

IBA GLOBAL INSIGHT

Oct/Nov 2013

**The six trillion
dollar question:
*Tax Abuses, Poverty
and Human Rights***

**Asia column:
China's corruption
push is making
companies wary**

**Global leaders:
Sir Nicolas Bratza
shares his views
on the future of
human rights law**

Me, myself and i

Personal data is becoming a multi-trillion dollar business raising concerns over who controls our digital identities



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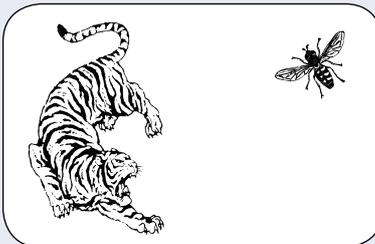
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The content of *IBA Global Insight* magazine is written by independent journalists and does not represent the views of the International Bar Association.

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From the Editor



As this edition of *Global Insight* went to press, thousands of IBA members were due to gather for the Association's 2013 Annual Conference in Boston. Major themes to be covered are also reflected in the pages that follow. The LPD showcase session in Boston – 'What happens in Vegas, stays on the internet' – will bring together leading luminaries of the media, such as former Editor of *The Times* Harold Evans, and leading legal authorities to examine the privacy issues thrown up by new technologies and particularly social media. The cover feature of this edition – **Me, myself and i**, page 14 – explores this terrain, considering how the law is adapting to a new reality in which information is the 'new oil', worth trillions of dollars.

The IBA's Human Rights Institute launches its Taskforce's report, *Tax abuses, poverty and human rights*, in Boston at the session of the same name. In our feature – **The six trillion dollar question**, page 31 – the Taskforce's rapporteur sets out the thinking behind the report, why it is so relevant now, and its main conclusions. Important here is the effort to clearly circumscribe the obligations of key actors in the global economy, including states, business enterprises and the legal profession.

Our news and comment sections also cover burning issues sure to feature prominently in discussions at Boston. With former US Secretary of State Madeleine Albright opening the week as the keynote speaker, what the international community ought to do about Syria will be at the forefront of people's minds. The article **Syria: Military intervention illegal but may be legitimate** on page eight of this edition sets out the views of leading international lawyers on the subject. Meanwhile our new Middle East columnist, Emad Mekay, considers the fraught situation in Egypt, likely to feature in the lunchtime 'Conversation with..' session at which Professor Cherif Bassiouni addresses the question 'The Arab Spring: what next?'. We will, of course, be making much of this content from Boston available in the December edition of the magazine, on the website and in film.

James Lewis



Private Equity Transactions Symposium 2013

14 November 2013

Mandarin Oriental, London, England

A conference presented by the Private Equity Subcommittee of the IBA Corporate and M&A Law Committee, supported by the IBA European Regional Forum

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- How investors view the asset class today and their plans for the future
- Financing
- Themes from topical markets
- Exits
- Distressed investing in Europe
- Current issues – a mixed bag of topical issues
- General Counsel Forum

Who should attend?

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News

The DOJ's holding pattern: antitrust and US Airways

RICHARD LLOYD

The decision in mid-August by the US Department of Justice to bring a lawsuit against the proposed \$11bn merger between US Airways and AMR Corp, the parent corporation of American Airlines, appears to fit neatly into a widely accepted narrative of antitrust under President Obama. That, under the current administration, the government's antitrust lawyers have taken a more aggressive stance in pursuing cases and levying fines against anti-competitive behaviour than under George Bush.

The case against the merger, which was originally announced in February, certainly bears all the hallmarks of a headline-grabbing mandate. In the suit, which was filed in the US District Court for the District of Columbia, the DOJ was joined by the attorneys general from six states – Texas, Arizona, Florida, Pennsylvania, Tennessee and Virginia – and the District of Columbia.

'The department sued to block this merger because it would eliminate competition between US Airways and American and put consumers at risk of higher prices and reduced services,' said William Baer, Assistant Attorney General in charge of the DOJ's Antitrust Division, in a statement released by the DOJ. 'Both airlines have stated that they can succeed on a standalone basis and consumers deserve the benefit of that continuing competitive dynamic,' he added.

The 56-page complaint filed by the DOJ and the states highlighted that the merger would create the world's largest airline, result in four operators controlling more than 80 per cent of the commercial air travel market in the US and give the combined business a particularly dominant position in Washington DC's Reagan National Airport. Although America is currently operating in bankruptcy, the complaint claimed that the airline was likely to emerge from Chapter 11 as a vigorous competitor to the US's other main carriers.

'The merger of these two important competitors will just make things worse – exacerbating current airline



industry trends toward reduced service, increasing fares and increasing passenger fees,' Baer stated.

The lawyers representing the airlines have struck a bellicose tone in response to the government's suit. While the government originally asked for the case to be heard in March 2014, the airlines successfully pushed for a November start.

It would not be surprising if the case settled before it reached court but, regardless, the DOJ's lawsuit has been taken as another example of the Obama administration's tough stance on antitrust enforcement. That reputation has been fuelled by a number of headline cases such as the blocked 2011 takeover of T-Mobile's American business by AT&T and the successful challenge to the proposed deal between H&R Block and TaxAct, also in 2011. The H&R deal gave the DOJ its first trial win in a merger challenge since 2003.

In his election campaign, Obama promised a more vigorous approach, criticising the perceived lax antitrust enforcement under Bush. In a statement he made to the American Antitrust Institute in 2007 while he was running for the Democratic nomination for President, Obama asserted that, 'the current administration has what may be the weakest record of antitrust enforcement of any administration in the last half century.'

The reality, since Obama's election,

has arguably been more nuanced. In an essay published in July last year in the Stanford Law Review Online, Professor of Law at the University of Michigan Law School Daniel Crane argued that, 'current enforcement looks much like enforcement under the previous regime.' The past year, he says, has done little to alter that conclusion. He describes the DOJ's challenge to the airline deal, like the proposed AT&T deal before it, as 'largely conventional horizontal merger challenges in concentrated markets.'

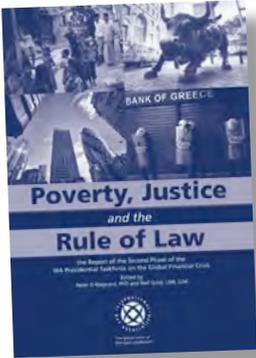
Crane's study focuses just on the DOJ and places a heavy emphasis on the numbers of anti-cartel criminal cases and the fines that have been levied, the number of merger challenges that have been brought and the level of civil non-merger cases. It does also not include fiscal year 2012 when the DOJ levied the largest total criminal fines in its history, with two particularly large cartel cases fuelling the record numbers.

The number of cases and level of fines can only paint part of the picture on how aggressively an administration pursues antitrust cases, a point that Crane highlights. They do suggest, however, a more complex story than the simple lax Bush, aggressive Obama headline. The question now is to what extent that narrative may be changing. As Crane and other antitrust specialists point out, the DOJ and the US's other primary watchdog at the Federal Trade Commission, tend to be less activist during an economic downturn. So as the American economy continues to recover we may expect to see a more interventionist approach.

Baer's team has certainly been steeled for a fight. He took over an antitrust division that has bolstered its in-house litigation capability including establishing the role of director of litigation in January 2012. So, as we watch the evolution of the DOJ's airlines suit, Obama's administration may be about to fully deliver on that campaign rhetoric.

Read the full story at tinyurl.com/IBANews-AntitrustUSAirways.

Presidential Task Force publishes report: *Poverty, Justice and the Rule of Law*



The IBA's Presidential Task Force on the Financial Crisis, led by the Public and Professional Interest Division (PPID) under Chair Peter Maynard, has followed and built on the work on

financial regulation of the first phase of the project (2010). Among its aims were an assessment of the impact of the global economic crisis and to identify ways that the legal profession can improve the prosperity of people throughout the world.

The Report, entitled *Poverty, Justice and the Rule of Law*, is available in printed format and can be read via the IBA website.

For further details on the work of the Task Force see tinyurl.com/IBANews-TaskForce2013.

Update on the IBA/OECD/UNODC Anti-Corruption Strategy

The IBA Legal Projects Team continues to conduct the IBA/OECD/UNODC Anti-Corruption Strategy's flagship Workshop for Legal Professionals. Workshops were held in Madrid and Barcelona, Spain, on 6 and 7 June, respectively. Forthcoming workshops include Nairobi, Kenya on 17 September, to be conducted in partnership with the Law Society of Kenya; and Harare, Zimbabwe on 19 September, in partnership with the Law Society of Zimbabwe. The Team also participated in an UNODC-UNDP High-Level Judicial Integrity Expert Group Meeting in Bangkok 11–12 July.

Read more about the Anti-Corruption Strategy at tinyurl.com/IBANews-ACS.



IBA launches first phase of Initiative for Women Business Lawyers in the Middle East

A series of focus group discussions recently took place in Dubai, UAE; Kuwait City, Kuwait; and Amman, Jordan, as part of the first phase of the IBA's Legal Practice Division (LPD) Initiative for Women Business Lawyers in the Middle East.

The focus group participants were women lawyers in commercial law practices who met to discuss the challenges and issues in international commercial law practice and contributed ideas to help shape a substantive programme for women business lawyers in the Middle East region, to be launched later in the year. The focus groups included mid-career lawyers in international firms, independent practitioners managing their own firms, academics and students.

