution – committed since the start of the revolution in February 2011. Gaddafi is being held by the Zintan fighters who captured him, while al-Senussi was recently extradited back to Libya from Mauritania, where he fled last September. In defiance of the Hague court's judicial process, Libyan officials originally announced a September trial date for Gaddafi, but have postponed the trial following the arrest of al-Senussi, who they hope can provide further information.

Because a warrant was issued by the ICC in 2011, the Libyan authorities are obliged to provide evidence to the ICC Pre-Trial Chamber to show why they should have jurisdiction. Under ICC rules, the Libyan authorities need to prove the existence of a national investigation, and show that they are both willing and able to carry out a trial 'genuinely'.

The Chamber has confirmed that it is waiting for further information from Libya and is yet to make a decision.

Former chief prosecutor Luis Moreno Ocampo concedes that Libya needs permission from the ICC judges, but believes the Libyans have clear jurisdiction over the case. 'The ICC is not an appeal court and the primacy is with Libya, the national system,' he says, speaking exclusively to *IBA Global Insight*. 'And this is what the ICC should decide.'

He adds: 'The new government wants to show to the world that they can do justice here. For them, it is a matter of pride and dignity that they can conduct this themselves.'



Saif al-Islam Gaddafi

Ocampo has previously been criticised for bias in favour of the Libyan authorities.

Complementarity and due process

Under the ICC's principle of complementarity, the Court can only accept jurisdiction when a Member State is unable or unwilling to do so itself.

Richard Goldstone, former chief prosecutor of the International Criminal Tribunal of the former Yugoslavia and the International Criminal Tribunal for Rwanda, is not convinced that the country is ready to hold a trial. He points out that announcing a trial before a decision has been made by the ICC is in violation of the Security Council resolution that referred the situation to the Court. 'From what I understand, the Libyans are in no position to afford Gaddafi a fair trial,' he says. 'The absence of a defence counsel is just one part of this.'

The threshold for what constitutes a fair trial in Libya is up to the discretion of the ICC judges. There are no guidelines in the Rome Statute, which brought the ICC into being, outlining what is acceptable. The only regulations concerning due process are associated with the prevention of immunity – when a state chooses to shield the accused – and not with potential violations that may make it easier to convict.

In its report on the situation in Libya on 4 June 2012, ICC Pre-Trial Chamber I

states: 'The view expressed repeatedly [during Rome Statute negotiations] was that the ICC should not function as a court of appeal on national decisions based on alleged deviations from applicable human rights norms [...]. Most delegates were concerned with sham or ineffective proceedings and thought that the problem of overly harsh national proceedings was one that could be taken up with a human rights body, not the ICC.'

The reason for this, Ocampo says, was to avoid complications from a clash of different legal systems. What might be acceptable in one system, such as having anonymous witnesses, might be unacceptable in another. 'A fair trial is important and there should be some basic conditions, but when you go further it is more complicated. The main point is that people in power are killing with impunity and nothing happens. That is the incredible change we are seeing. A new rule of law is starting in the world.'

International law experts insist, however, that the ICC must consider recognised due process standards when making decisions on jurisdiction. 'There are basic fair trial standards at an international level,' says David Michael Crane, founding chief prosecutor of the Special Court for Sierra Leone. 'Openness, fairness and an opportunity to be heard and represented are fundamental.'

To prove its case to the Chamber, Libya must show that its national investigation is covering 'substantially the same conduct' as alleged in the proceedings before the ICC. The charges do not need to have the same label as those before the Court, and there is no requirement for states to adopt legislation incorporating international crimes into national law.

There are also no rules on sentencing, and national courts – unlike the ICC – have the right to impose the death penalty. Under Libyan law, both Gaddafi and al-Senussi could face execution if found guilty.

Read the full story at tinyurl.com/GaddafiICC.

IBAHRI publishes report on Malawi's road to recovery and holds high-level discussion on progress and challenges



In a report released 3 September 2012, the IBAHRI concluded that the state of the rule of law in Malawi is 'on the road to recovery' but that some important issues still need to be remedied in order for Malawi to fully restore the rule of law. To mark the publication of *Rule of Law in Malawi: The Road to Recovery*, the IBAHRI hosted a high-level panel discussion in Lilongwe, Malawi.

The delegation was mandated to investigate serious concerns regarding violations of the rule of law, particularly the separation of powers, the Executive's disregard for the Constitution, and lack of

observance for basic human rights. Since the delegation's visit to Malawi and the change in Presidency, Malawi has made significant progress in respect for the rule of law. Nonetheless, the IBAHRI report highlights further challenges and makes recommendations to continue on the journey of recovery.

A full list of findings and recommendations is available via the IBA website at tinyurl.com/MalawiReport2012.

To read more about the panel discussion visit tinyurl.com/MalawiReport2012Panel.

Hungary: IBAHRI fact-finding report highlights concern over the threat to the independence of the judiciary and rule of law

In a report published on 10 September 2012 – *Courting Controversy: the Impact of the Recent Reforms on the Independence of the Judiciary and the Rule of Law in Hungary* – the IBAHRI called on the Government of Hungary to respect the decision of the country's Constitutional Court and to repeal the new legislative provisions that lowered the mandatory age of retirement for judges to 62 years, forcing the immediate retirement of more than 270 justices.

The report contains the findings and recommendations of the high-level IBAHRI delegation's fact-finding visit to Hungary to examine the impact of a series of controversial legislative reforms, including a new Constitution, which came into force at the beginning of 2012. At the end of its visit, in March 2012, the delegation concluded that although the rationale behind the reforms as presented by the Hungarian government – to make the operation of the judicial system faster and more efficient – is to be welcomed, several of the specific legislative solutions as they then stood, seriously threatened the institutional guarantees of judicial independence. Subsequent to the delegation's visit, the Hungarian Parliament passed legislation, in July 2012, addressing some of the main concerns regarding the independence of the judiciary, particularly in relation to the sweeping powers of the President of the newly-created National Judicial Office. While, generally, the legislative amendments introduced are considered improvements to some of the worst aspects of the reforms, the IBAHRI stresses that significant areas of concern remain.

A full list of findings and recommendations is available via the IBA website at tinyurl.com/HungaryReport2012.

IBAHRI to participate in the Regional Congress on the Death Penalty in Morocco

The IBAHRI will hold a seminar for the Moroccan legal profession, entitled Lawyers and the abolition of the death penalty in Morocco, as part of the as part of the Regional Congress on the death penalty. The IBAHRI aims to engage the legal profession in efforts to abolish the death penalty in law in Morocco. The country is one of five Arab states which have observed an unofficial moratorium on executions for over a decade with the last execution in Morocco taking place in 1993. Morocco has a strong abolitionist movement, mostly led by the Moroccan Coalition Against the Death Penalty. Established in 2003, the Moroccan coalition has seven member organisations, including the Moroccan Bar Association.

The regional congress against the death penalty will take place on 18–20 October 2012 at the Moroccan National Library. The Congress is organised by the abolitionist organisation Ensemble Contre la Peine de Mort (ECPM), in partnership with the Organisation Marocaine des Droits de l'Homme, the International Bar Association's Human Rights Institute (IBAHRI) and in association with the Coalition Marocaine Contre la Peine de Mort (CMCPM).

If you wish to attend the seminar, or the Regional Congress, it is necessary to register. Registration is free but compulsory. Please visit the website at tinyurl.com/RabatDeathPenalty. If you would like any more information about the IBAHRI seminar please contact louise.ball@int-bar.org or shirley.pouget@int-bar.org.



IBAHRI Director, Dr Phillip Tahmindjis, receives the Member of the Order of Australia Award

The IBAHRI congratulates Dr Phillip Tahmindjis, Director of the Institute, on being awarded the Member of the Order of Australia (AM) for service to the international community, and to the law, as a contributor and advocate for the promotion and protection of human rights.

Dr Tahmindjis, who has worked determinedly throughout his career on human rights, justice and rule of law issues, was conferred with Order of Australia on 21 September 2012 at Government House, Canberra. He has considerable experience in capacity building for bar associations, in particular, in Afghanistan, Swaziland, and East Timor. He has also undertaken human rights training for lawyers in Iraq, Libya, Palestine, and the Former Yugoslavia, and has compiled a Human Rights Training Manual in conjunction with the UN High Commission for Human Rights. He has conducted human rights fact finding missions to Russia, Pakistan, and Syria, and coordinated the project to establish global guidelines for human rights fact finding. He is also a trustee of the Southern Africa Litigation Centre.



Dr Tahmindjis has been a consultant to private industry and government with respect to the implementation of human rights (particularly with respect to anti-discrimination measures) and is the editor of four books and the author of several articles in this area, including *Sexuality and Human Rights: A Global Overview*.

He has held executive positions in several organisations, including President of the Queensland branch of Amnesty International, Trustee of

the Queensland AIDS Council, and Vice-President of the International Lesbian and Gay Lawyers Association. He has been awarded the Queensland Premier's Citation for contributions to law reform, the Queensland Equal Opportunity Practitioners' Association Prize for compiling the International Guidelines for Non-Discrimination in Legal Practice, and the QUT Prize for Outstanding Professional Achievement for his consultancy work in human rights.

IBAHRI releases film on human rights violations of young offenders in Brazil



Wilson Tafner

As part of its ongoing combating torture project in Brazil, the IBAHRI has released a short film entitled *The Forgotten: FEBEM, Young Offenders and Human Rights Violations in Brazil*. FEBEM is a former young offenders' prison in São Paulo that, in the 1990s, saw violent rebellions caused by institutionalised torture and ill-treatment. Prosecutor Wilson Tafner explains the story of FEBEM and how the legal profession and civil society came together to address these issues. The film includes images of a graphic nature that may be disturbing to some viewers.



To watch the film go to:
tinyurl.com/FEBEMFilm.



What backers want

SKIP KALTENHEUSER

Even as the remarkable wealth of the 400 richest Americans continues its astonishing annual increase – 13 per cent this year – those funding the Presidential campaigns still want more in return for their support.

This is the season of influence, as candidates race toward election day, 6 November 2012, seeking the mother's milk of politics to get them through the home stretch. It's a time to reflect on what the big money is seeking for the astounding bets being placed on this year's campaigns in the wake of the *Citizens United* case, where the Supreme Court endorsed the disappearance of practical limits on contributions.

One might assume there is no easy, short answer to this question; the high rollers do indeed have a range of interests. No, there is one very short answer. They want more. They're getting used to it. Those on the new *Forbes* magazine list of the 400 richest Americans saw their combined net worth increase by 13 per cent since last year. Not bad for tough times.

Consider multinational companies and one lever of influence some contributors covet. It's a safe bet more than a few would like to damp down the zeal of government investigations, including those of the US Senate.

In a 20 September 2012 hearing, The US Senate Permanent Subcommittee on Investigations focused on tax loopholes allowing US-based multinationals to dodge billions of dollars in taxes by shifting profits to low-tax jurisdictions overseas. According

to the subcommittee's chairman, Senator Carl Levin (D-Michigan), they also use legal loopholes such as transfer pricing to avoid taxes on repatriated income that should be subject to taxation. Billions in US taxes were lost in relation to two major US companies. While not determined to be illegal, Levin considers such manoeuvres as contrary to the intent of US tax policy, and rough on a country in need of revenue.

The Congressional Research Service puts the share of corporate income taxes for federal tax revenue in 2009 at 8.9 per cent, a drop from 32.1 per cent in 1952. Conversely, payroll taxes as a share of federal tax revenue rose from 9.7 per cent to 40 per cent. These types of loopholes riddle the tax code, and the cumulative impact on US deficits and on the huge sums the US must pay in interest on the national debt are undeniable.

The favours sought by major campaign contributors are often subtle, flying under the radar of most of the citizenry and usually of most media. For example, during this lively election season most eyes are on the races. Little attention has been paid to a recently proposed Senate bill, S 3468, championed by Senators Rob Portman, (R-Ohio); Mark Warner, (D-Virginia); and Susan Collins, (R-Maine). According to the Consumer Federation

of America, the arcane bill imposes duplicative and time-consuming requirements on independent agencies to conduct cost-benefit analyses of proposed protections. The targets of such regulations include predatory financial schemes, dangerous consumer products, polluters and anti-competitive practices.

Cost-benefit analysis is already used by these agencies under various laws tailored to them. The proposed bill, the Independent Agency Regulatory Analysis Act of 2012, is heavily backed by the Business Roundtable. It would authorise the President to issue executive orders requiring independent agencies to conduct 13 additional cost-benefit analyses. This is wonderful fodder for legal challenges seeking to delay and derail the activities of agencies including the Consumer Financial Protection Bureau, the Consumer Product Safety Commission, the Securities and Exchange Commission, the National Labor Review Board, the Federal Trade Commission, the Environmental Protection Agency, the Federal Reserve Board and many others. Additional political pressures would be brought by requiring the Office of Information and Regulatory Affairs of the Office of Management and Budget to conduct detailed review not just of rules but of significant policies. In other words, it would take the independence out of independent agencies.

Hill insiders note that this bill has the potential to cripple the regulatory reforms from an already fractured and weakened Dodd-Frank finance reform bill, which has so far only managed to implement about 100 hard-fought rules. Anyone doubting the desire to derail agencies pushing oversight of the finance industry has only to consider that Consumer Financial Protection Board chief Richard Cordray was just hauled before a Congressional committee, the 27th Congressional appearance by a member of his young agency. Cordray had to be placed in office via a recess appointment because Republicans refused to confirm an agency head. While he was on the pillory, Republicans called him 'not a legitimate appointee,' leaving 'a big gray legal cloud hanging over [his] agency.' Funded not by Congressional appropriations but by Federal Reserve fees, Cordray's budget was called 'a slush fund of half a billion dollars.' The desire of Republicans to vaporise the CFPB is not well concealed.

In the oddly coincidental world of Washington, a key Senate staffer shepherding S 3468 hails from one of the law firms at the vanguard of court challenges to financial regulations. So it goes with the revolving door.

Not far down the road from the effort to hamstring independent agencies is the desire to avoid prosecution for misdeeds, as opposed to civil penalty settlements that sound significant but aren't to the world's biggest banks. But prosecution remains a recurring concern in the finance sector. Jaws dropped all over town when the Justice Department announced it wasn't going to pursue Goldman Sachs. There is widespread belief that regulatory

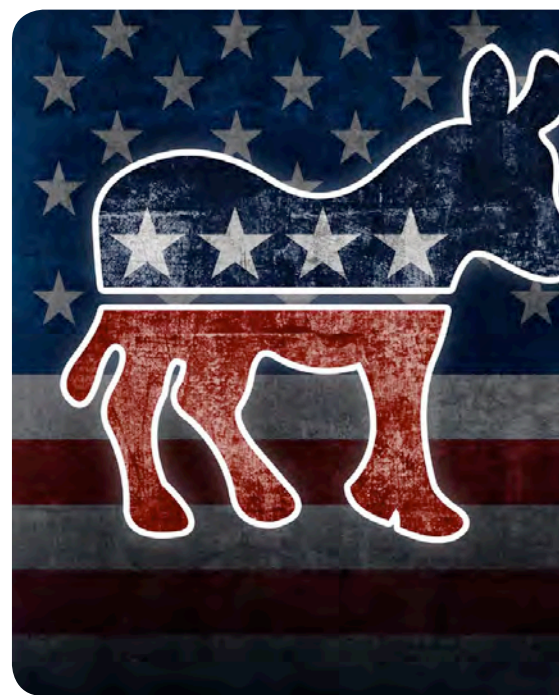
capture by the big financial institutions, who are among the major contributors to campaigns, will remain pervasive regardless of which political party is in charge.