The Initiative is the creation of the IBA's LPD Council Member, Sylvia Khatcherian who, during the IBA Annual Conference in Dubai 2011, observed that women commercial lawyers in the Middle East wished to develop their practices and in doing so felt the need to enhance their awareness of emerging global trends in international commercial law.

The IBA's LPD seeks to assist the lawyers in their practice development by creating programmes for women lawyers in the Middle East by:

- strengthening their knowledge base of international commercial law;
- developing their international practices; and
- enhancing awareness of global standards and trends in commercial practice.

The focus groups were incredibly successful with each country visited highlighting key differences in the issues that women face in the development of their commercial law practices. However there were many common issues that were highlighted during the discussions:

- formal training in specific topics of legal practice;
- increased opportunities to develop soft skills, especially speaking opportunities within IBA events; and
- encouraging interaction between international and local lawyers.

The second stage of the Initiative is to make use of the focus group's feedback to design a programme, or series of programmes, based on the feedback from the focus groups. The programme will be implemented late in 2013.

For further information on the project please contact Mitzi Huang, Senior Staff Lawyer, IBA London, mitzi.huang@int-bar.org.

IBA Young Arbitration Practitioners Subcommittee formed

A new IBA subcommittee, the Young Arbitration Practitioners Subcommittee, will commence its activities on 1 January 2014. Its creation follows the success of recent symposia hosted by the Arbitration Committee aimed at young practitioners which coincided with the IBA Annual Conference in Dublin and the Arbitration Day conferences in Stockholm and Bogota. This initiative has been inspired by the success of the Young Lawyers' Committee which has enabled young lawyers to join and become actively engaged in the IBA. Membership in new Subcommittee is open to all members of the Arbitration Committee under 40 years of age.

For more information about the Subcommittee, see tinyurl.com/IBANews-YAP.

Law firms to draw up first human rights policies by end of year

REBECCA LOWE

Four magic circle law firms may have human rights policies in place by the end of the year, *Global Insight* has learnt – making them the first law firms in the world to do so.

Clifford Chance, Herbert Smith Freehills (HSF), Linklaters and Freshfields Bruckhaus Deringer are all in the process of drawing up policies in line with the Guiding Principles on Business and Human Rights (the ‘Principles’), proposed by then-UN Special Representative John Ruggie and endorsed by the UN Human Rights Council in June 2011.

While hundreds of companies have adopted the Principles into their corporate social responsibility policies, not a single law firm in the world is currently believed to have a human rights policy of its own.

HSF partner Louise Moore, who leads the firm’s sustainability group, says the Principles have provoked huge interest across the firm, especially among younger lawyers. She believes the firm will have a Ruggie-compliant policy in place by the end of 2013.

‘This issue has really captured the imagination of our younger lawyers, reminiscent of how environmental issues did five to ten years ago,’ she tells *Global Insight*. ‘Today’s lawyers are highly idealistic and astute, and believe it is possible to achieve business ends without sacrificing human rights.’

The non-legally binding Principles put a duty on states to ‘protect’ human rights and companies to ‘respect’ them. Such obligations throw up considerable challenges for lawyers, who are expected under the guidelines to use their leverage ‘to mitigate impacts’ on human rights violations. For some, this may mean dropping a client that engages in ‘unethical’ activity, whether or not such activity falls within the lawyer’s mandate; for others, it may mean simply giving clear, comprehensive advice on reputational risks.

For many corporate lawyers, however, the Principles are not seen as relevant to law firms at all: lawyers are employed to achieve their clients’ wishes within the confines of the law, they claim, and not to be moral arbiters.



Andrew Denny, Chair of Allen & Overy’s Human Rights Working Group, believes it is possible for lawyers to balance their professional duties with the Principles, but concedes that putting a policy in place will not be easy. ‘Before we make a high-level commitment, we need to be able to answer the difficult questions. There is no point making a commitment so woolly that it is meaningless.’

Such concerns are compounded by law firms’ bureaucratic structures. Support is required from dozens and sometimes hundreds of partners and risk assessors, many of whom may not be knowledgeable about Principles compliance. Getting buy-in from the top is not always easy. ‘The vast majority of senior partners see themselves as mere representatives of the views of the partnership,’ says a senior expert in corporate governance, who declined to be named. ‘They are not there to have inspirational ideas.’

Despite this, awareness about the Principles is slowly growing among law societies and bar associations across Europe. John Sherman, former adviser to Ruggie and general counsel of Shift – the body taking the lead on putting the Principles into practice – hopes this will speed up lawyers’ engagement with their human

rights obligations. ‘We’ve had lots of acknowledgement from law societies and bar associations, which is really important,’ he tells *IBA Global Insight*. ‘The more they recognise the need for lawyers to pay attention to the Principles, the less of a problem it will be for the individual lawyers to stick their hand up and ask, “why should I do this?”’

Former Clifford Chance partner and Chair of the IBA Pro Bono Committee Tim Soutar agrees: ‘Most people don’t find it easy to stick their head above the parapet,’ he says. ‘If we can get bar associations and similar entities that set professional conduct principles to support this, it would make a healthy difference.’

While momentum may slowly be building, lack of support outside the US and UK remains a problem. The Council of Bars and Law Societies of Europe (CCBE), which represents a million European lawyers, has reportedly voiced concerns about the growing burden of compliance on the legal profession, with the Principles coming on top of anti-money laundering (AML) and anti-corruption obligations already in place.

Elise Groulx Diggs, one of the first two co-presidents of the International Criminal Bar, is currently designing a training programme for lawyers in Europe and the US that will teach human rights as part of a much larger body of law. ‘As a principle, I think it is wonderful for legal organisations to endorse this, but it has to be followed by training,’ she tells *Global Insight*. ‘The Guiding Principles are really an evolution of international criminal law. You have so many other bodies of law – labour law, anti-corruption law, sanctions law, trade law – that are all related. They should be taught together.’

She adds: ‘Law is an amazingly transformational tool and it doesn’t take that many people to bring about change. I think this is change whose time has come.’

Read the full story at tinyurl.com/IBANews-LawFirmsHR.

Human Rights News

Syria: Military intervention illegal but may be legitimate

REBECCA LOWE

Military intervention in Syria following the regime's alleged use of chemical weapons would be illegal but potentially 'legitimate' under global humanitarian law, one of the world's leading international lawyers has told *Global Insight*.

Under international law, armed attack against another nation is illegal except in self-defence or with the authority of the United Nations Security Council (UNSC). However, the use of force for a humanitarian purpose – such as protecting civilians from abuses perpetuated by the state – has become recognised as 'soft law', and was used to justify the 1999 Kosovo intervention by NATO.

A resolution condemning NATO's actions was put forward by Russia after the event, but was defeated by a vote of 13 to two. 'This has been regarded as ex-post-facto approval of the action,' says Richard Goldstone, former Chief Justice of the International Criminal Tribunal of Rwanda and the former Yugoslavia, who chaired the 2000 Independent International Commission on Kosovo. 'In the present case, it could be argued that the military force is being used to protect the people of Syria from the future use of chemical weapons. That would very much depend on the efficacy of the force used and whether it would indeed deter such future use of such weapons.'

In 2005 – following a report by the International Commission on Intervention and State Sovereignty, which came to broadly the same conclusions as the Kosovo Commission – UN member states agreed on a new 'responsibility to protect' principle. The norm, never cemented in law, allows for a last resort of military intervention under a series of strict conditions if a state commits genocide, war crimes, ethnic cleansing or crimes against humanity against civilians. However, unlike the Kosovo Commission proposals, such intervention could only take place with UNSC authority.

For former French Minister of Foreign and European Affairs Bernard

Kouchner, who served as UN special representative to Kosovo from 1999–2001, legitimacy is often more important than legality. States, he believes, have an ethical duty to intervene in humanitarian crises. 'Sometimes you have to break the law to change it,' he told the IBA Rule of Law Symposium during the IBA's 2012 Annual Conference in Dublin. 'And that is my advice: act illegally to change the law, and you will see [...] the change will follow you.'

The overriding aim of the intervention must be the direct protection of the victims, the Commission declared, and the method of intervention must be 'reasonably calculated to end the humanitarian catastrophe as rapidly as possible'. It must only be carried out once all non-violent solutions have been exhausted, and should not be done unilaterally but 'enjoy some established collective support'.

Converting legitimacy to legality could be achieved through a UNSC resolution or through crystallising customary law – that is, the acceptance of such a doctrine by a critical mass of UN member states. However, both would be extremely difficult to achieve. A more effective way would be through reform of the UNSC itself. Many international law experts and policymakers have called for an expansion of UNSC membership and for reform of its decision-making process, which currently allows all decisions to be vetoed by one of the five permanent members: the US, UK, China, Russia and France.

Former UN legal chief Hans Corell does not advocate bypassing the UNSC, but has long argued for veto-right reform for the institution to work effectively. He proposes that the permanent members only use their veto in situations where their most 'serious and direct' national interests are affected. 'We must not undermine



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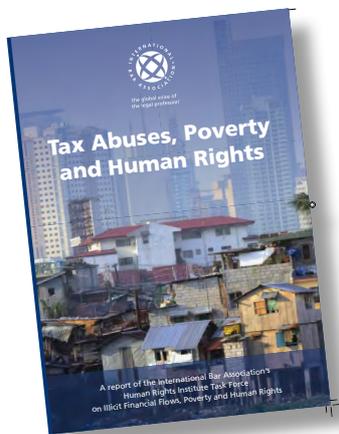
the UN Charter,' he says. 'What we need is that the permanent members of the UNSC fulfil their duty under the Charter.'

James Goldston, founder of the Open Society Foundation, acknowledges the UNSC lacks political legitimacy, but stresses that policy considerations – such as enforcing the international norm against the use of chemical weapons or protecting Syrian civilians from being killed – 'does not render lawful an unlawful act'. Instead, he says, the UNSC should refer Syria to the International Criminal Court for investigation – and be subject to fundamental reform.

Without reform, it could be argued the entire structure and procedures of the UNSC are contrary to developing norms of international humanitarian law. Where Kosovo was concerned, the UK Government argued the action was justified on the grounds that international law recognises an exceptional right to take military action without UNSC authorisation in cases of 'overwhelming humanitarian necessity'. The UK has reiterated this argument in the case of Syria and is currently seeking a UNSC resolution that would authorise member states to take 'all necessary measures' to protect civilians from the use of chemical weapons.

Read the full story at tinyurl.com/IBANews-Syria.

Tax Abuses, Poverty and Human Rights



In March 2012 the IBAHRI launched its Task Force on Illicit Financial Flows, Poverty and Human Rights to reflect upon issues such as: where to draw the line between tax evasion and avoidance; reforms required to confront tax abuses; the responsibilities of states and businesses; the role of the legal profession. The Task Force's mandate is rooted in an IBAHRI Council Resolution that links extreme and endemic forms of poverty with potential violations of human rights. For this reason, the Task Force has given a particular focus on the tax abuses that have negative impacts on developing countries.

Based on extensive consultation from diverse perspectives, the Task Force report *Tax Abuses, Poverty and Human Rights* analyses how tax abuses deprive governments of the resources needed to combat poverty and fulfil their human rights obligations. The report:

- provides a detailed overview of tax abuses and secrecy jurisdictions;
- scrutinises the links between tax abuses, poverty and human rights;
- draws on case studies from Brazil, Jersey and the SADC region;
- analyses responsibilities and remedies to counter tax abuses affecting human rights; and
- delivers unique recommendations for states, business enterprises and the legal profession.

The report covers developments in international tax cooperation on issues such as automatic exchange of information, and base erosion and profit-shifting. It also examines trends in international development policy which are increasingly focused on strengthening good tax governance in developing countries – thereby reducing dependency on foreign aid and improving development outcomes. It demonstrates the evolution of international human rights law and policy, whilst highlighting tax abuses as a pressing human rights concern.



First plenary meeting of the IBAHRI Task Force on Illicit Financial Flows, Poverty and Human Rights, March 2012.

With increasing media and civil society scrutiny on tax abuse by governments and the tax practices of wealthy individuals and multinational enterprises, the Task Force's report seeks to engage lawyers and the legal profession in this crucial global discussion.

Read Task Force rapporteur Lloyd Lipsett's feature in this edition on p 31.

For further details about the Task Force see tinyurl.com/IBANews-HRITaskForce.

IBAHRI concerned by arrest of Bangladeshi human rights lawyer Adilur Rahman Khan



The IBAHRI calls for the release of prominent human rights lawyer Adilur Rahman Khan, Secretary of the Bangladeshi human rights organisation Odhikar, who was arrested on 10 August 2013 and accused of 'publishing false images and information' and 'disrupting the law and order situation' of Bangladesh. Having been denied bail, Mr Khan remains in detention following the arrest by several officers from the Detective Branch of the Bangladeshi Police, reportedly without a warrant.

The charges brought against Mr Khan are widely reported to relate to a fact-finding report, prepared and later published on 10 June by Odhikar, that detailed extrajudicial killings of 61 individuals by law enforcement personnel during a rally, organised by the Bangladeshi Islamic group Hefazate, in May 2013 at Motijheel. Odhikar asserts that prior to Mr Khan's arrest the organisation had refused a request from the Information Ministry to disclose the names and addresses of the 61 victims, fearing for the safety of their families.

Read the full story at tinyurl.com/IBANews-Odhikar.

New torture prevention guide for Mexico's legal profession



The United Nations (UN) Special Rapporteur on Torture, Juan E Méndez, a former Co-Chair of the IBAHRI, provides the preface in *Protecting People from Torture in Mexico: A Guide for Legal Professionals*. Mr Méndez writes: 'Judges, prosecutors and lawyers play a key role in ensuring that all torture offences are investigated and that victims of torture have access to justice and obtain redress. An informed and well-sensitised legal profession can therefore make a significant difference in the fight against torture in Mexico.'

The Guide will be disseminated to legal professionals across Mexico through an integrated programme of four two-day torture prevention workshops.

The first workshop took place at the National Judges School in Mexico City, 5–6 September, delivered by expert jurists from both Spain and Latin America, including from the Mexican Supreme Court, the Office of the UN High Commissioner for Human Rights and members of the

UN Sub-Committee on the Prevention of Torture. More than 200 judges, prosecutors and lawyers are set to attend the training sessions which form part of an IBAHRI nationwide torture prevention programme in Mexico being conducted in collaboration with the country's Federal Supreme Court, Federal Prosecutor's Office, Federal Public Defenders Office, alongside the Office of the UN High Commissioner for Human Rights in Mexico, and members of the UN Sub-Committee for the Prevention of Torture.

Commenting on recent constitutional reforms in Mexico, Baroness Helena Kennedy QC, IBAHRI Co-Chair said: 'Recent constitutional reforms have been significant for the strengthening of due process assurances and the application of international human rights standards in Mexico's domestic law. We are delighted to continue our collaboration with Mexico's justice institutions in combating torture, and hope that this Guide makes a positive and practical contribution to the education of present and future generations of Mexican legal professionals.'

A new guide on the application of national and international torture prevention standards in Mexico has been launched by the International Bar Association's Human Rights Institute (IBAHRI), in collaboration with the Mexican Federal Supreme Court.

Abolition of the death penalty and the legal profession in Morocco

The IBAHRI has received funding from the Foreign & Commonwealth Office, to run a project in Morocco to build the capacity of the legal profession to advocate for the abolition of the death penalty. This project will build on the success of the IBAHRI project, which closed earlier this year, and which brought together legal professionals and civil society members to discuss the role of lawyers in the abolitionist movement in Morocco. Recognising the need for professional training on the legal basis for abolition, and in order to galvanise commitment to abolition, the IBAHRI will implement a series of regional training workshops for bar association members on the international human rights standards pertaining to the death penalty.

Read further details about the project here tinyurl.com/IBANews-Morocco.



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Immigration detention 'one of the most pressing rule of law issues of our era'

REBECCA LOWE

Immigration detention is 'one of the most pressing rule of law issues of our era', according to a leading British barrister who has authored a report calling for stronger legal safeguards for detainees.

Michael Fordham QC, author of *Immigration Detention and the Rule of Law*, a report commissioned by the Bingham Centre for the Rule of Law, believes policymakers 'can fall into the habit of treating these as persons whose liberty is cheap'. In the report, he calls on governments across Europe to review their policies and give detainees' rights 'the attention they deserve'.

The draft report, co-authored by Bingham Centre research fellows Justine Stefanelli and Sophie Palmer, has been seen exclusively by *Global Insight*.

The report proposes 25 'safeguarding principles' to improve detention standards in Council of Europe states. These include using detention only as a last resort, ensuring detention is as short as possible, protecting vulnerable persons from 'unsuitable detention', prescribing maximum durations for detention, ensuring detainees have access to legal representation and ensuring regular review of cases.

'The basic freedoms of those with irregular migrant status – whether they are asylum seekers, "foreign national prisoners" facing deportation or whatever category they may fall into – are not high on the political agenda,' Fordham tells *Global Insight*. There is currently no international body mandated to focus on immigration detention. Protective standards across European countries vary widely, according to interpretations of global human rights norms, European Court of Human Rights judgments and EU legislation.

The 'Return Directive' – agreed by EU states in 2008 – entered into force in 2010. It imposed a six-month limit on the length of detention, extendable by a further 12 months in certain cases. However, the UK and Ireland chose to opt out of the directive and have no maximum limit.



Amal de Chickera, Head of Statelessness and Nationality Projects at Equal Rights Trust, a global human rights organisation, has observed retrograde developments on immigration policy. 'We have seen increasing scaremongering by politicians, who try to show they are being tough on these issues. Over the last few years, there is a clear trend of immigration being criminalised.'

The immigration policies of several European countries require 'serious improvement', De Chickera says. In 2011, the European Court of Justice – the court that upholds EU law – ruled that returning asylum seekers to Greece would violate their human rights due to its poor detention conditions. While the physical condition of UK detention centres are better than many European states, the UK has been criticised on various counts.

In December 2012, a joint review by the HM Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration said 'insufficient progress' had been made with a quarter of cases reviewed and recommended establishing an independent panel to review lengthy cases. Safeguards protecting detainees with mental illnesses, including torture victims, were also deemed to be inadequately enforced.

Responding to the review, the Home Office confirmed its policy that torture victims should only be detained in 'very exceptional circumstances' and said it would make the guidance 'more explicit'. However, setting up an independent panel would not be 'necessary or appropriate', it said.

Anti-detention organisations claim that detention is both costly and ineffective. In the UK, each detainee costs nearly £40,000. Suggested alternatives include electronic tagging, financial sureties, curfews and reporting requirements.

Jamie Beagent, a senior solicitor at Leigh Day and Co, has represented dozens of foreign national prisoners (FNPs) held in UK detention, some for up to five years.

'It is quite common for those convicted of very minor offences – such as entering the country on false passports to claim asylum or working illegally – to serve short sentences but be detained for much longer under immigration powers,' he tells *Global Insight*. Detention escalated after 2006, when a near blanket ban on the release of FNPs after they had served their custodial sentence was imposed. This conflicted with the published policy, which said each case must be taken on its merits.