Among those expressing disappointment in the lack of robust pursuit of the financial sector's misdeeds by the Obama Administration is Jeff Connaughton. A former investment banker, political operative and successful lobbyist, Connaughton joined Senator Ted Kaufman as his chief of staff when Kaufman was appointed to fill out the two years remaining in Joe Biden's Senate term after Biden ascended into the vice-presidency. Kaufman approached his job like one of Eliot Ness's untouchables, determining not to run for reelection and to let the chips fall where they may. Connaughton, who recently authored the book *The Payoff: Why Wall Street Always Wins*, warned to Kaufman's agenda, including holding Wall Street

'The Congressional Research Service puts the share of corporate income taxes for federal tax revenue in 2009 at 8.9 per cent, a drop from 32.1 per cent in 1952. Conversely, payroll taxes as a share of federal tax revenue rose from 9.7 per cent to 40 per cent'

execs accountable for securities fraud, breaking up too-big-to-fail megabanks and other measures to curb destabilising risk-taking by Wall Street.

In September 2009, over eight months into the Obama Administration, Connaughton joined Kaufman in a meeting with senior Justice Department officials. He walked away feeling that instead of being 'aggressive, systematic and creative,' the department's response to Wall Street's misdeeds was 'passive, desultory and decentralized.' Connaughton believes the multiple task forces that have been announced remain under-staffed and non-threatening. He believes the opportunity to draw bright lines, such as tighter leverage limits sought by Kaufman, were lost, in part due to an opposing alliance of the Obama Treasury Department and Wall Street



banks. Among Connaughton's examples of how the levers of influence work is the difficulty of implementing Paul Volcker's rule that would ban proprietary trading by banks. Wall Street's legions sought multiple loopholes and exceptions, and now argue the whole approach should be scrapped because of the complexity they built into it.

Wall Street, which gave President Obama great support during the 2008 campaign, broke overwhelmingly in support of Mitt Romney in 2012, with many bankers expressing displeasure over Obama's earlier criticism of their crowd. Whether there will be gamblers' remorse if Obama continues to pull ahead in the swing states, with the cash spigots starting to redirect, remains to be seen. In any case, Connaughton wonders how either party can attack the other as too pro-Wall Street with credibility. If Obama gets rehired in November, many will watch to see if he'll come out swinging, perhaps with a bit of payback, with tough regulators. Or, will politicians seeking support in 2016 hear the Wall Street sirens' call, and manage to keep regulators and prosecutors a soft parade.

Connaughton says the Left, including the Occupy movement, and the Right, including the Tea Party, need to understand this is a practical issue they should come together to address. Long periods of financial stability can only be brought by structural reforms, says Connaughton, but the power of the finance sector's money is keeping that from happening. Connaughton bets that, without more significant reforms, another financial crisis is ensured. The political opportunity for real reforms may have to wait until that calamity.

While most of the big money behind Super PACs came out in early support of Romney and the Republicans, one of the best illustrations of

how campaign money works its magic is Jeffrey Katzenberg, CEO of DreamWorks Animation. Katzenberg was a major donor and bundler for President Obama's 2008 campaign, and a prolific contributor to Democratic candidates. In 2012, his support includes a couple million dollars to Priorities USA, a Super PAC eventually embraced by President Obama. According to Bill Allison of the Sunlight Foundation, two weeks after a February big-ticket fundraiser for President Obama at his home, Katzenberg was a guest at a 14 February luncheon hosted for Xi Jinping, China's vice-president, by Vice-President Joe Biden and Secretary of State Hillary Clinton. Depending on how intrigues in China are resolved, Xi is presumed by many to be China's heir-apparent.

Katzenberg, as he told the *Financial Times*, sought Xi's personal approval for a joint venture with three state-owned media firms, toward creating a Chinese studio. There were film-related trade dispute issues before the WTO that Biden was negotiating, consulting with Katzenberg and Robert Iger, CEO for Walt Disney. Long story short: a trade deal emerged that Hollywood could happily live with, and Katzenberg also announced his joint venture, Oriental Dreamworks. Producing films in China, the company isn't subject to the same quotas US studios face. Katzenberg is well positioned to take advantage of a film market predicted to become the world's largest box office.

Win-win for Katzenberg, but how many citizens, or competing businesses, could dream of such helpful access outside the sphere of big-money politics?

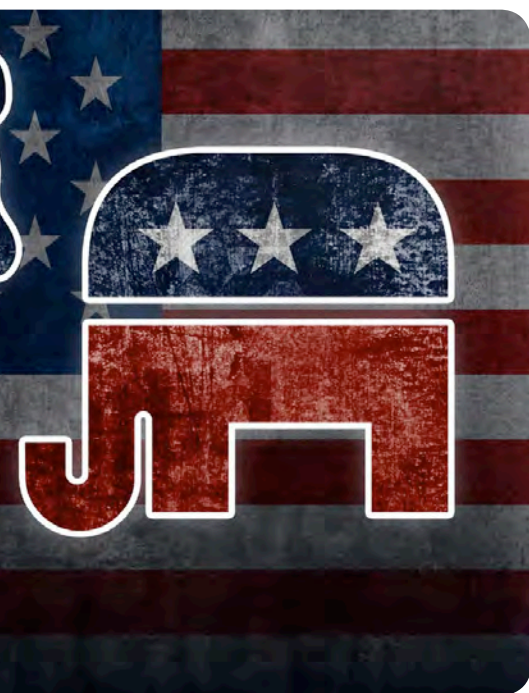
It's too early to know all the thinly veiled quid pro quos until some time after the election, says Dale Eisman of Common Cause. But past patterns with contributors can be discerned, and they are often predictive. The big exception, says Melanie Sloan, Executive Director of Citizens for Responsibility and Ethics in Washington, is that so much of the money in this post-*Citizens United* election is secret and much of it will remain so. She holds out hope that whistleblowers will start surfacing to reveal contributions that can be tied back to legislative action.

Allison notes that special interests tend to favour incumbents, many of whom companies have business with before now. This gives incumbents a huge fundraising advantage. If the incumbents lose, contributors can always give to the winners' fundraisers later. The rest of government – the agencies and departments – are more cloaked, as the favours asked, and the askers often don't surface.

One discernible Super Pac impact is boosting broadcasters and other media. Overall, \$6bn is predicted to be spent on presidential and congressional campaigns this election. Super Pac ads pay full freight instead of a candidate discount. Is there a conflict of interest when reporting on campaign finance and reform efforts? The National Association of Broadcasters has fought efforts to reveal ad expenditures.

Anything can happen once the big money starts soaking television sets with advertising that amounts to repetitive brainwashing. Ironical, then, that the presidential election may turn on Mitt Romney's pitch to donors in Boca Raton in which he referred to those dependent on government who think themselves victims, refusing to take responsibility for their lives. In so doing, he appeared to be writing off nearly half of Americans as voting, come hell or highwater for President Obama, – and all captured on video taken on the sly. ☒

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Democratising

The drug trade in Latin America is undergoing a 'democratisation'.
This is not a good thing.

JEREMY MCDERMOTT
MEDELLIN

There are no longer only a few mega-cartels controlling the business, and the United States can no longer dictate how the war on drugs is to be fought. The bodies are piling up as criminal groups, from street gangs to transnational criminal organisations, fight for a share of the trade, as drug-fuelled violence spreads across the whole region. Law enforcement and the justice system are struggling to keep up, with impunity levels for homicides as high as 90 per cent.

This 'democratisation' has seen an atomisation of the criminal groups that are involved in every link of the drug trade. The fact that most of these links are now often paid in product, rather than cash, has led to an explosion in drug consumption

in producer and transit nations alike, while consumption levels in the principal market of the US has stabilised at around 300 tonnes per annum. Latin America has become a victim of US 'success'. More effective US interdiction and the dismantling of many powerful drug cartels has led criminals to sell drugs at home, creating a new and wholly unpredictable wave of violence, feeding some of the highest murder rates in the world. Corrupt and inefficient police and judiciary are unable to cope. New markets have sprung up. The UK is now a major consumer of cocaine, with an appetite estimated at almost 50 tonnes a year.

In the 1980s the drug war was fought principally in Colombia and the US, with the

'If the consumption of drugs cannot be limited, then decision-makers must seek more solutions – including market alternatives – in order to reduce the astronomical earnings of criminal organisations'

Felipe Calderon
Mexican President

the drug trade



Medellin and Cali cartels controlling all the links in the drug chain, from the coca crops right up to cocaine distribution in the US. In the 1990s the Colombians began to pay their Mexican transporters with a percentage of the drug consignments instead of cash, so the latter developed their own structures and distribution networks, while Mexican domestic consumption

are no longer any monolithic and integrated structures that answer to one leader, not even the Sinaloa cartel under the world's most wanted man, Joaquin Guzman, alias 'El Chapo' ('Shorty' in English), who is often compared to Escobar. The drug trade is a hydra. Behead the beast, as with the killing of Escobar, and it will spawn new heads immediately.

'Honduras now has the highest murder rate in the world, at 86 per 100,000 of the population, as Mexican transnational criminal organisations (TCOs) set up shop and support local criminal gangs which are increasing in sophistication'

also began to climb. By 2008 the Mexican cartels, or more formally, Mexican transnational criminal organisations (TCOs), had eclipsed the Colombians, becoming among the most sophisticated and richest criminal syndicates in the world. The Mexicans are now the principal international suppliers of cocaine across the globe. The Mexicans and Colombians often pay their Central American transporter networks with cocaine, repeating the cycle, turning this region into the most dangerous place on Earth, as consumption increases and local criminal gangs make the leap into the big leagues as TCOs.

The pioneer in the cocaine trade was Pablo Escobar of the Medellin cartel. He not only controlled the entire process from drug crops to street distribution, but created the first mega-organisation dedicated to drug trafficking. Many traffickers, not just those operating in his home town of Medellin, were part of the cartel. Escobar would pool shipments from different cartel members and 'guarantee' not only delivery to the US, but that each supplier would get paid back in Colombia. Escobar did not allow his cartel members to consume their product (although he was an avid consumer of marijuana, which helped reinforce his natural paranoia). There was no local distribution of cocaine or its derivatives, as all product was exported. This was a model that the Cali cartel replicated on the other side of Colombia and until 1995, these two giant organisations controlled much of the cocaine trade. But with the killing of Escobar on a Medellin rooftop in 1993 and the arrest of the Rodríguez Orejuela brothers in Cali in 1995, the drug trade changed irrevocably. While the Mexican cartels now rival, if not surpass their Colombian predecessors in wealth and ferocity, there

Fragmenting organised crime

The fragmentation of the Colombian cartels has continued and this trend is being replicated in Mexico. The second generation of drug cartels in Colombia, born in the late 1990s, were federations like that of Norte Del Valle. Many different structures or 'baby cartels' sprung up, specialising in different links in the drug chain. Some were responsible for buying coca base in Colombia, Bolivia and Peru. Others set up crystallising laboratories to produce cocaine of 95 per cent purity. Then there were the transporters, by land, sea and air, who moved drug shipments in ever more innovative ways. Distribution in the US became the preserve of local gangs, including Latino street gangs, Crips, Dominicans, Aryan Brotherhood, and so on.

This fragmentation provided law enforcement and the justice system with a new set of challenges. Now they had to build up intelligence and cases against dozens of organisations. The removal of one did little or nothing to impede the flow of drugs, as another group, specialising in the same link in the chain, quickly stepped up to replace it.

The modern face of organised crime can be seen today in Colombia. Apart from the Marxist rebels of the Revolutionary Armed Forces of Colombia (FARC) and their smaller cousins, the National Liberation Army (ELN), there are no hierarchical structures that handle the drug trade. These guerrilla groups, 48 years into their fight to overthrow the state and impose communist regimes, have transformed from armed peasants in remote corners of the country, into heavily armed private armies with international connections, thanks to earnings from cocaine. Today, Colombian organised crime is all about networks with disparate elements, be they rebels, former cartel members, right-wing paramilitaries or new-generation capos,

all combining efforts on an ad hoc basis to put together drug shipments and export. Again, the police are scrambling to respond, now having to investigate individuals who form part of ever shifting and mutating criminal networks.

In Mexico the same fragmentation is happening, and is the main reason for the constant decapitations and mutilations that form the day-to-day horrors of the fight between Mexican TCOs, for control of the movement corridors and the coveted crossing points into the US. The once-mighty Gulf cartel split after the extradition of its leader in 2007. Its military wing, made up of former Mexican Special Forces, broke away and formed the Zetas, which have easily eclipsed their progenitors to become the fastest expanding and most brutal TCO in Mexico, if not the world. The cult-like La Familia, based in the state of Michoacán, which specialised in methamphetamine production, also fragmented after its leader was killed by security forces in 2010, with various factions – foremost amongst them the so-called ‘Knights Templar’ – fighting for spoils and pushing up murder rates yet further.

Whereas the Medellin and Cali cartels concentrated exclusively on the exportation of cocaine, today’s TCOs now have a much broader criminal portfolio, including extortion,

kidnapping and human trafficking, amongst others. This is ensuring that the violence multiplies and spreads. From Colombia it has infected not only bordering nations like Venezuela (now the most violent nation in South America with a murder rate of 50 per 100,000 of the population – as a point of reference the murder rate in the UK is just over one per 100,000), Ecuador (where coca is now being sown) and regional giant Brazil; but nations as far south as Argentina. Argentina has become not only a refuge for fugitive Colombian drug lords, but a huge drug market in its own right as well as an increasingly important transit nation for cocaine shipments.

A rock and a hard place

Central America is finding itself squeezed between Colombian TCOs in the south and Mexican groups in the north. Honduras now has the highest murder rate in the world, at 86 per 100,000 of the population, as Mexican TCOs set up shop and support local criminal gangs which are increasing in sophistication. These tiny Central American nations, barely recovered from the civil wars of the 1980s and early 1990s, do not have the funds to compete with Mexican TCOs, which have economic resources in excess of many of their national defence budgets.

Organised criminal syndicates are the most agile businesses that exist. They mutate in response to changing conditions and are able to react very quickly. When President Manuel Zelaya was removed from power in 2009, almost overnight Honduras became the principal air bridge for cocaine arriving from South America. TCOs immediately took advantage of the political chaos that resulted from the coup to land aircraft with multi-ton cocaine consignments.

However, the judicial systems of Latin American nations have been extremely slow to reform and react to changing conditions. The most responsive has been the Colombian system which, thanks to US funding, has switched from an inquisitorial to a US-style accusatory system, and sought to engage in continuous reforms. While the new system has speeded up prosecution and convictions in the case of those caught red-handed, the prosecution of complicated organised crime, once handled by specialised judges, has become infinitely more complicated. A measure of the chaos of the Colombian justice system can be seen in the case of homicides, where impunity is running at around 90 per cent. Colombia relies heavily on the tool of extradition to handle high-level cases, as its courts are simply incapable of prosecuting and condemning top-level criminals, or preventing them from continuing to run their criminal empires from

‘The war on drugs is no longer the war to prevent drug shipments reaching the US. The war on drugs is now the war against domestic consumption, and each nation knows it has to shoulder that burden alone’



behind bars. Extradition is also becoming more common from Mexico – which has historically been resistant but is becoming increasingly disposed to having the US justice system take on responsibility for high-level drug cases.

Coalition of the unwilling

It was the US that invented, and led, the war on drugs. However US strategy has not only encountered increasing resistance, but now has huge holes in its front lines, as a number of Latin American nations either refuse to cooperate, or are simply doing their own thing.

1999 marked a key change in the US drug war strategy, with the focus switching from interdiction of drug shipments and the legal fight against TCOs responsible for smuggling tons of cocaine, to attacking the supply side. 'Plan Colombia' was born under President Bill Clinton, designed to eradicate drug crops in Colombia, then by far the biggest producer of coca, the raw material for cocaine. So the US

financed and trained an elite anti-narcotics brigade in the Colombian army, boosted the anti-narcotics police and engaged in the most ambitious crop-eradication programme ever seen. US funding and contractors loaded up spray planes with glyphosate chemicals and unloaded them on huge tracts of the Amazonian jungle. So far more than \$8bn has been delivered via Plan Colombia. An estimated 100,000 hectares of coca were sprayed in Colombia in 2011, with another 35,000 eradicated manually.