The 'secret policy' was subsequently struck down by the UK Supreme Court in March 2011. Outlining the majority opinion in the case, Lord Dyson stated that the detainee may 'only be detained for a period that is reasonable in all the circumstances'.

A UK Home Office spokesperson said the Government operates 'fully in line with Article 5 of the European Convention on Human Rights and detention is not used for longer than is reasonably necessary'. She added: 'Where we and the courts find that an individual has no right to be in the UK, we expect them to leave. When they refuse, it is sometimes necessary to detain people in order to remove them.'

Although the report is aimed at Europe, Fordham hopes the standards could be invoked anywhere. 'If standards are suitable only for Europe, they are not truly fundamental,' he says. 'We hope this report will assist all those who are interested in ensuring that immigration detention is imposed compatibly with the rule of law.'

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Me, myself and i

The European Commissioner for Justice says personal data is 'the currency of the digital economy' with estimates suggesting that, by 2020, it will account for eight per cent of the EU-27 GDP – currently €13tn. *IBA Global Insight* examines the legal implications of this brave new world where few have control of their digital identity.

REBECCA LOWE

The world is experiencing a data explosion. Huge stockpiles of information are being amassed online at an unprecedented rate. According to Cisco, global internet traffic will hit 1.4 zettabytes of data by 2017, 12 times the amount generated in 2008. To put that in layman's terms, if one gigabyte is the equivalent of a cup of coffee, 1.4 zettabytes equates to the Great Wall of China. If someone took it upon themselves to watch all the video crossing the web, it would take them approximately five million years to do so.

There is now so much data stored in the world that we're running out of language to describe it. The only quantity bigger than a zettabyte is a yottabyte, a figure with 24 zeroes. After that, we're on our own. Yet how many people know how much of this data is theirs or where it is being stored? Or who is protecting it? Or what rights they have to access or remove it? The answer, it appears, is not many: more than two-thirds of consumers have 'little idea' what happens to their personal information, according to research by the Boston Consulting Group (BCG). The global population is pouring more and more of its life online, into a bottomless pit it neither understands nor controls.

'People have analogised that where we are with data is comparable to where they were in the industrial revolution with pollution,' says Brian Hengesbaugh, partner and technology specialist at Baker & McKenzie, and former special counsel in the US Department of Commerce. 'Pollution was coming out all over the place and was not really controlled. That is the environment we are in with data generation right now.'

If people realised the true worth of their data, however, they may try harder to get a handle on it. Described by the World Economic Forum in 2011 as 'the new oil', personal information has emerged as a distinct asset class with huge untapped value; the 'currency of the digital economy', according

to Viviane Reding, European Commissioner for Justice, Fundamental Rights and Citizenship. It could, says the BCG, amount to around eight per cent of the EU-27 GDP by 2020.

Yet while technology sprints unshackled into the future, old data protection laws struggle to keep pace. It is currently unclear who owns the rights over personal information and clarification is urgently needed, says Taylor Wessing IT-specialist partner Chris Rees, Co-Chair of a new IBA Working Group on Digital Identity. 'If you start from the position that information is the "new oil", then what lawyers need to do is recognise that the law needs to change to adapt to that new reality. It needs to develop appropriate safeguards and economic redress for this new asset class.'

Benjamin Amaudric du Chaffaut, senior legal counsel at Google France, admits the sluggishness of the law means they are often forging the legislative path as they go. 'We generally can't really rely on existing legal provisions and case law because we often face new legal issues. We therefore have to convince the court that we are doing the right thing.'

Relinquishing rights

The recent leaking of the US National Security Agency's Prism programme, which gave US authorities unprecedented access to personal data online, drew much-needed attention to consumer vulnerability. Suddenly, what material is held on the internet and how it is protected were questions not only being asked by NGOs and policymakers, but by internet users across the world.

While a growing number of countries are enacting data protection legislation, there remain significant inconsistencies across the world. The EU is due to bring in some of the toughest legislation in the world in 2014, while

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China and India – which will soon have more people online than Europe and the US have citizens – are in the process of updating their privacy laws. The US currently relies on a mixture of legislation, regulation and self-regulation for a patchwork of categories of information, but last year announced its intention to enact a privacy bill of rights for web users.

‘The internet is becoming an extension of our functioning as individuals. It is forcing us to think about identity in a much more holistic way, about the trail we create on ourselves, knowingly and unknowingly’

Erik Valgaeren

Partner and IT specialist, Stibbe Brussels

Differences in privacy laws act as a trade barrier and obstacle to innovation, as well as providing legal loopholes for savvy companies to exploit. Aware of the need for clarity on the issue, the IBA Working Group on Digital Identity has set about drafting a set of high-level principles to address concerns surrounding the collection and use of online information. Such data is not simply inputted by users, they point out, but comprises an entire ‘digital identity’ based on behavioural information, such as web-surfing, paying bills – or merely wandering around with a mobile phone, which continuously tracks your movements. Such information is stored by companies, often indefinitely, acting as a form of indelible, sprawling cyber-tattoo, a permanent digital footprint.

‘Until recently there was a general lack of appreciation about the amount of data being collected and stored in the online environment,’ says Sylvia Khatcherian, Managing Director and Global Head of Technology, Privacy and IP Law at Morgan Stanley and Co-Chair of the Working Group alongside Rees. ‘Many questions need to be asked, such as who has control over this information, how is it being used and how is it protected?’

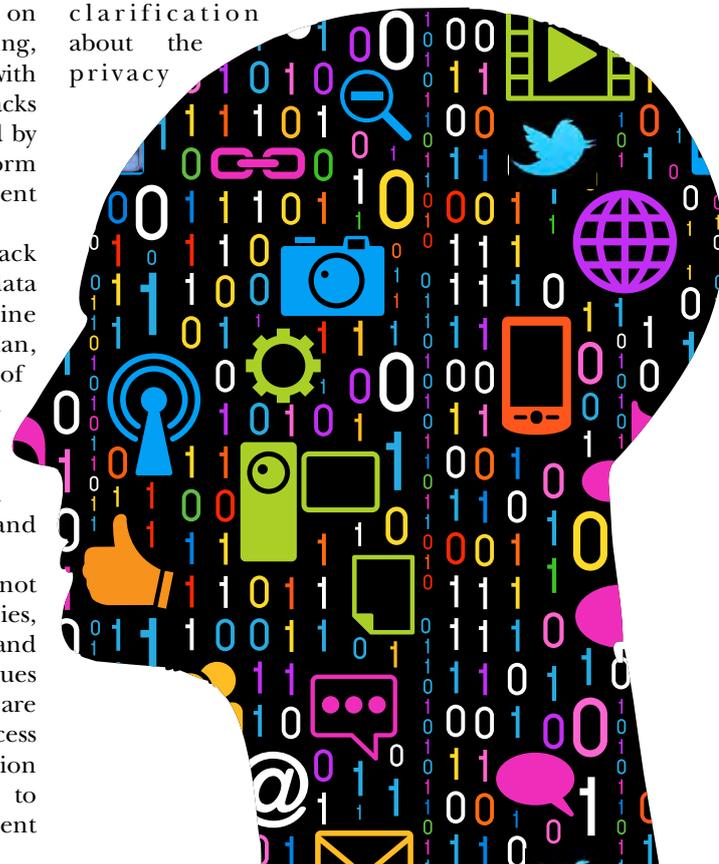
Khatcherian stresses the principles are not intended to be critical of internet companies, but aim to provide a balanced perspective and ‘consider all stakeholder interests’. Key issues under discussion include transparency (are terms and conditions clear and precise?); access (can users obtain or delete their information easily?); privacy (who else has access to this information?); security (are sufficient

safeguards in place to prevent data misuse?); and accountability (are there obvious means of redress for data violations?).

Internet service providers (ISPs) currently have highly diverse data protection policies, many of which change regularly. Users of Facebook own the rights over the information they post, but grant Facebook a ‘non-exclusive, transferable, sub-licensable, royalty-free, worldwide licence’ over that content. Google, in a case currently being fought in California, has surprised many by stating that users of Gmail should have no ‘legitimate expectation’ that their emails will not be read by the company, ‘just as a sender of a letter to a business colleague cannot be surprised that the recipient’s assistant opens the letter’. In a recent interview, Google co-founder Eric Schmidt admitted he could easily read people’s emails should he choose to do so – though quickly stressed that he would certainly lose his job and ‘be sued to death’.

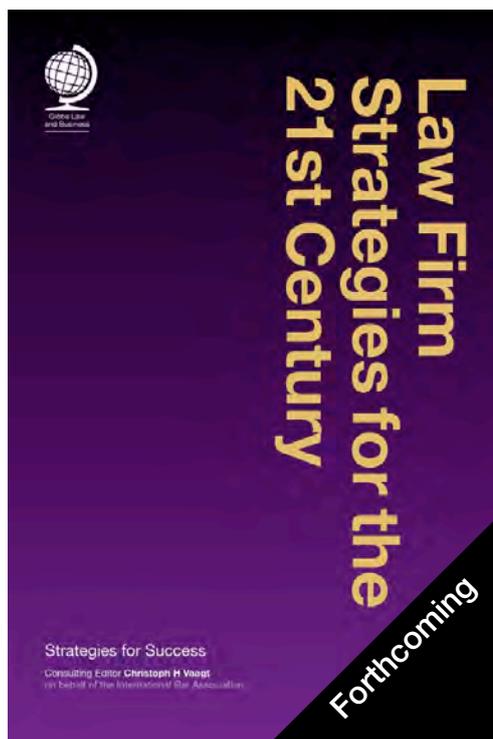
Google is no stranger to legal action. Privacy watchdogs in five European countries have told the company to rewrite its privacy policy, altered in March 2012, or risk facing legal sanctions. The policy, which Google believes complies with European law, unifies 60 policies into one and allows for data sharing across all its services. Previously, the internet giant was criticised in Europe over its collection of Wi-Fi data for its Street View system – which Google claimed was accidental – while both European and US authorities have demanded

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implications of its new product Google Glass, which can take pictures and video without onlookers knowing.

As new technologies continue to blur traditional lines between the public and private spheres, and old privacy laws are shoe-horned into ever more complex modern scenarios, internet users are advised to remain vigilant. 'People are only just beginning to realise they need discipline online,' says IBA Senior Staff Lawyer Anurag Bana, a member of the Working Group who is also managing a project on the way social media is affecting the legal profession. 'Ten years down the line we'll realise what we've said on the internet and how we've been perceived. We've been giving up our rights, and doing it willingly.'

Technology lawyer Erik Valgaeren, a partner at Stibbe Brussels and member of the Working Group, says that people must start to think differently about the way they interact online. 'The internet is becoming an extension of our functioning as individuals. It is forcing us to think about identity in a much more holistic way, about the trail we create on ourselves, knowingly and unknowingly. This triggers questions about how we are developing identity, how we are protecting it and what are the legal implications?'

Law of information

Leading the charge on data protection is the European Commission, which plans to implement a unified EU law, the General Data

'We generally can't rely on existing legal provisions and case law because we often face new legal issues. We therefore have to convince the court that we are doing the right thing'

Benjamin Amaudric du Chaffaut
Senior legal counsel, Google France

How to protect your digital footprint

The digital version of yourself may be far bigger and uglier than you realise. But there are a few ways you can try to hone it into shape. Here is *IBA Global Insight's* guide to controlling your privacy and security online.

The basics

- Review security and privacy settings on ISPs, and check regularly for updates.
- Choose secure passwords – containing numbers, letters and symbols – which are unique to each login and change them regularly.
- Only provide personal information where it is mandatory to do so.
- Check the security of any website where you are entering personal data: the 's' after 'http' denotes the site is secure. Most browsers will also mark a secure site with a padlock icon.
- Be careful about comments posted on social media sites even if you have privacy settings engaged: the safest rule, until anyone says differently, is that everything on the internet is public.
- Hide your list of friends on your social networking sites.
- Be cautious about downloading free software; it may contain malicious spyware or include code that can report internet habits to third parties.
- Regularly update your operating system so you have the most up-to-date security settings in place.
- Use reputable antivirus software and check frequently for updates.

Shutting the blinds

- Disable geo-location and facial recognition services on your mobile phone and social networking sites.
- Avoid browsing the web while logged into your Google, Facebook, Yahoo! or equivalent accounts; this allows ISPs to track your activity and trace it to you.
- Avoid accessing online accounts at cyber cafes or shared computers, and never leave an account open.
- Regularly delete tracking cookies and browsing history from your computer.
- Use the 'incognito' setting on the browser menu to surf the web without your activity being monitored.

'When you're online, you think you're anonymous and that no-one is watching. But in reality you're more identifiable and more telling than you are face-to-face'

Jeremy Bailenson

Founding director, Stanford University Virtual Human Interaction Laboratory

Protection Regulation, in 2014. The new law aims to strengthen people's rights over their personal data and make it easier to transfer information from one service provider to another. It also significantly increases fines for data violations and extends the scope of protection to foreign companies processing data of EU residents. This means companies such as Google would find it harder to claim jurisdiction in California when faced with European privacy lawsuits – as they are doing in an ongoing UK case, in which they are accused of secretly bypassing Apple's Safari browser security settings to track people's online activity. In its submission to the UK's High Court, Google said the information taken was not 'private or confidential', and claimed that British courts should not hear the case as no data processing takes place there. Representing the claimants, Olswang's Daniel Tench said he found it 'surprising that Google is seriously trying to contend that there is no expectation of privacy in one's history of internet usage', which is 'something inherently, intimately, personal'.

One particularly controversial provision of the EU draft law is the 'right to be forgotten', whereby personal information must be deleted when consent is withdrawn – such as, for example, embarrassing childhood posts on Facebook. While the idea has many supporters, some believe such a right would be impractical and conflict irreconcilably with other rights, such as freedom of speech. It is also unclear whether search engines such as Google would be affected

alongside original publishers of content. In a recent Spanish case, a claimant won the right to have a 15-year-old newspaper article removed from Google that referred to non-payment of social security contributions – despite the fact the newspaper itself was not obliged to remove the story. However, an advisor to the European Court of Justice (ECJ) disagreed, stating in June that Google is not obliged to delete 'legitimate and legal information' upon request (illegal or libellous information remains a moot point). The ECJ is yet to make a final decision in the case.

Chaffaut outlines Google's position on the issue. 'We are not the publisher, we are just a tool that helps users to find the content available on the web. If something is disclosed – legally, of course, and with their consent – we can't just ask third parties to clean the web for them. It goes against many principles, such as freedom of information.'

Rees believes that one way to inject some clarity into the muddy legal framework surrounding digital identity would be for the law to recognise personal data as a form of property. While such a property right is already recognised in UK data protection laws, he says, it is yet to be sufficiently recognised by the courts. Should it do so, people could more easily assert their legal and economic rights over their digital assets, while having the option to transfer those rights to a third party. An internet company would therefore need to recompense the user for any profit derived from the use of their information – unless, says Rees, it was aggregated and anonymised with other data.

‘Google regards the information it is harvesting as being its own by virtue of the harvesting,’ Rees continues. ‘My proposition would be that this is an incorrect analysis akin to the argument made by colonial powers who took oil from the Middle East. They felt the whole of the profit was theirs, but as the economy developed, the countries from which the oil was being extracted asserted their rights to be paid for that commodity.’

Such a ‘law of information’ may not be far away. While not defined in explicit property terms, personal information is increasingly being interpreted as a commodity with monetary value. In a recent US case, Facebook agreed to pay a settlement of \$20m to 614,000 users for using their data to promote products and services without asking permission or offering compensation – though the judge admitted it had not been established that Facebook ‘had undisputedly violated the law’.

Stifling innovation?

While Rees stresses that he does not wish to stifle innovation and ‘limit the capability of the information harvesting’, others believe that asserting such a property right may do just that. Hogan Lovells partner Tim Tobin, a specialist in data security law, points out that there are already a number of laws in place to regulate the internet – including the Federal Trade Commission Act in the US, which imposes harsh penalties for companies engaging in unfair or deceptive trade practices. Anything more, he

believes, could stifle innovation.

‘There are very thorny issues as to how you would value that particular property right,’ he says. ‘And I think we are already in a world where there is a trade-off that occurs when people are providing their information for various internet platforms. The trade-off is the interaction they obtain, the content that is made available to them.’

Indeed, ISPs would argue that handing over the keys to one’s digital identity in exchange for free email and web facilities is a fair exchange. After all, Google’s *modus operandi* helps it to generate targeted marketing to benefit its partners and also develop new products, fight fraud, filter spam, improve its geolocation services and far more. Google may have offered to put a ‘do not track’ button on its Chrome browser, but the consumer cannot expect to be getting something for nothing. It is a business, after all, not a charitable endeavour – and we are not only their customers, but their merchandise.

The key, it seems, is transparency. Until people know what and where data is being held, and exactly what is being done with it, neither they nor policymakers can make informed choices about this currency exchange being enacted on their behalf. If customers are not getting their money’s worth, they need to know about it. They could even be given the option of maintaining their privacy and paying for services the old-fashioned way – with cold, hard cash.

Data collection and storage, if done securely and transparently, should not necessarily be

Full blackout

- Replace Google with DuckDuckGo, a search engine that doesn’t keep track of your search activity or track your behaviour.
- Use Tor, a free worldwide network that conceals a user’s location and activity from online surveillance by passing internet traffic through a series of proxy servers.
- Cast Skype aside and use RedPhone, which allows you to make encrypted phone calls over the internet with other RedPhone users. Alternatively, iPhone users can use Silent Phone, for a small fee.
- Encrypt your instant messages with Pidgin and your text messages with Text Secure (on an Android phone) or Silent Text (on an iPhone).
- Encrypt your computer drives with programmes such as BitLocker, TrueCrypt or DiskCryptor.
- Achieve ‘military grade encryption’ of texts, pictures and audio messages with Wickr, an app that promises not to harvest personal data.
- Encrypt files before they enter the Cloud with CloudFogger, an open-source app available on Android and iOS.
- Use privacy software such as Do Not Track Plus or DeleteMe to remove your data from tracking sites.



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something to fear. Once clear access rights are agreed, such a wealth of information could prove as useful to consumers as to companies – and ultimately help to construct a more detailed and accurate picture of our lives than human memory could ever hope to replicate.