This has simply pushed the coca crops elsewhere. Now Peru is set to dislodge Colombia as the world's principal coca grower, prompting a renaissance of the Peruvian rebel group, the Shining Path, which was thought to have been destroyed after the arrest of its leader, Abimael Guzman, or 'Chairman Gonzalo', in 1992. Bolivia has seen its coca production increasing as well. Even the advances in Colombia are not permanent as the United Nations reports that coca production increased slightly here in 2011, the first such increase in a decade. But the number of hectares under cultivation only tells a fraction

IBA Human Rights Award winner fights for justice in Medellín

For a period in the 1980s and 90s, Medellín, capital of the Antioquia region of Colombia, held the infamous title of the most dangerous city in the world. As the seat of Pablo Escobar's narcotic empire, Medellín was the epicentre of much of Colombia's narco-fuelled violence, as the drug lord's cartel fought to maintain its control of some 80 per cent of the global cocaine market. The city's murder rate reached, at times, 250 per 100,000 inhabitants, compared to a rate in the US of roughly five per 100,000.



Ivan Velasquez

It was against this backdrop that 2011's IBA Human Rights Award winner, Ivan Velasquez, forged his career in the law, initially as a prosecutor in the Antioquia region, dealing with such events as Escobar's escape from La Catedral prison, and clashes between Los PEPE and Escobar's organisation. He went on to lead efforts to expose the parapolitical scandal in Colombian politics, which uncovered massive corruption at the heart of public life throughout the

country. Former IBA President Fernando Peláez-Pier caught up with auxiliary judge Velasquez of the criminal chamber of the Colombian Supreme Court, at the IBA's annual conference in Dubai.

Fernando Peláez-Pier: Judge, allow me to ask you, why did you choose to go down this path? Why did you decide to investigate some of the most powerful figures in the Colombian political landscape? What led you to do this?

Ivan Velasquez: The truth is that we did not seek out these investigations; rather that circumstances brought them about. After 1992 and 1993, which were crucial years in Medellín, came a peaceful period for the investigation, until I became the regional director of the public prosecutor's office in Medellín and had to confront the emergence and strengthening of paramilitary groups.

FPP: Your investigations have covered all sorts of situations: missing persons, torture, kidnapping ... and the State appears to be involved in many of these cases. To what extent does corruption penetrate, or [did it] used to penetrate Colombian public institutions?

IV: I think that unfortunately for Colombia, with regard to the paramilitary issues and more generally to drug trafficking and organised crime, in the mid-nineties, and the latter part of the 90s, there was a takeover – a seizure of the State – by organised crime, which led to situations similar to this one and which we have had to investigate.

The fact is that to date, more than 35 congressmen have been convicted for links to paramilitaries, and this demonstrates the scale of corruption within the State. It was not limited to members of congress. The jurisdiction of the Court is limited to the members of congress and to the regional governors. However, corruption has expanded to all spheres of public and private activity. It is present in the economic field, in local administration, in political relationships. In sum, corruption has

of the story. New strains of coca produce far more alkaloid (the active ingredient in cocaine) than ever before, and now coca farmers can harvest up to six crops a year from fields, where once they got three. The same growing conditions exist in Brazil, Ecuador and Venezuela. It will not be long before these nations become coca producers, rather than just transit nations for cocaine shipments.

US arrogance and the system of 'certifying' nations depending on their enthusiasm for, and participation in, the war on drugs, have created a political backlash in Latin America. Venezuela, under President Hugo Chávez, first banned US over-flights, and then in 2005 stopped working with the US Drug Enforcement Administration (DEA) altogether. Ecuador, under President Rafael Correa, shut down a US air base it had leased in the north of the country, as well as expelling the US ambassador in 2011. Neighbouring Bolivia expelled the DEA (as well as a US Ambassador) in 2008, creating yet another black hole for the US drug agency. It is no coincidence that these nations are now of key importance to the international cocaine trade.

However even close allies are deviating from the US party line when it comes to drug policy. One positive aspect of the democratisation of the drug trade has been that the US has found its prohibitionist stance and leadership of the drug war increasingly challenged. This has come not only from left-wing regimes like those of Venezuela, Bolivia and Ecuador, which regularly engage in anti-US rhetoric, but even allies like Guatemala, Colombia and Mexico.

This year the most strident call for a rethink of US drug policy came from the place you might least expect it. It was the recently elected, ex-military, President of Guatemala, Otto Perez who, despite making a strong stance on fighting crime the centrepiece of his successful election campaign, called for a debate on decriminalisation of drugs. In a balanced and considered op-ed in the *Guardian* in April this year, he argued that 'drug consumption is a public health issue that, awkwardly, has been transformed into a criminal justice problem.' He called for 'drug regulation', making comparisons with the controls placed upon tobacco and alcohol.

affected all the levels of State administration. I think that the penetration of corruption has been so strong that what has occurred is an appropriation of the State by organised crime. We are still trying to get out of this situation, because there is no doubt that corruption in Colombia is still rooted in all the public administrative sectors.

The guerrillas continue frequently to perpetrate violent attacks against the population, during conflicts or in ambushes against public authorities. The activities of drug trafficking organisations or what are now called '*bandas criminales*' (criminal gangs) are also a serious problem.

FPP: Drug trafficking organisations have decreased in number; it seems that they have drastically decreased and that they have moved to other countries such as Mexico, or Venezuela which has become an important drug transit point.

There is still the necessity to fight against this scourge. I believe that there should be a joint initiative between all the countries which are suffering from this. We see how the situation has drastically deteriorated in Mexico: it is said that Mexico has become the new Colombia.

However, it seems that a consensus does not exist between these countries in order to effectively eradicate this scourge. Moreover, I believe that it is not only drug-producing countries which should have this responsibility but also drug-consuming countries, and we know that the principal consumers are located in the north part of Latin America. What is your opinion on this? In your opinion, what has to be done to reach this consensus?

IV: I think that what has occurred throughout this fight against drug trafficking... the Oficina de Envigado – you were talking

at the beginning about the Medellin cartel, well its sister, the Oficina de Envigado has existed over the last five presidential mandates and still exists.

There has been a tremendous level of corruption. The corruption that has emerged from drug trafficking is incalculable.

This corruption has damaged security forces, especially the national police. Affirmations of drug trafficking penetration into the police sector have existed for a long time, despite the considerable efforts undertaken to control the situation.

I think that we should seriously reconsider the path we should take to fight against drug trafficking.

At the least, we should attentively examine the proposition put forward by the former presidents of Brazil, Colombia and Mexico.

They have asked whether legalisation would not be a more viable option so that resources could be dedicated to drug prevention rather than to repression given that as I have mentioned earlier, the Oficina de Envigado has persisted over five presidential mandates.

However, we must think about it concretely, not to become tolerant of crime but rather to identify what can be more useful for our countries, especially for countries within Latin America which have seriously suffered from drug trafficking.

FPP: Yes, that is a very big challenge and it remains to be seen how we will continue this fight against drug trafficking.

This is an edited version of a longer interview. To view it in full go to www.ibanet.org

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However at the Summit of the Americas in April in Cartagena, the beautiful Spanish colonial city on Colombia's Caribbean coast, the issue was not put on the agenda, after US Vice President Joe Biden stated that 'there is no possibility that the Obama-Biden administration will change its policy on legalisation.' This, despite the fact that it was decriminalisation and regulation which were being mooted, not legalisation.

The change we need?

There are now serious calls for an overhaul to the purely prohibitive approach adopted by the US. Some heavy hitters have called from the decriminalisation of drug consumption. This falls short of a legalisation of drugs, but is a big leap from the US government position, which is to punish and imprison drug offenders.

'We pedal and we pedal, but we do not make progress. We need to find other options to advance'

Juan Manuel Santos
Colombian President

Ironically Colombia now has a firm advocate for a more liberal approach to drug policy in the presidential palace. President Juan Manuel Santos provides a stark contrast to his predecessor, Alvaro Uribe, who was in perfect sync with US counterpart, George W Bush. Uribe overturned the 1991 Colombian Constitution on drug consumption which allowed for the personal use of drugs, even hard drugs like cocaine and heroin. President Santos has sought to undo some of the measures passed by his predecessor. Santos likened the drug war to riding a static bicycle: 'We pedal and we pedal, but we do not make progress. We need to find other options to advance.'

His comments have been echoed by Colombia's former National Police Director, Oscar Naranjo, voted the world best policeman as well as being a crucial Washington ally. He said that Colombia has 'mortgaged its drug policy to US interests.' He has called for the decriminalisation of marijuana use as a starting point.

Mexico is currently ground zero for the war on drugs, racking up some 50,000 casualties since 2006, when current President Felipe Calderon declared war on the cartels. However even Calderon has suggested that reform of drug policy is the way forward. 'If the consumption of drugs cannot be limited, then decision-makers

must seek more solutions – including market alternatives – in order to reduce the astronomical earnings of criminal organisations,' he said last year on a visit to the US. His predecessor, former President Vicente Fox, has gone much further, calling for an outright legalisation of the drug trade. 'My proposal is to legalise all drugs and their system of production,' said Fox at a conference at the Cato Institute in Washington last year. 'Education must be the crucial element in this matter.'

Uruguay has moved from rhetoric to action. In June the government proposed a law legalising the production and sale of marijuana (consumption has long been legal). Production of up to 100 hectares of cannabis crops will be controlled by the government.

The future of the drug war in Latin America

While the Obama administration has rebutted any attempts to decriminalise drugs or rethink overall drug policy, there is a shift. More and more the US is looking to disengage from foreign adventures and these include large deployments of men and resources for the war on drugs. There is a subtle move in Washington to tackle the drug problem from a treatment perspective and concentrate efforts at home.

Latin America is growing in confidence, even as its economies strengthen while those of Europe and the US flounder. Latin American nations are happy to receive aid from the US, but now seriously question the conditions that come with it. Drug decriminalisation in the region is already underway, albeit in a sporadic and haphazard manner, country to country. The war on drugs is no longer the war to prevent drug shipments reaching the US; the war on drugs is now the war against domestic consumption, and each nation knows it has to shoulder that burden alone. The US may provide funding and aid, but at the end of the day it is a national problem and now the greatest single threat to the national security of the countries that form this region. The Achilles heel of these national wars against organised crime and drugs is not just corrupt law enforcement agencies, but weak justice systems unable to process criminals and secure convictions. In Colombia, often held up as the regional success story, convictions are secured of less than ten per cent of those arrested for crime. Most of the criminals, even those caught '*en flagrancia*', are walking out of the back door, and straight back into business. ☒

Jeremy McDermott is the co-director of InSight Crime www.insightcrime.org and is based in Medellin.



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Cleaning up the City

A series of scandals has cast a long shadow over the already beleaguered financial sector in recent months. *IBA Global Insight* examines what needs to be done to reform the industry.

REBECCA LOWE

'Barclays will operate to the highest ethical standards,' new CEO Antony Jenkins told a room of analysts in September. 'We have a unique opportunity to start the next phase of Barclays' 320-year history.' The speech was passionate and well received. Equally passionate was a speech by Citigroup CEO Charles Prince in 2004 following a spate of abuses at the bank, when he vowed to 'create a companywide conversation about some of the kind of cultural and reputational things that have bitten us lately'. Four years later, Citigroup was hit by heavy exposure to toxic financial instruments – instruments that precipitated the biggest financial crisis of recent history.

Words are wonderful things. Yet as the world emerges, bruised and bitter, from global financial meltdown, more is required than crusading rhetoric. Bankers may no longer be immune to failure, but they remain immune to the consequences of failure. Jobs have been lost and fines levied, but not one British banker has been

sent to jail for endemic and systematic failures across the sector [see box]. Having brought the world to its knees, those responsible continue to walk upright – free, flagrant and impervious to harm.

Meanwhile, swingeing cuts have been imposed on the UK's Serious Fraud Office (SFO), responsible for tackling high-level fraud and corruption, as well as on law enforcement agencies across the country. The government has cut corporation and income tax, reduced public spending and relaxed laws on tax havens – havens that contributed to the 2008 crisis by allowing banks to sidestep reserve requirements and investment banking rules.

Economic crime can no longer be excused as 'victimless' as incomes drop and communities falter. But only with constant, unrelenting public pressure can there be accountability. 'We have passed the tipping point and people ought to be aware of what they have had to pay for this chicanery,' says Jack Blum, one of the top white-

collar defence lawyers in the US. 'This is the time to get your pitchfork and start howling at the moon.'

Incalculable damage

The SFO could clearly do with a few more pitchforks of its own. Due to lose 43 per cent of its 2009 budget by 2014, its armoury is currently looking rather weak. With just £30.5m in its coffers, it will be expected to investigate some of the most serious abuses ever encountered in the financial sector – a sector with the firepower and funds to hire the top white-collar lawyers in the business.

The cuts were one reason why former director Richard Alderman, who stepped down in April, chose to abandon complex prosecutions in favour of 'quick wins' and deals with companies. As a consequence, the SFO's reputation suffered, many experienced people left and a glut of wrongdoing went unaddressed. 'Under its former leadership, morale hit rock bottom,' says Ros Wright, chair of the Fraud Advisory Panel and former director of the SFO. 'I don't think this was the direction that Judge Roskill, who wrote the original report, envisaged. He envisaged an elite organisation that tackled the very difficult, principally City-based frauds – the cases that nobody else was equipped to deal with.'

Lawyers involved reveal that the SFO was approached by US authorities about Libor abuses over a year ago, but declined to investigate. Some believe this was due to its political sensitivity, with the BAE bribery case – stopped by the government in 2006 following diplomatic pressure from the Saudis – still very much in the foreground. 'It was all being politically fixed,' says one City lawyer, who used to work at the SFO. 'Libor became an indicator of economic solvency and it was in the national interest to prevent indicators from ratcheting up. It is a big political case and the UK dodged it.'

Now, since the Barclays scandal, the SFO has had a rethink and has been given £3m to pursue the investigation. Indeed, there are hopes that under new director David Green the office will find its way back on track. He has vowed to 'rebalance the relationship between prosecution and civil settlement', and seems to have the leadership his predecessor was lacking.

Yet £3m does not get you very far when a team of investigators is likely to cost around £1,500 an hour. The government may need to do more if it wants to heed Lord Justice Thomas's warning in the recent *Tchenguiz* case. Sharply critical of the investigation, he partly blamed the mistakes on funding: 'It is clear that incalculable damage will be done to the financial markets of London if proper resources, both human and financial, are not made available.'

Credible deterrence

Some might argue that incalculable damage has already been done. Lack of resources has meant a dearth of individual prosecutions, contributing to a culture of immunity among bankers. 'You can go on fining banks for the next 100 years, but the threat of jail for individuals is the best deterrent,' stresses Michael O'Kane, head of Business Crime at Peters & Peters. Fines, after all, are paid not by the guilty parties, but by the shareholders, and often barely make a dent in company accounts.

Not everyone agrees, of course. Stuart Popham, vice-chairman of EMEA Banking at Citigroup and former global senior partner of Clifford Chance, admits there is a 'perception' of pervasive wrongdoing in the banking sector that

'The financial industry has used its revolving door with the government to weaken the regulations that constrain them'

Joseph Stiglitz
Economist and Nobel laureate

needs urgently to be addressed, but that doesn't necessarily mean sending people to jail. 'I can see why people would say, hold on, no-one has been prosecuted,' he says. 'But making poor decisions shouldn't be a criminal act. Obviously we can't have an industry without limits, but I think some of this is being judged in retrospect, which makes it very difficult to differentiate between poor decisions and scandalous decisions.'

What is clear, however, is that UK authorities need the tools to take on complex prosecutions should they so wish. This would not mean the end of deals and plea bargains; once bankers believe they will be taken to court if found out, they will be more likely to step forward voluntarily or plead guilty early in proceedings. In the US, the Manhattan District Attorney's Office is able to obtain pleas in the vast majority of serious fraud cases because defendants know that, if charged, there will be a 92 per cent chance of conviction.

According to Matthew Cowie, corporate investigations counsel at Skadden and former SFO prosecutor, there should always be room for both prosecutions and civil remedy.

'Corporates can be a great vehicle for change and self-regulation, and effective enforcement action will always have an effect on the watching corporate world,' he says. 'However, most effective regulators know that without pursuing the long, hard cases, you cannot have credible deterrence.'