Indeed, Jeremy Bailenson, founding director of Stanford University's Virtual Human Interaction Laboratory, believes big data analysis has immense potential to change society for the better. He has spent almost ten years assessing what knowledge can be determined from people's non-verbal movements alone – knowledge, he claims, which is far more powerful than that garnered from other internet activity,

'If you start from the position that information is the 'new oil', then what lawyers need to do is recognise that the law needs to change to adapt to that new reality'

Chris Rees

IT-specialist partner, Taylor Wessing and Co-Chair of a new IBA Working Group on Digital Identity

such as web browsing. Many of his experiments are based around the Microsoft console Kinect, which continuously observes players' behaviour and shares the information online. From this data alone, 'there is nothing we haven't been able to predict when we've tried,' he says, from aspects of people's personalities to their learning capabilities to their likelihood of crashing a car.

The concern, he says, is if such information falls into the wrong hands. 'It's easy to regulate a company like Microsoft because they are selling you these products and can be held accountable. What I'm worried about is that you have this device in your home that tracks your movements and others can easily access that.' He adds: 'When you're online, you think you're anonymous and that no-one is watching, but in reality you're more identifiable and more telling than you are face-to-face.'

Poverty killer

Now that vast amounts of data are being shifted into the ubiquitous 'cloud' – an aptly nebulous haven, which means effectively a vast network of online servers – concerns over security are more pressing than ever. 'The sharing and combination of data through cloud services will increase the locations and jurisdictions where personal data resides,' says Olswang partner and technology specialist Blanca Escribano. 'For machine-to-machine communication and the internet of

things [communication devices connected via the internet communicating with each other and with the wider world], some concepts of traditional data protection rules have to be rethought. As stated by the EU Commission, the meaning of "personal" data, the purpose of this data, who is liable and what is "consent" have to be adapted to this new context.'

However, it would be extremely hard for a hacker to access cloud data, Chaffaut insists, because it is both encrypted and fragmented across multiple servers, and would only be readable when accessed on a local device. 'Now almost everything is in the cloud, and this is something that cannot be changed,' he says. 'The challenge is to show that the whole of the infrastructure is secured and we support the highest security standards to protect our users' data.'

Because any loss of social media data could have a devastating impact on users, Valgaeren believes ISPs could be called upon to sign up to a certification or 'monitoring' scheme that verifies data security and the overall health of the company. 'For many people, the digital world is as important – or more important – as the real world,' he says. 'So the question is, can we leave it up to the market to take on this very significant role of being your digital identity provider, or should there be some government-regulated or self-regulated trust label for these companies?'

The need for greater trust online has prompted a series of innovative proposals for identity management systems from both the private and public sector. The emerging idea is to create a form of 'identity ecosystem', whereby users can store personal information across several different identity providers. Through this system, people's identity could be verified without them necessarily having to reveal it publicly, as they could control how much information is disclosed in any one transaction. This way, users could more easily keep track of multiple accounts and passwords, while companies could help secure against fraud.

While any kind of identification system tends to be viewed with mistrust in Western countries, elsewhere this is not always the case. The World Bank recently announced its plan to provide digital identities to all 1.2 billion Indian citizens in order to fight fraud and help people access financial services. The scheme, according to World Bank President Jim Yong Kim, may prove to be a 'poverty killer'.

What is clear is that this brave new world of big data has the potential both for greatness and for gross exploitation: 'Like uranium,' says Bailenson, 'it can heat homes and it can destroy nations'. Which direction it takes is ultimately up to us. ☒

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

Global leaders:

Sir Nicolas Bratza

Sir Nicolas Bratza, served on the European Court of Human Rights (ECtHR) – which oversees justice for more than 800 million people – for 14 years. In his last year as President he grappled with a backlog of 138,000 cases, growing anti-ECtHR sentiment in the UK and elsewhere, and stagnating funding. In this in-depth interview, conducted by former CNN news anchor Todd Benjamin, he shares his views on the future of the Court and human rights law.

Todd Benjamin: Nicolas, first of all, let me ask you what seems like a very simple question but actually is a very fundamental and complex question. How do you define human rights?

Sir Nicolas Bratza: I think it won't come as any surprise – having worked with the [European] Convention [on Human Rights] system for a long time – that I tend to see human rights in terms of Convention rights, which of course cover a wide range of what I think most people would regard as the obvious civil and political rights, but the phrase 'human rights' is often given a very much wider meaning.

Sometimes, quite rightly, it's given a wider meaning, rather than simply Convention rights. Having said that, I think the Convention rights are, through the jurisprudence of the Court that has interpreted the rights of the Convention, very wide.

TB: Well, now that you have some perspective – because you stepped down as president in October 2012 – do you feel that the rights that now stand should reflect this modern society we're living in? Would you like to see things perhaps added or perhaps some things deleted?

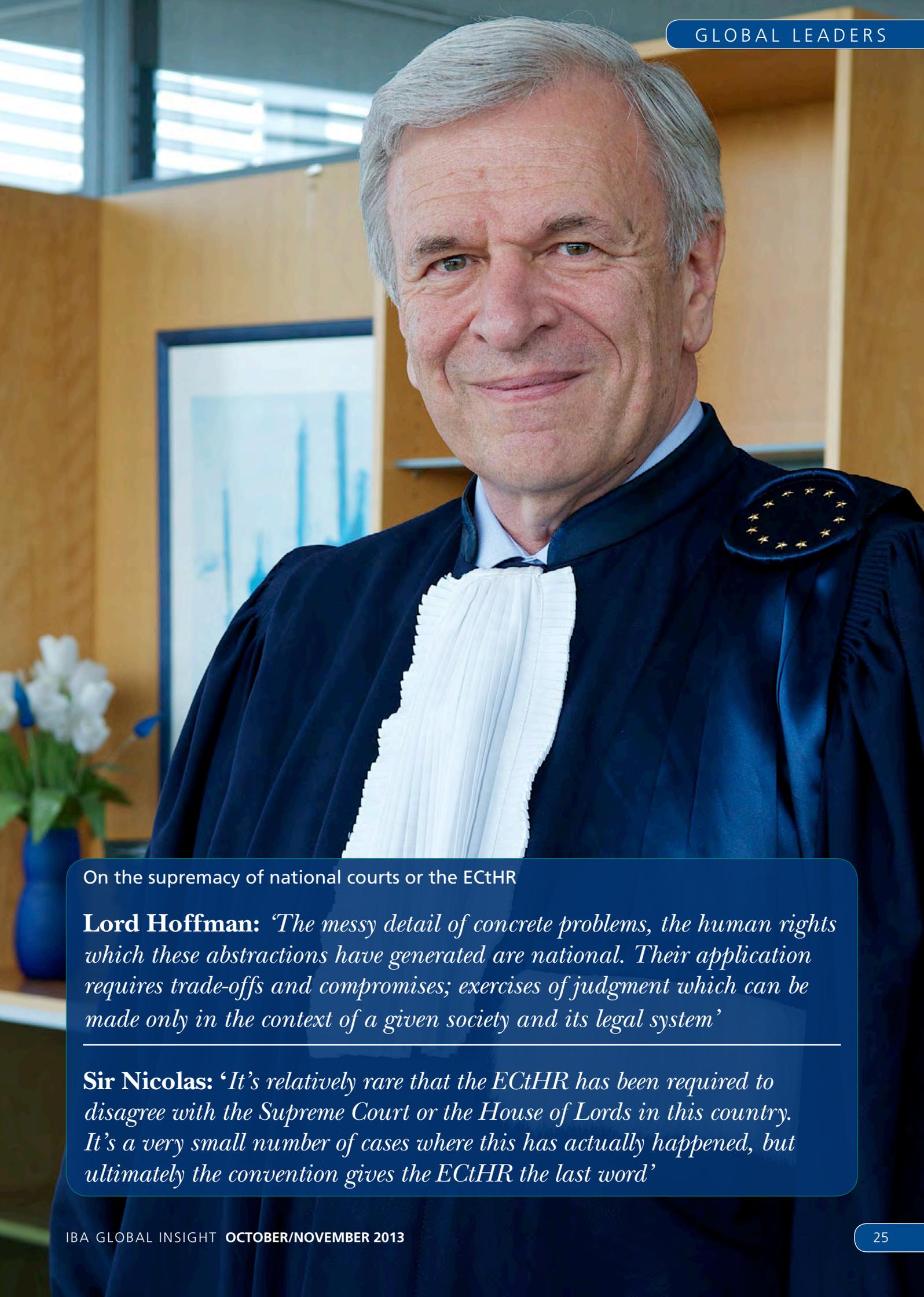
NB: I certainly wouldn't want to see anything deleted. I'm not sure that one actually needs anything to be added. There have been, as you know, some protocols which have followed the drafting of the Convention. The first protocol was in existence at the time the Convention came into

effect, but there have been subsequent protocols added to cover different rights and different aspects of the rights that are guaranteed.

TB: The reason I'm asking you this is because of course the Convention – and you were responsible for it in terms of carrying out its rights – was drafted in 1953 after the Second World War, was supposed to be, in a sense, a beacon for democracy because there was a lot of fear about communism and a lot of those rights really were tied up with civil and political rights; not really socioeconomic rights and not environmental rights. Given that that is very prevalent in the society we now live in, shouldn't some of those rights also be enshrined? Shouldn't it be enlarged in some way?

NB: Well, to some extent they are. I think the right to property, which was guaranteed by the first protocol, many people would regard as an economic or socioeconomic right. The same with education, the same with a number of the labour rights, the rights to form unions, and the rights people would see as essentially social and economic rights.

You talked about environment. There is no environmental right as such in the Convention. Nevertheless, Article 8, which does guarantee the right to respect for private and family life and the home, has, I think correctly, been interpreted as at least covering the noise pollution which is authorised or which is not stopped by a government which renders living in a house or living in a family intolerable.



On the supremacy of national courts or the ECtHR

Lord Hoffman: *‘The messy detail of concrete problems, the human rights which these abstractions have generated are national. Their application requires trade-offs and compromises; exercises of judgment which can be made only in the context of a given society and its legal system’*

Sir Nicolas: *‘It’s relatively rare that the ECtHR has been required to disagree with the Supreme Court or the House of Lords in this country. It’s a very small number of cases where this has actually happened, but ultimately the convention gives the ECtHR the last word’*



On the media undermining respect for the judiciary

‘The old conventions that seem to apply certainly with the parliament – that members of parliament do not attack judges or criticise judges or criticise decisions – seems to have gone completely... the tone and the terms that are often used... is really unacceptable’

TB: Let me ask you some very specific questions now. Lord Hoffman, a retired senior UK judge, has argued that, while the principles of human rights may be universal, ‘the messy detail of concrete problems, the human rights which these abstractions have generated are national. Their application requires trade-offs and compromises; exercises of judgment which can be made only in the context of a given society and its legal system.’ Interpretation of human rights law should therefore be left to national courts and politicians, is his assertion. Does he have a point here? Why should a European court have more authority and credibility than the highest domestic courts?

NB: It doesn’t have more authority or credibility, but nevertheless it was a body which was set up in part by the United Kingdom, who played a very important role in the creation of the Convention system, as a body which had the ultimate authority in applying and enforcing Convention rights.

Now, that doesn’t mean that it is more credible or less credible than national courts; as has frequently been said and has been emphasised in the Brighton Declaration [an agreement on reform of the ECtHR, adopted by all 47 member states of the Council of Europe], the primary responsibility lies with national authorities to guarantee Convention rights within their particular forum, and of course national authorities – in particular, national courts – play a very important part in doing this, and if they effectively implement the rights at a national level, then there is very little for the ECtHR to do, and that is shown by the fact that it’s relatively rare that the ECtHR has been required to disagree with the Supreme Court or the House of Lords in this country. It’s a very small number of cases where this has actually happened, but ultimately the Convention gives the ECtHR the last word.

TB: Why do you think this perception exists if in fact you – most of the time – uphold the right of the state or the judgment it’s made?

NB: That is what is so puzzling. The two cases seem to be invoked every time there is this hostility to the ECtHR but, as you correctly say, in the great majority of cases the applications against the United Kingdom are rejected by the ECtHR or end up with a finding of no violation. It’s only, I think, last year in 0.6 per cent of the total number of cases brought against the United Kingdom where the ECtHR found that there was a problem.

TB: And of course you say there are only two cases. One would be over the voting right of prisoners and the second one dealing with Abu Qatada. For those who aren't familiar with the case, it concerns a person with an alleged terrorist link to al-Qaeda, and it took many years before he was able to [be extradited] to Jordan. It cost something like £1.7m to go through the legal procedures. Can you understand how the public and politicians find this extremely frustrating?

NB: I can understand the frustration, but I can't understand the frustration being loaded onto the ECtHR. The ECtHR was not the body that was essentially responsible for the time that was taken.

Can I say a little bit more about the Abu Qatada case? What the ECtHR said back at the end of the 1980s was, firstly, that it was wrong in principle to return somebody to a country where they faced a real risk of torture or inhuman treatment. Secondly, it said that it was also wrong to send somebody back to a country where they faced a flagrant denial of justice within the country concerned.

So far as the first limb was concerned – that of whether Abu Qatada himself would be tortured – the ECtHR looked at the question, examined it thoroughly, and decided that the memorandum of understanding that had been reached between the United Kingdom on one side and the Jordanian authorities on the other, protected Abu Qatada himself from being subjected to torture.

On the other hand, the memorandum of understanding, as it was then reached, did not address the question of fair trial and there was – as the court found and indeed as the Court of Appeal in the UK found – a real risk that if Abu Qatada was sent back to Jordan, he would face a very long term of imprisonment based on

a conviction which was obtained as a result of evidence obtained by torture.

That was what our Court found. That is what the ECtHR found – and the Court of Appeal in [the UK] took a similar view, describing it as abhorrent; the idea that somebody could face either the death penalty or long-term imprisonment based on evidence which had been extracted by torture.

TB: But can you understand how that's a very emotive issue and in some ways – when the Court rules in a certain way – in the eyes of some it undermines its credibility?

NB: A lot of cases are emotive. Of course, if one is dealing with a suspected terrorist, it is emotive if there is a finding in favour of that person, but the Court has its role and its role is to apply the Convention as it sees it and the Convention – as I say – is cast in absolute terms insofar as certain rights are concerned.

TB: A question submitted by Philippe Sands: what would be the consequences for the system of the ECtHR if the UK were to leave the Convention?

NB: I think it would do untold damage to the Convention system because it would send a very clear message, not just to 'old' democracies but to the newer democracies that have relied on the support given by the older member states; it will give the impression that it is actually no longer necessary to have a Convention system; that it's no longer necessary to have the system that was set up of having an international court with overriding powers to determine whether there has or has not been a Convention [sic]. It sends completely the wrong message to my mind.



TB: This one from Cecile Aptel, the founder of the International Center for Transitional Justice's Programme on Children and former Co-Chair of the IBA War Crimes Committee: what do you think of the recent discussion to create a human rights world court?

NB: I think it's an interesting discussion. It was certainly suggested – I think by Martin Scheinin [the first United Nations Special Rapporteur on human rights and counter-terrorism] – the idea of having a world court which not only covered countries but also covered corporations who are doing a great deal of damage to human rights or arguably throughout the world.

I must say, I have great problems with the idea. We have a number of regional bodies. We have obviously the European system. We have the inter-American system. We have, to some extent, the African system. We don't as yet have an Asian system. I think it's much more important that those regional bodies are strengthened before one starts the idea of creating a world human rights court.

TB: And this one from Helena Kennedy, human rights barrister and Co-Chair of the IBAHRI: do you think the media undermines respect for the judiciary?

NB: Yes: it does, inevitably. What I find unfortunate is that the old conventions that seem to apply certainly with the parliament... that members of parliament do not attack judges or criticise judges or criticise decisions seems to have gone completely and I think the tone and the terms that are often used to describe not just judgments of the ECtHR but judgments even of national courts is really unacceptable.

TB: Earlier we were talking about alleged terrorist suspects and how it can be an extremely emotive issue. Even though you're upholding the rights of

On the consequences for the ECtHR if the UK were to leave the Convention

'It would do untold damage to the Convention system because it would send a very clear message, not just to 'old' democracies but to the newer democracies that have relied on the support given by the older member states'

those suspects, it can undermine the confidence that the public has in the work that your court is doing. So, what can be done to secure greater public confidence in human rights? This is another question that has been submitted.

NB: I think a number of things. One is that I do believe – as I say – that the language that is used to criticise judgments which are unpopular should be moderated. Secondly, more emphasis should be placed on cases that are not controversial in the same way. Unfortunately, cases that are controversial are the ones that are reported. Cases in which the court finds no violation are hardly ever reported; certainly not in the tabloid newspapers. So, I think what one needs to bring out is the things that everyone would accept were good things that have been achieved by the ECtHR; the improvements in human rights, not just in the rest of Europe but in the United Kingdom itself.



TB: Another question, this one from Anthony Lester [member of the House of Lords]: what can be done to have senior UK judges want to become judges on the ECtHR [sic]?

NB: I think that's a very difficult question to answer. I think it would be very good for the Convention system if the candidates that are put up by the United Kingdom had extensive judicial experience or were high court judges or above at the time they were put on the list. But going back to one of your other earlier questions, I think the very attacks that are made in this country against the Court and against its judges do have an effect on whether judges from this country are prepared to put their names forward... So, I think this negativity does have an impact also on the willingness of people to apply. There are other problems as well. There is a pension system, but it's not nearly as generous a pension system as exists in the UK for judges.

On the protracted extradition proceedings against Abu Qatada

'What the ECtHR found – and the Court of Appeal in [the UK] took a similar view, describing it as abhorrent– [was] the idea that somebody could face either the death penalty or long-term imprisonment based on evidence which had been extracted by torture'

TB: James Goldston, the Executive Director of the Open Society Justice Initiative, asks: going forward, what concrete steps can allies of the Court and the bar in civil society and academia and government take to more effectively defend the Court against spurious attacks and secure enduring political and financial backing for what he sees as its crucial mission?

NB: I think NGOs already do a great deal in trying to redress the balance here in spreading

the true word about the Convention and the Human Rights Act rather than the word that is disseminated so often in tabloid newspapers. I've recently been elected as the President of the British Institute of Human Rights, which has done very valuable work in trying not just to dispel these myths that have grown up but also to defend the Human Rights Act, which I think has done an enormous amount of good in this country and which is also threatened with being repealed and replaced.

TB: The court has a backlog of more than 100,000 cases. That's a massive backlog. Given that, wouldn't it be more effective for the Court to try and focus on the most serious violations of human rights such as torture and extrajudicial killings and leave more subjective questions of social policy such as prisoner voting rights or night flights over Heathrow to politicians?

NB: Can I say it once? The Court does focus on what you call egregious violations of human rights. We have long established what's called a prioritisation policy where emphasis will be put on cases related to extrajudicial killings, to torture, to detention without trial. Those cases are given priority, but that doesn't mean that it simply ignores cases which – from the public perception – are less important or less egregious violations. It has to deal with them.