Until now, deals were pursued haphazardly and without any guarantee of being accepted by the courts. However, American-style deferred prosecution agreements (DPAs), due to come into effect by 2014, should help bring consistency into negotiations. Under a DPA, a company will escape prosecution on the proviso that it agrees to comply with certain conditions, such as the payment of a fine and measures to prevent future offending.

Judges will be involved early in the process, while a 'statement of facts' will include a formal admission of wrongdoing. However, it is not yet clear how detailed the statement will be, and there remain concerns that DPAs will lack the depth and transparency of a full prosecution. 'It is worth doing, given the situation we are in at the moment,' says Robert Wardle, former director of the SFO. 'But it should not stop prosecutors going after individuals. There is admittedly an illogicality saying we have enough evidence to prosecute, but we're not going to do so unless you do it again.'

The SFO currently faces several legal and procedural hurdles to carrying out full investigations effectively and efficiently. One stumbling block to pursuing prosecutions against companies is the need to prove intent by their 'guiding mind', which more often than not is the entire board of directors. This contrasts with the US, where companies can be held accountable for the actions of any employee.

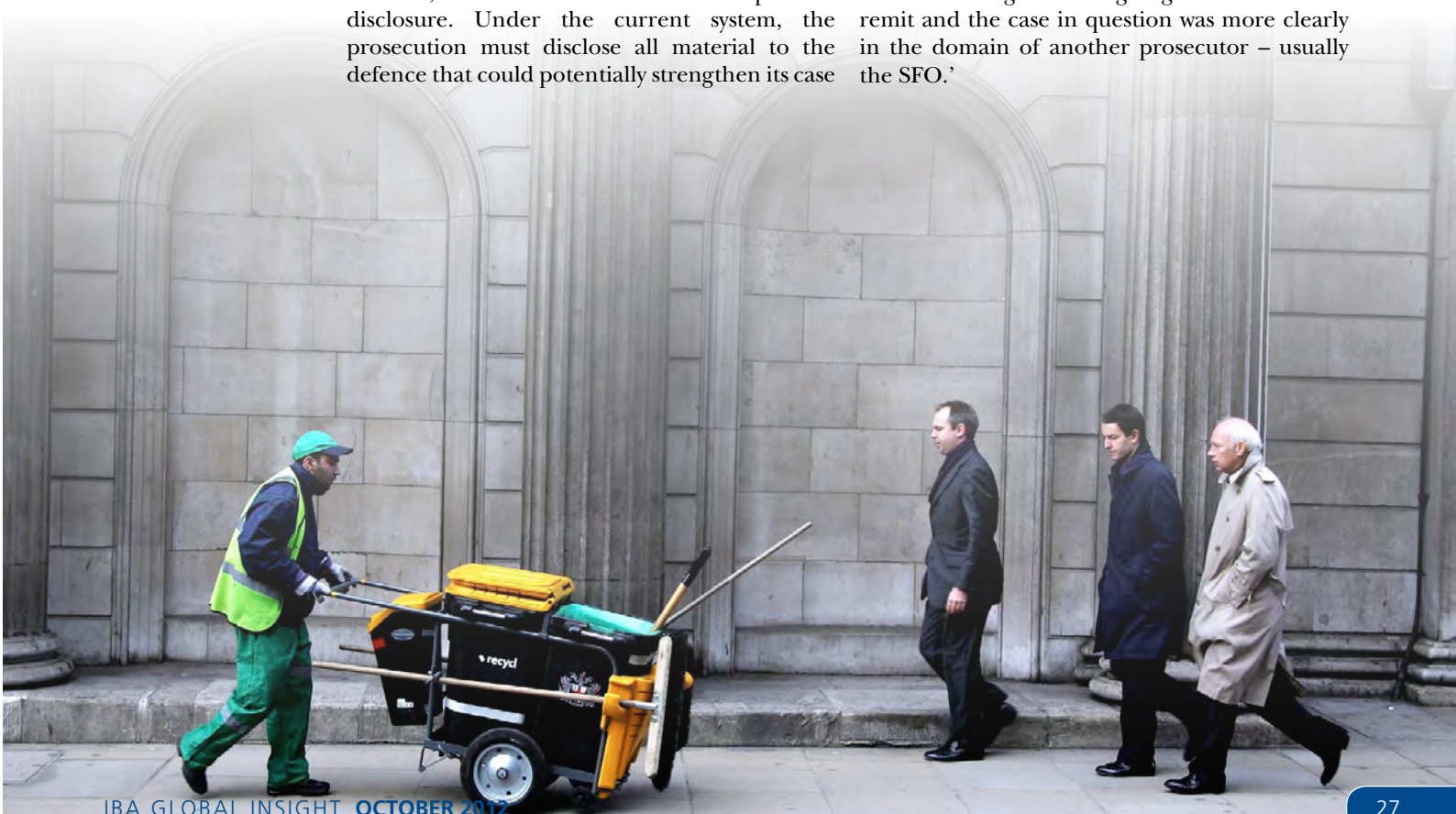
Perhaps the biggest burden for the SFO, however, concerns the rules of pre-trial disclosure. Under the current system, the prosecution must disclose all material to the defence that could potentially strengthen its case

– which, in fraud investigations, can often mean millions of documents. In the Allied Deals fraud case, prosecuted jointly by the SFO and Southern District of New York, the Americans spent six weeks working on disclosure, whereas the British team spent two years. 'The disclosure rules in the UK are very onerous on the prosecution and irrelevant for big fraud cases,' says Wright. 'You take in gigabytes of material and have to filter through it all, looking for the little gem that undermines your case and helps the defence. It is meaningless and impractical.'

Governor's eyebrows

Funded by the City, the Financial Services Authority (FSA) has escaped the worst ravages of the recession. Though far from flush, its budget has grown over the past four years, from £324.4m in 2008/9 to £505.9m in 2011/12, with the money split between its regulatory and prosecutorial functions. Though it mainly focuses on insider dealing and market offences, it also has the power to prosecute offences outside the scope of the law governing financial markets, such as money laundering – should it so wish.

The FSA could, therefore, have investigated Libor when it first came to light. Former head of enforcement Margaret Cole says it was considered carefully before being rejected. 'The industry that pays fees to fund the FSA might at some point argue that it is paying for an industry regulator not a prosecutor, particularly if the FSA was thought to be going further than its remit and the case in question was more clearly in the domain of another prosecutor – usually the SFO.'



Libor notwithstanding, the FSA grew much needed prosecutorial teeth under Cole. Before she joined in 2005, it had never prosecuted an insider dealing case. In 2011, her last full year, she secured 11 convictions, with a further 16 awaiting trial. Long accustomed to being shielded from the law, traders were suddenly shocked – and scared.

Unlike the SFO, where the average employee salary is around £44,000 – the salary of a second year trainee at a magic circle firm (equity partners' annual incomes are more like a million) – Cole was able to push up salaries by 30 per cent. 'When we wanted to pass over cases to the SFO, we didn't meet much of a desire to take them on,' recalls one former senior lawyer at the FSA. 'And what we were finding was that this was a funding issue.'

Where its regulatory arm is concerned, the FSA has proved rather less successful. With RBS, it ignored five years of warning signs before the bank's collapse in 2008. The FSA's subsequent report revealed the authority only had six people to supervise both the bank's investment banking and retail operations, and relied on senior management to 'identify deficiencies' in systems and controls.

It is hoped the FSA will do better after being split in April 2013 into the Prudential Regulatory Authority, supervising banking and wholesale money markets under the auspices of the Bank of England, and the Financial Conduct Authority (FCA), designed to protect consumers. Cole believes the FCA will continue as the enforcement arm of the FSA left off, but is less sure about the role of the Bank of England. The central bank may have to engage in litigation, she says, in which it lacks experience. 'It will be interesting to see how the PRA deals with the disputes that will come its way when it takes over bank supervision. The "governor's eyebrows" may not be enough to bring banks into line in today's world, and the FSA's experience shows that cases can be hard fought. Historically, enforcement by means of tribunal or court cases hasn't been part of a central bank's DNA.'

Revolving door

According to one former senior member of the FSA, the government was approached about taking Libor into the regulatory boundaries of the authority two years ago, but dismissed the idea. For O'Kane, the reason for such evasion is clear. 'I don't think this government, or probably any recent UK government, has the effective prosecution of white collar crime as a priority. The financial services industry is such an important part of UK GDP.'

There are certainly valid questions to be asked as to why investigations of HSBC, Standard

Chartered and Barclays were all launched in the US rather than the UK. With all these cases, the shadow of BAE looms long – a case nominally dropped due to 'national security' considerations that the Saudis would stop sharing terrorism information, but which some suspect as having been influenced by business concerns. Former SFO assistant director Helen Garlick does not question the official explanation, but recalls that 'there was a lot of propaganda during the case. Why are we risking carrying on an investigation that could lose British contracts that could be snaffled up by the French and Italians?'

'You can go on fining banks for the next 100 years, but the threat of jail for individuals is the best deterrent'

Michael O'Kane

Head of Business Crime at Peters & Peters

It is an attitude that has long endured in the UK – and, in a country where business and political interests often overlap, the financial industry is effective at getting its voice heard. Last year, over 51 per cent of all Conservative Party funding came from the City, and many politicians of both major parties have strong interests in the sector. Former HSBC CEO Stephen Green, for example, was at the helm when some of the bank's most egregious money laundering crimes were being committed, and is now a minister in the Treasury team examining banking reform.

Assisting such interests is a powerful lobbying industry. Popham, chairman of City lobbyists group TheCityUK, may disagree – 'I don't see it; I think politicians perhaps spend too much time trying to be popular and gain electoral success' – but the industry is clearly thriving. Last year the British financial services sector spent more than £92m lobbying politicians and regulators, according to the Bureau of Investigative Journalists. A similar trend is evident in the States: last year Wall Street spent \$480m on lobbying, according to www.opensecrets.org. 'It is very interesting that in recent months, US white collar enforcement has been aimed at foreign (UK) banks,' says O'Kane. 'I suspect that there is a huge amount of lobbying pressure in the US to do so.'

One of the most powerful US lobbyists is Citigroup. Having been bailed out by the government in 2008, it employed more lobbyists than any other company which registered with Congress to influence new financial regulations in 2009, according to US Senate records. Last year, the bank was described as 'recidivist' (a

The latest banking shenanigans... that we know about!

Money laundering: A US Senate probe found HSBC lacked money laundering controls to prevent billions of dollars being cleaned for Mexican drug gangs. Board members at HSBC included prominent establishment figures. HSBC apologised for 'shameful' systems breakdowns and set aside \$700m (£445m) for potential US fines.

Libor manipulation: UK and US regulators fined Barclays a record £290m for attempting to manipulate the Libor inter-bank lending rate, leading to the resignation of chief executive Bob Diamond and chairman Marcus Agius. An inquiry by US and UK regulators and prosecutors is ongoing, and several major banks have been served subpoenas.

Sanctions busting: the New York Department of Financial Services fined Standard Chartered £217m for illegally hiding transactions with Iran. RBS is also being investigated for possible sanctions violations. As *IBA Global Insight* went to press, several other major banks were also being investigated.

Bribery and corruption: The SFO is investigating Barclays in relation to commissions paid by the bank to raise billions from Qatar and Abu Dhabi in 2008, which helped the bank avoid a bailout. The FSA is also looking into whether the bank adequately disclosed fees it agreed to pay the Qatar

Investment Authority. Barclays has said it does not believe it has broken any disclosure rules. 'The bank considers that it satisfied its disclosure obligations and confirms that it will cooperate fully with the FSA's investigation,' the bank said in July. It declined to comment on the SFO investigation.

Mis-selling: The FSA report on 22 banks' financial incentive schemes for the selling of Payment Protection Insurance (PPI), describes 'a range of serious failings', including a first past the post system whereby the first 21 sales staff to reach a target could earn a bonus of £10,000. In 2004, Barclays was found to be making ten per cent of its global profits from mis-selling PPI in the UK, but a call for an FSA investigation fell on deaf ears. FSA managing director Martin Wheatley – soon to be head of the FCA – says he will take personal charge of reforms

Mortgage fraud: In February, Citigroup agreed to pay \$158.3m to settle claims its mortgage unit fraudulently misled the government into insuring risky mortgage loans for over six years. More than a third of the loans it granted went into default, resulting in millions of dollars in losses for the government. As part of the civil fraud settlement, Citigroup accepted responsibility for failing to comply with government requirements and submitting certifications that were fraudulent. The payments were in

addition to the \$2.2bn it has to pay as part of a wider \$25bn settlement between the DOJ and the nation's top five mortgage lenders. In August, the bank agreed to pay shareholders \$590m to settle allegations it misled them in the marketing of mortgage debt. Citigroup denied the allegations, but said it entered into the settlement 'solely to eliminate the uncertainties, burden and expense of further protracted litigation'.

Toxic culture: The SEC alleged that when Goldman Sachs structured and marketed a synthetic collateralised debt obligation (CDO) it failed to disclose a hedge fund's role in both the portfolio selection process and taking a short position against the CDO. In July 2010, while not admitting or denying wrongdoing, Goldman Sachs agreed to a \$550m settlement (described by the SEC as the largest commission penalty for a Wall Street firm). In March 2012, former Goldman executive Greg Smith resigned, saying: 'I can honestly say that the environment now is as toxic and destructive as I have ever seen it...the interests of the client continue to be sidelined in the way the firm operates and thinks about making money.' Goldman stated: 'In a company of our size, it is not shocking that some people could feel disgruntled. But that does not and should not represent our firm of more than 30,000 people.'

repeat offender) by New York District Judge Rakoff after marketing a billion dollar fund of toxic mortgage-backed securities. Sick of what he saw as Citigroup's perpetual reoffending, the judge refused to endorse a \$285m deal with the Securities and Exchange Commission (SEC), and instead demanded a full trial. Citigroup and the SEC have jointly appealed.

'The financial industry has used its revolving door with the government to weaken the regulations that constrain them,' says Nobel prize winning economist Joseph Stiglitz, speaking

to *Vanity Fair*, 'and, even after it was manifestly clear that they were inadequate, to prevent the imposition of adequate new regulations.'

Such influence, whether from direct lobbying or a 'revolving door' of overlapping interests, is clearly far from beneficial for society. The most powerful use their dominance to secure their position at the top of the tree, while the rest slip slowly down the trunk. 'Inequality leads to lower growth and less efficiency,' says Stiglitz. 'Lack of opportunity means that [a country's] most valuable asset – its people – is not being fully used.'

Popham concedes that many people seem to share Stiglitz's view. He believes, however, that the answer lies in outlining a clearer vision of what role the industry should hold in society. 'We need to show that the financial sector occupies a different position in society than is popularly seen, and is not a distinct entity. It needs to be seen as helping new businesses be created, as being involved in social purposes, as a key employer.'

Secrets and lies

One great beneficiary of this political influence is the offshore world. Wealthy elites and multinational corporations are able to stash their funds away from the prying eyes of regulators and tax authorities, while banks and lawyers get rich from providing the services that allow them to do so.

Such 'secrecy jurisdictions' take money from needy communities and increase polarisations

one case, and shows little inclination to do more. Yet there is much to be investigated here. HSBC recently paid \$1bn to the US DoJ for laundering \$14bn of drug money and – according to James Henry, former chief economist at McKinsey & Company – was lucky not to be shut down. 'Investigators I spoke to at the bank say this is like the Bank of Credit and Commerce International (BCCI) in the 90s,' he told *Democracy Now* in a recent interview. 'The only difference is that that was a Pakistani bank that we decided to close down.'

A July 2012 report by Henry, commissioned by Tax Justice Network, reveals that the world's richest people have up to \$32tn stashed in offshore tax havens. Private banks handling the most offshore assets are UBS, Credit Suisse, Goldman Sachs, Bank America and HSBC.

Blum is adamant the system must change. He is bewildered by a mechanism that allows banks to avoid the laws of the jurisdiction where they

'For those of us who believe in the rule of law, depriving democratic governments of revenue by manipulating the laws of offshore havens is exceptionally bad government'

John Moscow

Former New York assistant district attorney

of wealth, while encouraging illicit financial activity. But this has not stopped Britain becoming one of their chief champions, with tax havens spread through its overseas territories. 'London is the centre of a web of arrangements that allow companies and individuals to engage in activities offshore that should be the subject of effective enforcement,' says O'Kane. 'Secrecy jurisdictions are the number one problem for global enforcement to tackle.'

Michael Todd QC, chairman of the Bar Council of England and Wales, agrees that tackling tax havens should be a priority. 'I am not so concerned with a place where someone does not pay much tax,' he says. 'I am more concerned with whether secrecy is a bar to proper regulation. We wish to ensure there are proper safeguards for the investing public in a legal sense, as well as a commercial and financial sense, so that any investigatory powers an agency has can be used effectively.'

According to Blum, 'all the UK banks' were engaged in violating US sanctions on Iran. After tougher sanctions were imposed, he says, international bankers would send out private memoranda explaining the 'common wisdom' on how to circumvent them. 'The Iranians will pay a premium for people who help them cheat the system,' he explains. 'It's good business.'

Despite this, money laundering is yet to be taken seriously in Britain. The FSA has only prosecuted

are licensed, and then be saved by taxpayers in that jurisdiction when they fail. 'What exactly is the value added from these people who make so much money at the expense of the rest of us?' he asks. 'Zilch.'

Former New York assistant district attorney John Moscow, who led the fraud prosecution against BCCI alongside the SFO, is equally infuriated. 'For those of us who believe in the rule of law, depriving democratic governments of revenue by manipulating the laws of offshore havens is exceptionally bad government,' he told a subcommittee of the US House of Representatives in 2006. 'We should work together to establish the rule of law worldwide. We should join to abolish bank secrecy laws and practices.'

It is clear that banks urgently need to rein in excesses and overhaul their corporate governance. To do so requires a vastly improved system of oversight and regulation. To achieve such a system requires political resolve. To create this resolve requires persistent and unrelenting howling at the moon, with pitchforks at the ready. Then, perhaps, the Antony Jenkins and Charles Princes of this world will know that the tipping point has long since been passed, and words are no longer enough. ☒

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Massacre at Marikana

In the aftermath of the killing of 34 protesting workers by police at a platinum mine, South Africa struggles to find answers amid competing interests and political manoeuvring.

KAREN MACGREGOR

Human Rights Day in South Africa is on 21 March. It celebrates rights under democracy and commemorates the Sharpeville massacre – the day 52 years ago when police opened fire on protestors and killed 69. Sharpeville symbolised the struggle against apartheid and is a key date in the country's liberation history.

But it will only be with anger, shame and disgust that South Africans will remember the Marikana massacre of 16 August 2012, by the police, of 34 protesting workers at a dusty platinum mine in the North West province. Not to forget ten people killed in the week leading up to the tragedy, taking the death toll to 44, with some 70 people injured and more than 250 arrested.

The blame game swung into action within hours of the killings.

The public pointed fingers at the police. The press was present and, chillingly, caught part of the massacre on film. A primetime news programme juxtaposed footage from three cameras that showed jumpy police firing as miners rushed at them, and men dropping dead.

The police blamed violent protestors. The protestors blamed the British mine owner Lonmin (staff: 28,000), as well as the police and each other, following rivalry and conflict between two trade unions. Analysts painted a backdrop of dire conditions in the mining sector, poverty and social inequality.

Political opponents of the African National Congress (ANC) held government responsible and, within the party, opponents of President Jacob Zuma used Marikana to mobilise against his pending re-election as party leader in just a few months' time. The government wasn't sure who to blame, as it is responsible for the police and is in a ruling alliance with the huge Congress of South African Trade Unions (Cosatu), whose mining affiliate is at the heart of the confusion.

Realising the threat Marikana posed to South Africa's international reputation, to its economy, to the government and to himself – and in the face of police action reminiscent of the darkest days of apartheid – Zuma set up a commission of inquiry to probe the conduct of Lonmin plc, the police and the unions. It is headed by Ian Farlam,

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a respected retired judge of the Supreme Court of Appeal. He must report to Zuma in four months.

The commission will try to make sense of the tragedy. But as Farlam began his work in late August, it was already clear that a complex matrix of underlying problems, contesting forces and events led to the tragedy, and that they will take far more than a commission to resolve.

Shooting to kill

There are fundamental flaws in the police force. Two officers had been killed by protestors a couple of days earlier, so the police had cause to be angry and nervous. The police said the protestors were armed, that they had tried to

*'The massacre at Marikana
appears not avoidable and
tragic... but rather entirely
inevitable and predictable'*

Pierre de Vos
Constitutional legal scholar

negotiate a peaceful end to the strike, and had begun to take crowd control measures when they were attacked. But none of that explains the ineffective and ultimately violent response to the protest.

In the footage, police mill about, seemingly devoid of a plan. They panic as the miners run, and continue to shoot after ceasefire orders are issued. A poorly trained police force is hardly news to South Africans, but Marikana showed that the force is unable effectively to handle protests. Commentators pointed out that the public-order police force was disbanded in 1990s, and despite years of mounting protests countrywide, has not been reconstituted.

As the weeks passed, an even more shocking picture emerged: eye-witnesses told stories of police cold-bloodedly murdering miners who were hiding among boulders, driving over protestors and mowing down victims who had their arms aloft in surrender. Media reported that arrested miners had been systematically tortured by police. *City Press* said the Independent Police Investigative Directorate was looking into alleged brutality at five police stations, and had taken 194 affidavits from miners. Prosecutors charged the arrested miners with public violence, illegal gathering and attempted murder. Murder was added to the list of charges, then suspended following a public outcry.

‘What is clear is that the unstable labour situation is untenable, but it is spreading rapidly from mine to mine on the world’s largest known platinum resource’

Alan Seccombe
Business Day

Bobby Godsell, chairman of Business Unity South Africa, said during a discussion at the Gordon Institute of Business Science in Johannesburg, that in apartheid South Africa ‘you can say that violence was regrettable and understandable. In a constitutional democracy, [violence] is not understandable. It is completely outrageous.’

Under Zuma there has been militarisation of the police force, which now uses military ranks and has shifted from keeping the peace to a ‘shoot to kill’ approach in the ‘war’ on crime. Zuma has been criticised for appointing inexperienced leaders, and corruption and poor performance have eroded public faith. Against this backdrop, legal expert Pierre de Vos wrote: ‘The massacre at Marikana appears not ‘avoidable and tragic... but rather entirely inevitable and predictable’.

Widespread anger

Marikana has highlighted failings in the police and in Zuma’s leadership, but it must also be seen in the broader context of labour and other problems in the mining sector, such as fluctuating metals prices and rising costs, and the even wider context of social discontent over lack of basic service delivery, poverty and inequality. Miners are paid poorly, live in abysmal conditions and their work is dangerous. There is great pressure on Lonmin and other companies to improve their circumstances. Indeed across the continent, natural resources companies face mounting criticism over human rights abuses and shocking treatment both of workers and local communities. The situation has been complicated by the influx of Chinese investment to the region, often with too few strings attached.

At the core of events leading up to the killings lies the conflict between two unions – the Cosatu-affiliated National Union of Mineworkers (NUM), and newcomer the Association of Mineworkers and Construction Union – and the issue of recognition of new unions. Cosatu unions such as NUM are strong and generally effective, but as part of the ruling alliance they are associated with failures of government, and

miners have claimed that NUM has not been fighting hard enough for better conditions or pay, opening up space for upstart unions. Cosatu is used to dominating the labour scene, and is prepared to flex its muscles to exclude rivals.

‘There are social, labour, political and historical issues,’ wrote Allan Seccombe of *Business Day*, ‘that make unraveling the mess in which Lonmin and the South African platinum sector find themselves a nearly impossible task’. There was anger against Lonmin, but little interest in the company being foreign-owned; blame has largely been laid at the foot of the mining sector as a whole for poor conditions and pay, and frequent failures in resolving labour disputes.

‘What is clear is that the unstable labour situation is untenable, but it is spreading rapidly from mine to mine on the world’s largest known platinum resource,’ Seccombe wrote. Strikes have flared at other mines and a month after the massacre, the strike at Lonmin had not ended and there had been more protests.

Failed democracy

For the ANC, Marikana is a political blow, and for Zuma it could yet prove fatal. Within days of the tragedy, Julius Malema, expelled former leader of the ANC Youth League, surfaced at Marikana and slammed Zuma’s leadership, hoping to use Marikana to unseat the president.

But for the ANC it is not just about Zuma. Problems of corruption, divisions and service delivery have beset the ruling party, which seemed unassailable for the decade following democracy in 1994, when the new government took giant strides in consolidating freedom and improving people’s lives. Marikana is not just a blot on the post-apartheid landscape – it speaks of serious problems for South Africa and its government that are far easier to explain than to resolve.

Right Reverend Dr Jo Seoka, an Anglican bishop and president of the South African Council of Churches, wrote in *Business Report*: ‘The Marikana murder is a story of a failed democracy which, instead of protecting the rights of its citizens, takes away their lives.’ Democracy, he said, means freedom to live one’s life and express one’s mind, freedom of movement and the right to decent work and a living wage. ‘This is what the striking miners died for. This I know because I had the conviction to climb the mountain to be with the strikers and listen to their story. All I heard was the story of basic human rights.’ ☒

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

Environmental



law gets radical

As inertia hampers the fight against environmental degradation, IBA Global Insight makes the case for shifting the agenda from breaking conventions to enforcing them.

POLLY BOTSFORD

Just days after the Rio+20 Earth Summit had been condemned as a failure by the environmental movement, the very same movement was able to herald a landmark victory in an appeals court in the United States.

In the District of Columbia, on 26 June, three judges turned down an appeal brought by what is known as the Coalition for Responsible Regulation against the Environmental Protection Agency (EPA).

The Agency had begun to assert itself as the body charged with regulating carbon emission limits. In the appeal, its power to act as such was being challenged by the Coalition (made up of states such as those of Texas and Virginia and various national coal, mining and real estate interests – the case was nicknamed ‘*Fossil Fuels v EPA*’).

The judges unanimously found against the Coalition’s arguments that the science of global warming was not sufficiently well-supported and that the EPA was relying on unreliable studies. They agreed with the EPA that since carbon emissions have been shown by the science to be harmful, it was entitled to impose limits. In other words, emissions from vehicles and coal-fired power stations in the United States should be regulated by existing laws and agencies.

But the case is also important because countering the hundreds of consolidated petitions against the EPA were a number of environmental *amici curiae*, including an organisation called ClientEarth. ClientEarth is a public interest environmental law firm based in Hackney in East London. It is a very different sort of law practice: its client is the Earth and it looks for ways to use the law to change the behaviour of government (and so its citizens) on key environmental issues. It submitted a weighty legal opinion supporting

the EPA – the first time that a European organisation has done so in a case like this in a US court.

Its CEO, James Thornton, used the European experience to counter the doom-mongering of the Coalition. As he said at the time: ‘We argued that greenhouse gas regulations don’t damage the economy. The European Union’s economy hasn’t been damaged by the Kyoto Protocol or the Emission Trading Scheme. Indeed, alternative energy provides increased energy security and the potential for economic growth.’

ClientEarth is a product of a radicalisation of the environmental law sphere that has developed in recent times. Though public interest environmental law is not new, the US has had such lawyers for some time now (one of the largest of such organisations there, EarthJustice, won its first victory against Disney way back in 1972), it is new to the UK and the EU (ClientEarth also has offices in Warsaw and Brussels). This particular public interest firm is funded not by the client but by philanthropists and the occasional grant to bring enforcement cases, to influence drafting of new laws (particularly in Brussels) and to carry out research on environmental issues. It also employs a scientist because Thornton’s mantra for environmental law is: ‘start with the science’.

This radicalisation has come about as existing environmental laws have been seen as failing to deliver. This is not for sheer want of law: the current canon we have now is very substantial (see box on page 36). It has built up over the years from very sparse beginnings as public health laws from the Victorian era (interestingly, they were introduced with just as much reluctance as we saw in the EPA case: in the UK, it was not until ‘the Great Stink’ of the mid-1800s, when the stench

Milestones in environmental laws

- 1858** The 'Great Stink' of the River Thames in London triggers groundbreaking laws on sanitation
- 1931** The Geneva Convention for the Regulation of Whaling is signed; one of the earliest 'conservation' conventions
- 1957** Treaty of Rome establishes European Economic Community which later becomes the EU and is the source of much environmental law in the region
- 1968** UNESCO Biosphere conference is held in Paris; first of its kind to raise issues of pollution and limited resources and precursor to arguments for 'sustainable development'
- 1970** Earth Day is first held in the US on 22 April; a peaceful mass demonstration to highlight environmental issues; it is still held each year
- 1974** UN Convention on International Trade in Endangered Species is signed; a crucial step in controlling illegal trade in ivory and furs
- 1974** The Rowland–Molina Hypothesis is published containing landmark findings that chlorofluorocarbons may erode the Earth's protective ozone layer
- 1982** UN Convention on the Law of the Sea is signed; provisions on ocean conservation, pollution prevention, protecting and restoring species
- 1983** The US's Environmental Protection Agency and the National Academy of Sciences' report on the build-up of greenhouse gases in the Earth's atmosphere says they will lead to global warming
- 1987** Montreal Protocol is signed after scientists find hole in ozone
- 1992** The UN Framework Convention on Climate Change sets voluntary targets for carbon dioxide reduction goals but lacks of support from the US
- 1992** First Rio Earth Summit organised by UN
- 1995** The Intergovernmental Panel on Climate Change (IPCC) sees hundreds of prominent climate scientists release their second report that states that: 'projections of future global mean temperature change and sea level rise confirm the potential for human activities to alter the Earth's climate to an extent unprecedented in human history'
- 1997** Kyoto Protocol adopted; to take effect from 2005
- 2001** UN Agreement on Fish Stocks – rules for fishing in international waters – comes into effect
- 2002** EU ratifies the Kyoto Protocol, followed by Russia in 2004; by the time it takes effect in 2005, only the US has not ratified it
- 2006** Wild law Conference held in Brighton, UK, with speaker Cormac Cullinan who first coined the phrase
- 2007** China overtakes the US as world's biggest producer of greenhouse gas emissions
- 2010** *Eradicating Ecocide* – Polly Higgins publishes controversial book on 'the fifth crime against peace'
- 2012** Rio+20 Earth Summit is held; US President Barack Obama, UK Prime Minister David Cameron and German Chancellor Angela Merkel do not attend

of excrement flowed into the River Thames (and thus right by the Houses of Parliament), that parliamentarians would act to improve sanitation and pay for new sewage systems).

This was pretty much how it was with only incremental growth on similar themes until the 1970s when environmental law expanded exponentially to reflect the equally exponential increase in environmental problems. New laws and new sources of law have emerged in the face of ecological crises. The EU has been particularly prolific (and since 1997, Article 6 of the European Treaty has contained an 'environmental protection requirement' which means that consideration of environmental concerns must be integrated into all EU policy) producing hundreds of laws that have gone on to shape the domestic legislation of the European Community countries.

Some EU law has been derived from the other new source of environmental law, international conventions and treaties: on the law of the sea, on oil pollution, on pesticides. There are estimated to be over 1,000 treaties

or jurisdiction for such cases to go to. The Montreal Protocol – that was introduced in 1987 to protect the ozone layer and appears to have gone some way to prevent ozone damage from getting worse – is held up as an example of the power of public international law, but it is the exception not the rule and there are any number of conventions that are routinely flouted.

The victory in the EPA case demonstrates that even when there is a law (the Clean Air Act) and an agency that can enforce the law (the EPA), it is still an uphill struggle to make that enforcement happen (and the State of Virginia has indicated that it may appeal against the court's findings so the victory may be shortlived).

It is these shortcomings in the effectiveness of environmental laws that have led to a radicalisation of approach within the environmental law sphere. New ideas and new paths have emerged, such as ClientEarth; in the face of continued ecological devastation, environmental lawyers are making the case for more deep-seated change.



'We argued that greenhouse gas regulations don't damage the economy. The European Union's economy hasn't been damaged by the Kyoto Protocol or the Emission Trading Scheme. Indeed, alternative energy provides increased energy security and the potential for economic growth'

James Thornton
CEO, ClientEarth

on environmental law, more than any other area of law; the canon is wide and deep.

But for all this, critics point to the limited effect these laws have had, as well as their multiplier-effect complexity, to deal with the issues that faces us: the failure of forest laws to protect against deforestation, the failure of conventions against pollution to prevent pollution.

International environmental law in particular tends to under-achieve; this is in part because enforcement is so difficult, in most cases only states can enforce these treaties against another state and this is an unappealing path for most to take, and because there is no obvious court

For example, better access to environmental justice has come into sharp focus. Currently, the public, individuals and NGOs often do not have access to justice because it is too costly to bring a claim or because they are only allowed to bring a claim where they are considered to be 'individually concerned'. By improving access to justice, reformers such as ClientEarth hope to bring to life many environmental laws that lie dormant on the statute books.

One mechanism that supports them in this is a 1998 agreement, the Aarhus Convention, which declares that better access to justice should be provided to citizens. The first step then is to ensure that signatories to

that Convention properly comply with its principles.

Hand-in-hand with questions over access to justice is the lack of an appropriate forum for bringing environmental disputes. Because so many environmental laws are international in scope, there are often huge problems in determining the right forum for cases. As a result, some environmental lawyers are now putting forward the notion of an entirely new court dedicated to international environmental issues.

Stephen Hockman QC is Head of Chambers at 6 Pump Court in London and the founder of the International Court for the Environment (ICE) Coalition, which is campaigning for such a court. He explains the issues: 'We need a body which can handle transnational environmental disputes – not only those between states but also those between non-state actors such as an NGO and a multinational or a multinational and a state.'

In addition, the International Court of Justice (ICJ) has shown itself unwilling to grapple with some environmental issues. This was recognised in the dissenting judgment in the case brought by Argentina against Uruguay regarding pollution of the Uruguay River in which it was regretted that the ICJ had missed: 'what can aptly be called a golden opportunity to demonstrate to the international community its ability, and preparedness, to approach scientifically complex disputes in a state-of-the-art manner.'

Hockman is keen to emphasise that this is not a court intended simply to harangue multinationals: 'At the moment, what is lacking is a forum for serious and considered jurisprudence to develop. We are not out to demonise specific individuals or companies but to nurture sophisticated judicial settlement on issues affecting the environment.'

It appears that the idea of an environmental court is no longer pie-in-the-sky talk, as Hockman says: 'there is now a very well acknowledged and accepted case for improved dispute resolution procedures in this area. Such acknowledgment was recently given as part of the World Justice Forum [which preceded the Rio+20 Earth Summit]'

The ICE Coalition's current proposals are that an informal and voluntary tribunal is set up whilst we wait for the world's governments to sign up to a formal court. Hockman anticipates that this transitional version will be a start down that road.

This voluntary tribunal is a less radical (and, therefore, perhaps more feasible) notion than another approach put forward by Polly Higgins, the lawyer and controversial

author of the concept of 'ecocide'. In Higgins' vision, ecocide would become the fifth crime against peace by creating a legal duty of care not to support destruction of the natural earth. Ecocide would become part of national laws but, ultimately, she argues, would be an international crime for which the International Criminal Court in The Hague would be the court of last resort.

'We need a body which can handle transnational environmental disputes – not only those between states but also those between non-state actors such as an NGO and a multinational or a multinational and a state'

Stephen Hockman QC

Head of Chambers, 6 Pump Court in London and founder of the International Court for the Environment (ICE) Coalition

Just as revolutionary as the crime of ecocide is the concept of wild law: laws that would give a legal personality to a specific species or a place in order that, for example, their habitat could be protected from an industrial project. Wild law advocates argue that the current canon of environmental laws are failing to eradicate or reverse ecological disaster because they have at their core the notion that the Earth is a resource to be exploited rather than existing in its own right. They say that all that the laws do is to seek to control and limit that exploitation; to redress the imbalance between man and nature, nature has to be given a legal voice. At the moment, however, wild law is a radical – and radically different – proposition and may well remain out in the wild for some time to come.

In the meantime, existing environmental laws could be improved and the EU and national governments do recognise this and are beginning to consider what improvements could be made. The laws could also work harder: there could be greater regulatory policing of pollution, endangered species, bird habitats and so on. But this is often a question of resources; regulators with a limited budget cannot prosecute to that extent (and, of course, resources have been harder to come by as a result of global economic problems). And the question of resources quickly becomes a question of political will.

Political will is particularly important in environmental law because, like civil rights

law a generation ago, it stands, at this point in time, at the stormy confluence of politics and law. The flow is both ways: first, political will is what makes some laws effective (for instance, the EPA's stance on greenhouse gas emission regulation is underpinned by the political support of the Obama Administration). Secondly, the law can be used as a political weapon – bringing cases as a means of changing policy or simply enforcing existing policy. As Thornton says: 'we start with the science and work out what best can be achieved using the law as a tool'.

But this confluence of politics and law raises the debate as to what extent the courts should be used in this way. In the UK, the courts have trodden a fine line here, as Professor Richard Macrory CBE QC, Director of the Centre for Law and the Environment at the Faculty of Laws of University College, London, and a barrister at Brick Court Chambers, explains: 'environmental law raises the question: who is best placed to work out what the laws should be and how they should be enforced, politicians or judges?'

'...if you don't ensure that the rule of law permeates into a modern society then environmental laws will always be undermined'

Hans Corell
former Legal Counsel of the UN

One example of this fine balance is in the judicial review challenge of the UK government's proposal for a third runway at Heathrow back in 2010. The case was extremely high profile and related to whether or not the government should have reconsidered its air transport policy in light of subsequent climate change legislation. But the larger political question, like the elephant in the room, was whether a third runway should go ahead.

In his High Court ruling, Lord Justice Carnwath, the UK Supreme Court judge, would not answer that question and stated at the very outset that he did not believe it was up to the courts to decide on national policy: 'Whether there should be a third runway at Heathrow Airport is a question of national importance and acute political controversy... This court is concerned only with issues of legality.'

Politicising environmental law enforcement could be detrimental in other ways: getting

parties embroiled in complex litigation rather than finding a political solution may not be an efficient way to solve new problems. Macrory cites the example of India where the judiciary take a more interventionist approach, and where cases regarding the pollution of the River Ganges, for instance, have dragged on for years without resolution: political intervention may have produced better and faster results. As Macrory summarises: 'if you hand over decision-making to the judges, it can let the politicians off the hook.'

Also, using the law to effect change only works in places where there is the rule of law and it is upholding the rule of law that some say is the key to unlocking environmental (as well as other) problems. The World Congress on Justice, Governance and Law for Environmental Sustainability organised by the UN Environmental Programme in the run up to the Rio+20 Earth Summit gathered well over 200 chief justices, attorneys general, auditors general, chief prosecutors, and other high-ranking representatives of the judicial, legal and auditing professions. It adopted a Declaration highlighting the importance of the judiciary, the prosecutors and the auditors in implementing, developing and enforcing environmental law.

Hans Corell, who is a member of the High Level International Advisory Committee for the Congress and former Legal Counsel of the UN, explains: 'if you don't ensure that the rule of law permeates into a modern society then environmental laws will always be undermined.'

Corell is sensitive, however, to the complexities which environmental laws raise. He adds: 'environmental laws have been difficult to date because the science has not been all that clear. But ultimately once rules are being decided upon the best chance of having these rules upheld is to reinforce the independence of the judiciary, the prosecutors and the auditors, and maintain the integrity of the judicial process.'

What Corell is asking for would be no small task to achieve – and, for that, it is probably the most radical notion of all. ☒

Polly Botsford is a legal and current affairs journalist. She can be contacted at polly@pollybotsford.com

More information on the World Congress on Justice, Governance and Law for Environmental Sustainability can be found at www.unep.org/delc/worldcongress.



Polly Botsford's filmed interview with James Thornton can be viewed at: tinyurl.com/ibafilms.

I am a regular reader of the Newsletters; they are very relevant and allow me to stay current with global developments, especially the copyright and internet law aspects in different jurisdictions. The quality is high and I appreciate the global reach of the Newsletters.



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Arbitration

United Kingdom - contributed by Herbert Smith LLP

Court of Appeal rules on arbitrability of shareholders' claims

The extent to which parties may agree to submit intra-corporate disputes - in particular claims under company legislation - to arbitration has long been uncertain. The Court of Appeal recently ruled in favour of the arbitrability of a shareholder's unfair prejudice claim brought under Section 994 of the Companies Act 2006 and has provided important guidance on the arbitrability of corporate disputes more generally.

Author: Matthew Weiniger

(Read article <http://www.internationallawoffice.com/?i=7FTST06>)



Matthew Weiniger

USA - contributed by DLA Piper US LLP

US court rejects arbitrator bias challenge during enforcement proceedings

The US Court of Appeals for the Second Circuit recently refused to vacate an arbitral award under the US Federal Arbitration Act where a party argued that an arbitrator had failed to disclose prior experience that rendered the arbitrator potentially biased. The decision clarifies the boundaries of arbitrator bias relating to undisclosed prior experience.

Authors: JP Duffy, Kiran N Gore

(Read article <http://www.internationallawoffice.com/?i=7FUZUJ9>)



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Illustration by Chris Learey

Could an Australian High Court decision spell the beginning of the end for the tobacco industry?

JONATHAN WATSON

Australia's Tobacco Plain Packaging Act 2011 (the 'Act') means that from 1 December, all forms of tobacco branding have to be labelled exclusively with simple unadorned text, in a standard form and font. It also requires that all tobacco products be sold in drab olive green packages and include health warnings covering 75 per cent of the front of the pack, and 90 per cent of the back.

The world's leading tobacco companies – British American Tobacco (BAT), Philip Morris International, Japan Tobacco and Imperial Tobacco – are understandably none too pleased about this. They launched a legal challenge, but on 15 August this year, their complaints were rejected by Australia's High Court.

'The message to the rest of the world is big tobacco can be taken on and beaten,' said Australia's attorney general and health minister, in a triumphant joint statement issued after the verdict. 'Without brave governments

willing to take the fight up to big tobacco, they'd still have us believing that tobacco is neither harmful nor addictive.'

The High Court's decision put anti-smoking campaigners throughout the world in a celebratory mood. 'We congratulate Attorney-General Nicola Roxon, the Government and the Parliament for having the courage to stand up to the tobacco industry and insist on the Australian Government's sovereign right to protect the health of its people,' said Anne Jones, chief executive of the Australian branch of Action on Smoking and Health (ASH). 'This victory will encourage all governments to defend public health from tobacco industry attacks.'

The World Health Organization (WHO) also welcomed the court's decision and called on the rest of the world to follow Australia's tough stance on tobacco marketing. 'Plain packaging is a highly effective way to counter industry's ruthless marketing tactics,' said WHO Director-

General Margaret Chan. 'It is also fully in line with the WHO Framework Convention on Tobacco Control.'

This is the main concern for the tobacco industry. Its top executives fear that Australia's move could spread to the \$161bn cigarette market in the European Union and beyond – just

they may wait for the outcome of any appeals to the WTO before enacting any legislation,' says Roger Green, principal at Australian intellectual property specialists Watermark.

In the UK, a consultation on plain packaging run by the country's Department of Health came to an end on 10 August. The next step will be

'Once all cigarette packets in a retail outlet look identical, the only way that a consumer is going to be able to identify which product they wish to purchase is by identification of the world trademark... recognition of the tobacco trademark owner's principal or core brand will dramatically increase'

Jenny Mackie
Partner, Pizzey's

as the ban on smoking in public places spread from California across the world.

Governments already thought to be close to introducing their own plain packaging laws include those of China, France, New Zealand, Norway, South Africa, the United Kingdom and Uruguay. The European Commission is also considering action on a pan-EU level.

In New Zealand, for example, a consultation on plain packaging for tobacco is now taking place, with comments due by mid-October. 'I believe it is quite likely New Zealand, which has close economic ties to Australia, will follow suit, though

for the government to issue its response to the comments it receives.

In the UK, Imperial Tobacco, BAT and Japan Tobacco have helped to form a libertarian-style campaign group called 'Hands Off Our Packs'. It urges supporters to say 'no more nanny state diktats'. It remains to be seen how successful they will be but the recent appointment of Jeremy Hunt to run the Department of Health – a politician whose previous dealings with News Corporation suggested he was vulnerable to the persuasive powers of corporate lobbyists – could have a

WHO Framework Convention on Tobacco Control

Entered into force: 2005

Number of countries who are parties to the treaty: 176

The convention obliges countries who sign it to take a number of steps over time to reduce demand and supply for tobacco products, including:

- protecting people from exposure to tobacco smoke
- counteracting illicit trade
- banning advertising, promotion and sponsorship
- banning sales to minors
- putting large health warnings on packages of tobacco
- increasing tobacco taxes
- creating a national coordinating mechanism for tobacco control

While the treaty doesn't specifically address the use of trademarked brands or logos, it requires signatories to ensure that packaging and labelling don't promote a tobacco product by 'any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions'.

significant impact on the government's plain packaging plans.

In France, an MP introduced a member's bill in 2010 that aimed to create plain packaging. Although it was never adopted, Marisol Touraine, the health minister in the country's newly elected government, has said she will work towards 'neutral packaging', especially at EU level.

The tobacco companies will continue to campaign against this kind of legislation. 'Although the Tobacco Plain Packaging Act passed the constitutional test, it's still a bad law that will only benefit organised crime groups which sell illegal tobacco on our streets,' claimed BAT spokesman Scott McIntyre. 'At the end of the day no one wins from plain packaging except the criminals who sell illegal cigarettes around Australia... We still believe the government had no right to remove a legal company's intellectual property.'

Pack mentality

It is difficult to assess how many countries are likely to enact their own plain packaging legislation. According to Enrico Bonadio, lecturer in law at The City Law School of London's City University, Australia's success is just one victory in a much wider battle. 'The war is still on,' he says. 'Indeed, in the near future, other international courts may come to a different decision on the subject of plain packaging for cigarettes.'

In their Australian lawsuit, the tobacco companies argued that the new legislation contravened section 51 (xxxix) of the Constitution of Australia, which states that the government can make laws with respect to 'the acquisition of property on just terms from any State or person'. The tobacco companies argued that the government was acquiring their property by depriving them of the right to use their brands. They also argued that they were entitled to compensation on just terms.

The full global impact of the High Court's decision may become clearer once the reasoning behind it has been published. Ross Becroft, a trade law expert at specialist law firm Gross & Becroft and a member of the executive of the IBA's Trade and Customs Law Committee, says the Court 'is likely to have found that the new legislation simply prescribes restrictions on the

use of a trademark and branding and does not amount to the acquisition of property'.

The approach taken by the Australian government to the implementation of the Act and the regulations is that public health concerns far outweigh any impact on trade or other commercial interests of any other stakeholder, says Neil Kirby, Director of Healthcare and Life Sciences Law at Werksmans Attorneys in South Africa and Chair of the IBA's Healthcare and Life Sciences Law Committee. 'Whether or not the public health concerns relating to the consumption of tobacco are strong enough to outweigh the IP rights of certain stakeholders, more particularly, the manufacturers of tobacco products, remains to be seen,' he adds.

'The seriousness of the hazards of smoking far outweighs the interests of the smokers as a group'

Supreme Court of Appeal, South Africa

Courts in other jurisdictions may take a different view. In the United States, for example, tobacco companies recently inflicted a defeat on a law forcing cigarette packaging and advertisements to display images such as diseased lungs. The firms had argued that under the terms of the First Amendment, the requirements violated their right to free speech.

In a 2-1 decision, the US Court of Appeals in Washington ruled that Food and Drug Administration (FDA) regulations requiring cigarette packaging to include visual images warning of smoking's health risks, along with the telephone number 1-800-QUIT-NOW, could not be justified as they amounted to more than simply conveying information to consumers. They were 'unabashed attempts to evoke emotion' and 'browbeat consumers' into not buying the companies' products, the court ruled.

As a federal appeal court in Cincinnati had previously upheld the regulations, the matter may have to be settled in the US Supreme Court.

Putting IP before health

Australia's law is also being challenged by tobacco-growing countries such as Ukraine, the Dominican Republic and Honduras via the World Trade Organization (WTO). The countries allege that Australia is in breach of a number of WTO obligations under the General Agreement on Tariffs and Trade (GATT), the Agreement on



Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Agreement on Technical Barriers to Trade (TBT).

At the beginning of September, Australia successfully blocked a request from Ukraine to the WTO Dispute Settlement Body to establish a panel to rule on whether the laws violated global trade agreements.

Ukraine had claimed that the 'unprecedented measures deny the essence of the rights that are protected under the TRIPS agreement and erode the protection of intellectual property rights, thus raising systemic concerns that directly affect Ukraine as an important producer and exporter of tobacco products'.

It also alleged that the plain packaging measure was 'clearly more trade restrictive than necessary' to achieve Australia's stated health objectives and thus in violation of the TBT agreement. Ukraine can renew its request for a panel at a future meeting. This second request can be blocked only if it is opposed by all WTO members attending.

Kirby says it is doubtful that the WTO or any other organisation could prevent implementation of the Act. 'The sovereignty of Australia permits it to pass laws that are consistent with its health regime, which would include legislation on matters of public health, which are paramount in the debate concerning the control of tobacco products globally,' he says.

He points to a recent case dealing with tobacco advertising in South Africa, in which the country's Supreme Court of Appeal ruled against BAT. 'The right to commercial speech in the context of this case is indeed important,' the court's decision said. 'But it is not absolute. When it is weighed up against the public health considerations that must necessarily have been considered when imposing the ban on

advertising and promotion of tobacco products it must, I think, give way. The seriousness of the hazards of smoking far outweighs the interests of the smokers as a group.'

The TRIPS agreement does seek to protect IP rights such as trademarks, notes Becroft. 'However, article 16 of TRIPS refers to the owner of a registered trademark as having the exclusive right to prevent third parties from using its trademark, so the agreement does not confer an obvious positive right on countries to protect trademarks absolutely.'

In addition, Article 20 of TRIPS states 'the use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as... use in a special form or use in a manner detrimental to its capacity to distinguish the goods,' says Green.

Article 8(1) of TRIPS says: 'Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health'. Article 20 of the GATT contains a similar provision. There is an interesting argument to be had as to whether Australia needs to prove that its new measures are necessary to protect human health.

According to Roger Green, the Act does not totally extinguish tobacco companies' trademark rights. 'The trademark owners will still be able to use their brand names in relatively small script on cigarette packs to identify their brands, and they will still be able to enforce their trademark rights against infringers who use substantially identical or deceptively similar brand names on their packaging,' he says. 'Tobacco brands can also be used in some non-advertising or packaging contexts.'

And despite all the complaints, there has not been much consideration of one positive outcome for tobacco trademark owners:

The Tobacco Plain Packaging Act 2011

Key aims:

- reducing the attractiveness and appeal of tobacco products to consumers, particularly Australian youth
- reducing the ability of tobacco product packaging to mislead consumers about the harmful effects of using the product
- increasing the prominence and effectiveness of health warnings on product packaging which have been mandated for many years
- reducing the amount of tobacco products sold in Australia and the rate of uptake by potential new users, particularly smokers, of tobacco products

The Act also restricts trademarks from being placed on tobacco products or their retail packaging, except in a very restricted manner, thus preventing such trademarks from being used as a design feature to divert attention away from the health warnings, or otherwise to promote use of tobacco or tobacco products.

a potential strengthening in brand recognition and retention as a result of the legislation. Jenny Mackie, a partner in the trademarks practice of Australian law firm Pizzseys, explains: 'Once all cigarette packets in a retail outlet look identical, the only way that a consumer is going to be able to identify which product they wish to purchase is by identification of the world trademark,' she says.

'Clearly for a consumer of these products this will mean that the level of recognition of the tobacco trademark owner's principal or core brand will dramatically increase,' she says.

Some have argued that the dispute over plain packaging effectively brings the WTO into direct conflict with the WHO. Becroft is sceptical about this. 'In my experience of the WTO, it is very much seen as a standalone jurisdiction dealing with trade issues that impact on other policy areas from time to time,' he says. 'The WTO agreements do not prescribe unfettered free trade.' It is also still unclear whether Australia's legislation has contravened any of these agreements.

'The weight of public opinion now favours stricter control for tobacco products, especially cigarettes'

Neil Kirby

Director of Healthcare and Life Sciences at Werksmans Attorneys, and Chair of the IBA's Healthcare and Life Sciences Law Committee



The global trade war heats up

Another proceeding currently underway is a case launched by Philip Morris Asia against Australia under a 1993 bilateral investment treaty between Australia and Hong Kong. Philip Morris is arguing that it has not been accorded fair and equitable treatment as an investor and the legislation may amount to expropriation of its assets. 'It is quite common for public policy purposes to be excluded from such investment treaties,' Becroft says.

If successful, this would not render Australia's legislation invalid, but result in payment of compensation if it is found that Philip Morris's brands have been expropriated, says Green. By contrast, if the WTO proceedings are successful, Australia may be required to change its legislation. To complicate matters further, Philip Morris Asia only bought shares in Philip Morris Australia 14 months after Australia's new legislation was announced. 'This could give rise to some interesting arguments around legitimate expectation,' Becroft says.

Philip Morris has also pursued a claim against Uruguay over the country's tough rules on cigarette packaging. The company is citing impairment of its commercial interests in a case lodged with the World Bank's arbitration body, the International Centre for Settlement of Investment Disputes (ICSID). It argues that these violate trade agreements with Switzerland, where Philip Morris International is based. Uruguay is defending its laws, arguing that its government has a right to legislate on such matters in the interest of public health.

Jonathan Carr, a lawyer in the litigation department at Weil, Gotshal & Manges in Washington DC, says that if a complaint against Australia is filed at ICSID, 'it is not clear whether ICSID would have the power to order injunctive relief against the new law since there is no precedent for such an action'. Carr also says that many observers view the action by Ukraine, the Dominican Republic and Honduras at the WTO as 'a long shot' as none of them is a significant trading partner with Australia.

According to Kirby, the weight of public opinion now favours stricter control for tobacco products, especially cigarettes. 'In this regard, the controls that are implemented by governments, such as the Plain Packaging Act, may very well trump matters concerning free speech and even intellectual property rights – this appears to be a trend that is remarkable in a number of jurisdictions.'

If this comes to pass, it could spell the beginning of the end for the tobacco industry. ☒

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The limits to freedom of expression

Does the denial of crimes against humanity mark the outer limit of freedom of speech? The ongoing dispute between France and Turkey over the Armenian genocide sheds light on a complex and sensitive issue.

ARIEH KOVLER

In February, France's Constitutional Council – the quasi-judicial body charged with upholding the Constitution of the Fifth Republic – struck down a bill 'to prevent the denial of genocides recognised by law'. The bill would have created a new criminal offence, punishable by a year's imprisonment and a €45,000 fine, of: 'justifying, denying or trivialising the crimes of genocide, crimes against humanity and war crimes, defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court [...] or recognised by France.'

The bill had passed through both the Senate and the National Assembly with cross-party support before legislators referred it to the Council for a ruling.

The government of Turkey protested and threatened France with economic and diplomatic reprisals, responding to the real motivation behind the bill: to make it a crime in France to deny the Armenian genocide, the only other genocide apart from the Holocaust to be formally recognised by the French National Assembly.

Turkey accused the then-French President, Nicolas Sarkozy, of trying to pander to France's

500,000 ethnic Armenian voters, suggesting this as a possible motive for the bill. However, France also has between 500,000 and a million ethnic Turkish voters; moreover a version of the bill was first introduced in 2006. French politicians claimed to be acting out of a moral duty to prevent the denial of massacres in history, but French suspicion of Turkey and its attempts to join the European Union might also have played a part. The bill was opposed by Amnesty International, which claimed it represented 'an attempt to curtail freedom of expression'. Since his election earlier this year, President François Hollande has indicated his support for a new genocide bill, echoing the sentiments of his predecessor.

Elsewhere, Štefan Harabin, President of the Slovak Republic's Supreme Court, drew his own rebukes and threats from Turkey after publicly promising that Slovakia's new law, which prohibits denial of the Armenian genocide, would be enforced. Mr Harbin said that anyone who denied the genocide – even Turks of official rank – would be sentenced to up to five years in jail.

Diplomatic pressure

Armenian genocide Remembrance Day is marked every year on 24 April. On this day in 1915, Interior Minister Mehmed Talaat signed the order to arrest 250 prominent Armenian intellectuals, businessmen and cultural figures in Constantinople and take them to holding centres. Several hundred more followed them. A few weeks later Talaat – part of the de facto ruling triumvirate of the Ottoman Empire – signed the Tehcir Law, expelling the Armenian population of the Empire. Armenians were forced out and their property seized. Ottoman soldiers massacred Armenian villages, burying the residents in mass graves. Some Armenians were forced into concentration camps. By 1919, more than a million Armenians had been killed.

At first, the defeated Ottoman Empire recognised the massacres of Armenians and tried some of the perpetrators. However, after Atatürk overthrew the Ottoman regime and founded modern Turkey in 1923, attitudes began to change. Following the Second World War, Turkish academics began to argue that the deportation and massacre of Armenians didn't constitute 'genocide'; that reports were exaggerated; or even that events had been justified.

Ensuring that the deportations and massacres weren't recognised as genocide became a cornerstone of Turkish foreign policy in the late 20th century. Turkey used its role as a NATO member and ally to discourage the United States from recognising the genocide, and placed similar diplomatic pressure on Israel to prevent Armenia from being discussed at genocide conferences. Turks who discuss the genocide have been harassed and, in some cases, faced criminal charges for 'insulting Turkishness'. However, despite Turkey's best efforts, though, the Armenian Genocide is increasingly recognised and acknowledged as historical fact, and not just a point of view.

Why is Turkey so hostile to the recognition of the Armenian Genocide? Arguably, it's partially a matter of national pride. Modern Turkey is supposed to be a rejection of the long-dead Ottoman regime and its crimes. Nevertheless, there remains just enough identification with faded imperial glories for modern Turkish leaders to want to defend its actions. As Turkey has become an increasingly assertive regional actor under the Erdoğan government, this defence of its past has become more important.

Reparations are another key concern for successive Turkish governments. Following the Holocaust, West Germany paid substantial reparations to survivors and to the newly-formed State of Israel. Armenian groups have been pressing Turkey for reparations since the

1920 Treaty of Sèvres, and pushing for a return of Armenian property seized by the Ottoman government. Some even propose moving the border between Turkey and Armenia to account for territory lost during the conflict. If the Armenian genocide becomes universally recognised, some in the Turkish government worry that the pressure to pay reparations would become unassailable.

From denazification to genocide denial

The notion of banning genocide denial developed from laws passed in the aftermath of the Holocaust and the Second World War; however, the first denial laws didn't specifically aim at the Holocaust at all. In the immediate aftermath of the war, the victorious allies began a programme of civic reform known as 'denazification', designed to root out Nazism and to prevent it from re-emerging. Denazification laws punished the worst offenders and tried to prevent fascist movements from rehabilitating themselves and retaking power.

'Historical or scientific or other facts and debates are best established and proved through open debate and argument, and allowing the clear light of day to shine on weak or false arguments'

Kirsty Hughes
Chief Executive, Index on Censorship

Nazi symbols were banned, and publicly supporting the Nazi regime was criminalised. Key to denazification was making Germans and other perpetrator nations understand and acknowledge the crimes committed during the Second World War; therefore, the act of denying, minimising or justifying Nazi atrocities was also made illegal.

Holocaust denial emerged as an organised phenomenon in the early 1960s in America. Historian Harry Elmer Barnes, an opponent of US involvement in the First and Second World Wars, claimed that all of the crimes of the Nazis and Japanese were exaggerations, including: the Holocaust; that there were no gas chambers; and that the Holocaust was merely anti-German propaganda. Following Barnes' lead, pseudo-academic Holocaust deniers sprung up all over the world: Ernst Zündel in Canada, David Irving in the UK, Robert Faurisson and Roger Garaudy in France.

Holocaust denial found followers among Europe and North America's increasingly

organised Far-Right, acting as its intellectual vanguard and providing the jackbooted neo-Nazis of the 1970s and 1980s with a veneer of credibility. They found fertile ground in the Middle East too; Palestinian President Mahmoud Abbas' PhD thesis claimed that the Holocaust was exaggerated, and Iran hosted an international conference on Holocaust denial in 2006.

The links between Holocaust denial, fascism and antisemitism encouraged several European countries to clarify or amend their anti-Nazi laws in the 1990s to explicitly criminalise Holocaust denial. After specific Holocaust denial laws

However, such limits can be difficult to define. Kirsty Hughes, Chief Executive of free speech campaigning organisation Index on Censorship, told *IBA Global Insight* that 'freedom of expression is a fundamental right and any limits on it should be necessary and proportionate and relate to very serious threats'. Such limits should not be established lightly: 'criminalising speech and debate is not the route either to good historical understanding or to tackling racial hatred,' she warns.

European Union law does much to encourage the criminalisation of genocide denial. A 2008 EU framework decision on racism agreed that 'Member States shall ensure that the following intentional conduct is punishable: 'Publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes', while allowing Member States to limit this to acts 'likely to disturb public order or [acts which are] threatening, abusive or insulting'. Index on Censorship opposed the 2008 decision on the grounds that it threatens the right to free expression and could leave the EU open to charges of hypocrisy from authoritarian states. Hughes explained that 'historical events should not be barred from public discussion, no matter how unpleasant that discussion may be'.

Further afield, Rwandan law forbids the denial of the Rwandan genocide, with a severe maximum sentence of 25 years' imprisonment.

Although these laws exist on statute books, in some jurisdictions they are almost ornamental; a legislative statement of public policy, rather than a practical law to be implemented. The vast majority of prosecutions have been brought in only a few countries: Austria, France, Germany and Switzerland have been the most active in prosecuting Holocaust deniers.

Former Red Army Faction founder and subsequent neo-Nazi Horst Mahler is currently serving a five-year jail sentence for denying the Holocaust. Jean-Marie Le Pen, the long-time leader of the French National Front, has been convicted for 'minimising the Holocaust' in both France and Germany, after calling the gas chambers a 'detail of history'.

Rwandan courts place a wide interpretation on its genocide denial law, leading to accusations that it is used as a political tool against opponents of the government. Peter Erlinder, a US lawyer and academic who served as Lead Defence Counsel at the UN International Criminal Tribunal for Rwanda, was arrested as a 'genocide denier' in 2010, provoking an outcry in the US. Erlinder was eventually freed on bail. Rwandan newspaper editor Agnes Uwimana Nkusi, a critic of government corruption, was sentenced to 17 years in prison for claiming that there were victims on both sides of the Rwandan genocide.

'There are limits to freedom of expression: the justification of a pro-Nazi policy cannot enjoy the protection of Article 10 and the denial of clearly established historical facts – such as the Holocaust – are removed... from the protection of Article 10'

European Court of Human Rights, *Garaudy v France* (2003)

became well-established, victims, campaigners and academics argued for similar laws prohibiting the denial of other genocides.

In word but not deed

A number of states consider genocide denial a criminal offence. Sixteen countries – all in Europe, apart from Israel – have laws against Holocaust denial. Hungary was the most recent to join this group, passing a law banning Holocaust denial in early 2010. Later that year, a new right-wing government changed the law to cover 'the genocides committed by Nazi or communist systems,' a similar form of words to that used by the Czech Republic. Poland and Lithuania also ban the denial of crimes against the Polish and Lithuanian people committed by either the Nazi or Soviet regimes, although these laws don't specifically mention genocide. The Swiss penal code makes it a crime to deny, minimise or justify any genocide, as does the law in both Portugal and Lichtenstein. The struck-down French bill was similarly broad.

The breadth of such limits is a problematic concept. 'That there should be limits to freedom of speech is now widely accepted,' according to former war crimes prosecutor Richard Goldstone, 'It is for each democracy to decide where those limits should be situated.'

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In early April, her sentence was reduced on appeal to four years.

In what may be the first successful prosecution for denying the Armenian genocide, Switzerland convicted Turkish politician Doğu Perinçek in 2007 under their denial laws. He is currently appealing to the European Court of Human Rights, claiming that the law is an unjustifiable restriction on his freedom of expression.

Proving history

Most common law jurisdictions do not have genocide denial laws, but may still prosecute deniers under racial hatred or incitement laws. This is a relatively frequent occurrence in the UK, Canada and Australia.

In 1984, Canadian schoolteacher James Keegstra was convicted of ‘willfully promot[ing] hatred’ against Jews for teaching his students that the Holocaust was a hoax. Keegstra appealed to the Supreme Court of Canada, claiming the law against promoting hatred was an unconstitutional restriction on his free speech.

‘That there should be limits to freedom of speech is now widely accepted. It is for each democracy to decide where those limits should be situated’

Richard Goldstone
Former war crimes prosecutor

The Court found that the law did restrict his freedom of expression, but that the restriction was reasonable and justifiable.

The Court reached a different conclusion in the case of Ernst Zündel, a German neo-Nazi resident in Canada and a publisher of pamphlets including *The Hitler We Loved & Why* and *Did Six Million Really Die?* In 1988, Zündel was convicted under a law banning the malicious spreading of false information.

Zündel appealed, claiming that the offence itself was a breach of his right to freedom of expression. The Supreme Court struck down the law and cleared Zündel. Ironically, Zündel – who had never been granted Canadian citizenship – was deported in 2003 from Canada to Germany, where he was convicted of Holocaust denial under German law.

The most important UK court case on Holocaust denial was a civil libel action, brought by British Holocaust denier David Irving against historian Deborah Lipstadt and her publisher Penguin Books. Lipstadt’s book, *Denying the Holocaust*,

called Irving a Holocaust denier and a bigot, and accused him of deliberately misrepresenting evidence about the Holocaust. The case was tried using English libel law, under which the burden of proof is on the defendant to show that the libellous comments are true or justified. This forced the defence to prove in court that the Holocaust had happened, and that Irving’s denial of it stemmed from his far-right political beliefs, rather than any historical evidence.

The judgement, presented in April 2000, categorically found that the Holocaust occurred, and that Irving ‘persistently and deliberately misrepresented and manipulated historical evidence’ in order to deny it. Much like Zündel, Irving was eventually arrested in Austria in 2005 for denying the Holocaust and imprisoned there for 13 months.

More complicated was the case of Fredrick Töben, an Australian citizen who ran a Holocaust denial group. Töben was arrested in the UK in 2008 under a European Arrest Warrant (EAW) from Germany for publishing Holocaust denial material on the internet. The tangle of jurisdictions had to be unravelled by the court: Töben frequently put Holocaust denial materials online; he did this in Australia but they were accessible worldwide. The act was a crime in Germany but not under English law. Ultimately, the EAW was quashed and the German prosecutors withdrew an appeal.

In countries where deniers are rarely prosecuted, genocide denial prosecutions often become complicated human rights cases, with courts forced to balance freedom of speech against the statute and the offence. The Spanish law on genocide denial was tested after the conviction of far-right activist Pedro Varela in 1998. Varela appealed to the Constitutional Court of Spain. The court eventually ruled in 2007 that the genocide denial law itself was unconstitutional – though it left intact laws banning the justifying of genocide.

A consensus across countries and cultures would be helpful, but has proven elusive. ‘International cooperation with regard to genocide denial would be the optimal way to go,’ says Richard Goldstone, ‘but no doubt difficult to achieve. I doubt, for example, whether the US and the EU could find an acceptable formula to satisfy both.’

The most obvious objection to genocide denial laws in Europe is Article 10 of the European Convention on Human Rights, which protects freedom of expression. In 2003, French Holocaust denier Roger Garaudy appealed to the European Court of Human Rights, arguing that France’s denial laws were incompatible with Article 10. The Court disagreed, finding:

‘there are limits to freedom of expression: the justification of a pro-Nazi policy cannot enjoy

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Intent to destroy

The term 'genocide' itself was coined by Raphael Lemkin in 1943; he invented the word to describe the then-ongoing Holocaust perpetrated by Nazi Germany, and the past massacres of Armenians. The preeminent legal definition of 'genocide' is taken from the 1948 UN Convention on the Prevention and Punishment on the Crime of Genocide, and has since been incorporated in to the Rome Statute of the International Criminal Court. It defines genocide as:

'any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.'

This description captures a large number of events in history, including the massacres of the Maya during the Guatemalan civil war; the Hutu genocides of Tutsi in Rwanda and Burundi; Serbia's ethnic cleansing of Muslims in the Yugoslavian civil war; Saddam Hussein's gassing of Iraqi Kurds; and, of course, the 20th century's most organised, systematic and inhuman genocide: the Holocaust of the Jewish people during the Second World War.

the protection of Article 10 and the denial of clearly established historical facts – such as the Holocaust – are removed [...] from the protection of Article 10 [...] Denying crimes against humanity is one of the most acute forms of racial defamation towards the Jews and of incitement to hatred of them.'

That ruling dealt specifically with Holocaust denial, but what are the justifications for

more general genocide denial laws? Gregory Stanton of Genocide Watch considers 'denial' to be an integral component of genocide itself, the last of his purported eight stages of genocide, and 'among the surest indicators of further genocidal massacres'. But if denial is an indicator of future genocides, banning it doesn't mean that the future genocide won't happen: only that there might be less of a warning beforehand. For Index on Censorship's Kirsty Hughes, 'historical or scientific or other facts and debates are best established and proved through open debate and argument, and allowing the clear light of day to shine on weak or false arguments'. She adds that 'limits on speech and free expression should focus on cases where there is genuine incitement to violence'.

Making the case

Interestingly, almost all of the countries that have laws against Holocaust denial were directly touched by the Holocaust, either as victims or as perpetrators. The same can be said about Rwanda's genocide denial laws, however partially they are applied.

Attempts to criminalise denial of the Armenian genocide, however, are distinguished by a lack of connection to either the victim or the perpetrator. Denying the Holocaust in Germany is easy to interpret as racism and incitement against Jews – it amounts to a claim of a conspiracy involving millions of Jews and others. This is a harder case to make if a French or Swiss academic claims that the expulsions and massacres of Armenians don't constitute genocide.

France's rejected bill is problematic for other reasons; it banned the denial of genocides recognised by the French Assembly, rather than those recognised by a court, making the decision of what constitutes genocide a legislative act, open to political pressures and lobbyists.

After the Constitutional Council ruling, President Sarkozy ordered the drafting of a new bill that would avoid the Council's objections. However, it could be too late. The European Court of Human Rights is due to rule on Doğu Perinçek's case against Switzerland's Armenian genocide denial law. If Perinçek wins, it is likely to spell the end for broad genocide denial laws inside all the Convention States, including France. ☒

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The IBA addresses the issues raised in this feature through its Media Law and Freedom of Expression website, which can be viewed at: www.mlfoe.org.



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Bridge over troubled waters

A planned causeway between Egypt and Saudi Arabia could bring the two countries closer economically, socially, and politically.

ANDREW WHITE

A long, thin finger of water which thrusts up from the northern rim of the Red Sea, the Gulf of Aqaba has long represented a dividing line between the continents of Africa and Asia. However, that could be about to change as Saudi Arabia and Egypt have announced plans to push ahead with a \$3bn causeway linking the home of Islam with the most populous country in the Arab world. The project, which had for years been delayed by bitter diplomatic wrangling, has been heralded by the governments of both countries as a way to improve economic and social relations. The proposed 32km causeway will emerge from the desert in Ras Nassrani, in the Egyptian resort of Sharm El-Sheikh, arching over the Tiran Strait and passing through Tiran Island, as it stretches to Ras Hamid near Tabuk in northern Saudi. It represents not just a physical bridge between the two states, but a political one too: a concrete-and-steel tie between the House of Saud, and the Muslim Brotherhood which rose to power in Egypt in the wake of the Arab Spring revolts.

For Egypt and its new leaders, the financial incentives for pushing ahead with such a project are manifold. Under the rule of former President Hosni Mubarak, the country's annual GDP growth rate rose to 7.2 per cent in 2008, from 4.1 per cent in 2004, and remained at 5 per cent in 2009 and 2010, despite the global economic downturn. Now the country's economy is struggling to recover from the trauma of Tahrir Square. Local, regional and international confidence in Egypt as a place to do business has all but evaporated in the climate of political uncertainty which permeates the streets of Cairo. Egypt's unemployment rate in the second quarter of 2012 was 12.6 per cent, compared with 11.8 per cent in the year-earlier period, and 8.9 per cent in the fourth quarter of 2010, the last quarter in which Mubarak was in

power. Behind closed doors, meanwhile, business leaders accuse the new government of leading a witch-hunt against enemies of the state whose only crime was to have been successful under the previous regime. Accusations of bribery and corruption – sometimes legitimate but too often supported by vague or unsubstantiated evidence – have led to the arrest and imprisonment of a number of high-flying businessmen, and big business has ground to a halt amid the fallout.

Of course, not all benefitted under Mubarak, and by the end of his rule spending on transport links, utilities, schools, and healthcare facilities had slowed to a trickle. With private sector growth non-existent in 2012, Egyptian President Muhammad Mursi is hoping that massive infrastructure spending will give the country the boost it so sorely needs, and to that end he has repeatedly urged his officials to remove all obstacles facing Saudi investment in Egypt. The government has opened an office in Cairo to deal exclusively with the problems faced by Saudi investors in Egypt, and a 50-strong delegation of Saudi businessmen and other officials recently visited the Presidential Palace, where Mursi granted them a private audience and assured them that Saudi investment projects in Egypt (worth as much as \$27bn) would proceed without delay. Egyptian officials also presented 15 new projects valued at \$8.5bn to the Saudi delegation during the visit, much of it concerned with the privatisation of Egypt's creaking state-owned assets. The privatisation process, introduced by former Prime Minister Ahmed Nazif, had proved to be a bone of contention between the two countries after Egyptians filed a series of lawsuits challenging the privatisation of state-owned companies that granted ownership to Saudi investors. It has been estimated that more than 20 such investment projects were halted by legal action, or by workers' strikes.

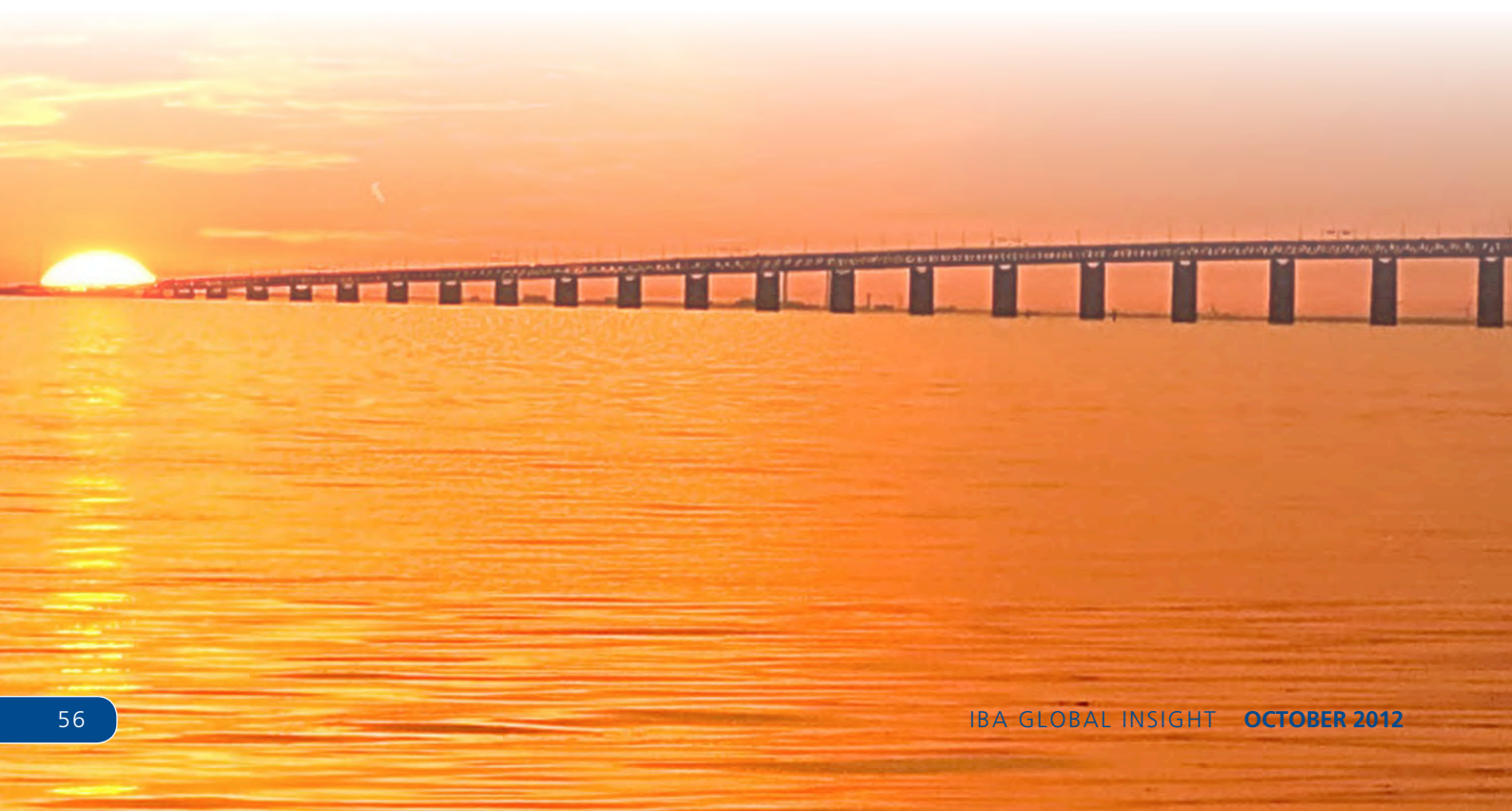
Trade is also expected to blossom when the causeway opens. In March, Hussain Omran, chairman of the foreign trade department at the Egyptian Ministry of Commerce, said that a causeway between the two countries would increase trade by more than 300 per cent, from US\$4.2bn annually to more than \$13bn in two years. Tourism, too, should benefit. While Western tourists are shying away from the pyramids and sun-loungers, Dr Hisham Zaazoua, senior assistant to the Egyptian Tourism Minister, says the number of Saudi tourists to Egypt could soar to more than 1.2 million annually, compared to the current figure of 300,000, upon completion of the causeway. Saudi, meanwhile, is likely to benefit from a huge rise in religious tourism. At present, during the religious seasons of Hajj and Umrah, more than three million Muslims travel to the Kingdom, and many more will be able to do so if the causeway offers easy access to pilgrims from across the Levant and North Africa.

Religious considerations, of course, underpin the political consensus which has emerged from decades of dispute and delay. Only after a July 2012 meeting between Mursi and Saudi's King Abdullah, was the causeway development fast-tracked: senior figures in both administrations have since been enthusiastic in their public proclamations on the subject, and a technical committee convened in September to discuss the practicalities of the project. When the Muslim Brotherhood swept to power earlier this year, Saudi leaders feared Egypt's new government might seek to build closer relations with Iran, the country Saudi regards as its greatest threat,

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and to export Islamism beyond its already porous borders. However, Mursi's visit to Riyadh was his first presidential visit abroad, a move many observers interpreted as a sign that the Muslim Brotherhood in Egypt will seek to reinforce its image as the moderate face of political Islam, one which is turned to rulers in the Gulf, as opposed to Tehran. Saudi is looking for assurances that Egypt and its high-profile Islamist government will not seek to foment the rise of Islamist blocs in other states across the region, or indeed within the Kingdom itself. And a new era of economic, social, and political cooperation, such as that advanced by the causeway project, could go a long way to soothing the pressing concerns of both governments. ☒

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