You've cited the prisoners' rights and the airport noise as being effectively social and economic rights which are best dealt with by national authorities. I must say I would contest that. The protocol to the Convention does – as it's been interpreted – confer an individual right of franchise, which can be restricted of course, but it's one which applies as much to prisoners as it does to other citizens. It's not, as I see it, just a social or economic right.

Again, you talk about airport noise. I don't believe that we have ever said – and of course we can't say – that there is an environment right as such guaranteed by the Convention, but Article 8 of the Convention does guarantee a right to respect for private and family life and for the home, and I see nothing fanciful in saying that intolerable noise, authorised by the state concerned, is an interference with that right which has to be justified. And of course in the case of *Hatton v UK*, which did concern night noise at Heathrow Airport, the ECtHR found that the interference was justified. ☒



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



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The six trillion dollar question

Tax Abuses, Poverty and Human Rights, a forthcoming report from the International Bar Association's Human Rights Institute, addresses the practices of multinational corporations and their detrimental impact on the developing world

LLOYD LIPSETT

The tax practices of multinational enterprises and wealthy individuals are being scrutinised ever more closely. Tax havens and bank secrecy are under attack. Tax abuses are well and truly on the agenda. So why has the issue become one of such great magnitude now?

Tax abuses are a very significant part of illicit financial flows out of the developing world, depriving governments, communities and citizens of substantial resources that could be invested in policies and programmes to eradicate

poverty, reduce inequality and fulfil human rights. For example, a recent Global Financial Integrity report estimated that developing countries lost \$5.86tn to illicit financial flows from 2001 to 2010 and, that corporate tax abuses such as transfer mispricing accounted for 80 per cent of those outflows.

There's a growing understanding that countering tax abuses and improving tax enforcement in developing countries should be a key focus for international efforts to

combat poverty and contribute to sustainable development. In developed countries too, there is a strong impetus to confront tax abuses in order to shore up domestic revenues in the aftermath of recent financial crises. For instance, the United States has passed legislation (the Foreign Accounts Tax Compliance Act – FATCA) whose goal is to catch US tax dodgers with offshore accounts. Other governments are beginning to enact similar legislation to comply with and extend FATCA's requirements – including between some countries in Europe, as well as between the United Kingdom and its crown dependencies in the Channel Islands and some of its overseas territories in the Caribbean. This legislation adds momentum to the global movement towards greater exchange of tax information and further erodes offshore bank secrecy.

There's an important ethical dimension. Politicians and advocacy groups are questioning the justice of sophisticated tax planning strategies that result in individuals and corporations not paying a fair share of tax – and perhaps not paying any tax at all. In December 2012, a UK House of Commons report examined the tax practices of Amazon, Google and Starbucks and criticised the lax enforcement of the revenue authority, Her Majesty's Revenue and Customs (HMRC). A public outcry ensued, including protests at Starbucks shops in the UK. Starbucks responded to these pressures by announcing

Development assistance is like walking up a descending escalator. And the descending escalator here is the illicit financial flows that flow out of the poor countries and into the rich countries'

Thomas Pogge

Task Force Chair; Leitner Professor of Philosophy and International Affairs, Yale University

voluntary payments of £20m to HMRC. The case illustrated the rising importance of tax planning as a matter of corporate social responsibility and business ethics, and the reputational risks that have now become associated with alleged tax abuses.

In a context of persistent poverty and rising inequality between and within nations, tax abuses will continue to be a priority issue for



Monaco harbour

governments. It was tax that was at the top of the agenda of the G8 meeting in Northern Ireland in June 2013 and many of the G8 leaders' pledges in the Loch Erne Declaration relate to confronting tax abuse. Shortly afterwards, in July 2013, the Organisation for Economic Co-operation and Development (OECD) released an *Action Plan on Base Erosion and Profit Shifting*, which was endorsed by the G-20. The *Action Plan* states that 'fundamental changes are needed to effectively prevent double non-taxation, as well as cases of no or low taxation associated with practices that artificially segregate taxable income from the activities that generate it.' The *Action Plan* proposes a series of 15 actions that will address different issues associated with base erosion and profit shifting (BEPS) over the next two years, including the development of 'a multilateral instrument designed to provide an innovative approach to international tax matters.'

Central are age old legal and policy questions related to tax abuses: where does one draw the line between legal tax avoidance and illegal tax evasion? What sorts of transactions and structures have the greatest impact on the revenues of developing and developed countries? What are the most effective reforms required to confront tax abuses? What are the responsibilities of states and business enterprises in implementing those reforms? What is the role of the legal profession in countering tax abuses?

The IBAHRI Task Force

To contribute to the global debate on tax abuses, the International Bar Association's Human Rights Institute (IBAHRI) formed the Task Force on Illicit Financial Flows, Poverty and Human Rights to reflect upon these questions from the perspective of international human rights law.

The Task Force's mandate is rooted in an IBAHRI Council Resolution that links extreme and endemic forms of poverty with potential violations of human rights. For this reason, the



Task Force directed its focus on the tax abuses that have negative impacts on developing countries.

The Task Force's report – which will be launched at the 2013 IBA Conference in Boston – is based on interviews with a wide range of stakeholders with diverse perspectives, as well as consultations focusing on Brazil, Jersey and the SADC region.

The Task Force found that tax abuses have considerable negative impacts on human rights. Simply put, tax abuses deprive governments of the resources required to provide the programmes that give effect to economic, social and cultural rights, and to create and strengthen the institutions that uphold civil and political rights. Actions of states that encourage or facilitate tax abuses, or that deliberately frustrate the efforts of other states to counter tax abuses, could constitute a violation of their international human rights obligations, particularly with respect to economic, social and cultural rights.

Throughout the Task Force's consultations, many stakeholders – and lawyers in particular – stressed that taxes must be clearly defined by the law. This is an important component of the rule of law and tax justice. If taxes must be based on the law, then it follows that if certain tax behaviour is considered abusive or potentially

abusive, the legislator can always change the relevant tax laws, regulations and policies.

This focus on the rule of law and the role of the legislator corresponded, for some observers, with the principle that states have the primary obligation to protect human rights. If human rights are affected by tax abuses, it is the responsibility of the state authorities to review and change tax laws, minimise opportunities for tax abuses and improve enforcement.

Stakeholders largely agreed that there is a legitimate scope for tax planning and tax avoidance by business enterprises and individuals. Agreement with the general principles of the rule of law, however, did not stop other civil society stakeholders from raising concerns regarding the fairness and unnecessary complexity of current tax laws.

Numerous concerns were expressed about the relative power of wealthy individuals and multinational enterprises to avoid taxes by shaping the tax laws (or tax incentives and tax holidays) in their favour and/or by engaging lawyers and other advisors to craft sophisticated structures to avoid the application of the law. One tax lawyer drew the conclusion that 'tax authorities will always be half a step behind the tax planners.'

Conclusions of the Task Force

The Task Force's report presents a number of conclusions and recommendations for governments, business enterprises and the legal profession.

Conclusion one: states have obligations to counter tax abuses at the domestic and international level, including through cooperation in multinational institutions. While it must be recognised that international human rights treaties do not address tax abuses in an explicit manner, the Task Force concludes that states' legal obligations related to economic, social and cultural rights can be applied to the question of tax abuses, both in terms of their actions at the domestic level, in their international cooperation efforts and in their participation in multilateral institutions.

Conclusion two: business enterprises have a responsibility to avoid negative impacts on human rights caused by tax abuses. The emerging human rights guidance for business enterprises suggests that all business enterprises, including corporate legal advisors and bankers, should exercise due diligence regarding the potential negative impacts of their operations – including tax planning strategies. Indeed, tax abuse is poised to become an important issue for business enterprises in terms of corporate social responsibility, reputational risk and human rights.

Furthermore, the estimated scale of corporate tax abuses also undermines some of the claims that foreign investment and private enterprise are major drivers of sustainable development. While there is undeniable evidence that foreign investment and private enterprise can be a powerful force for development and positive human rights impacts, evidence on the extent of tax abuses by multinational enterprises serves to reinforce criticism and cynicism about the role of the private sector in development.

Conclusion three: the legal profession has an important role in assisting states and business enterprises in confronting the negative impacts of tax abuses on human rights. There was widespread agreement in the interviews that lawyers must balance their obligation to defend their client's interest with the underlying role of the tax system in society. One stakeholder stated that 'we also need to encourage positive performance and the positive leadership role that lawyers can play in creating rules and regulations. Lawyers need to decide what is acceptable behaviour for their profession and to take the issue [of tax abuses] outside an individual decision for an individual lawyer.'



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cutting through complexity

The Task Force is comprised of the following experts on taxation, poverty and human rights:

Stephen Cohen: Professor of Law, Georgetown University, US

Sternford Moyo: IBAHRI Co-Chair; Senior Partner, Scanlen and Holderness, Zimbabwe

Robin Palmer: Director of the Institute for Professional Legal Training (IPLT), University of KwaZulu-Natal, South Africa

Thomas Pogge: Task Force Chair; Leitner Professor of Philosophy and International Affairs, Yale University, US

Celia Wells: Head of Bristol University Law School, UK

Lloyd Lipsett: Task Force Rapporteur; international lawyer, Canada

Shirley Pouget: Task Force Facilitator; IBAHRI Programme Lawyer, UK

These concerns were particularly strong in the context of developing countries where the capacity of tax authorities may be comparatively weak and there is less ‘equality of arms’ between the tax authority and sophisticated taxpayers. Related concerns were raised about the potential for straightforward bribery, corruption and undue influence in securing tax exemptions and advantages for certain business sectors and elites.

In the context of the developing world, the tax abuses of greatest concern of the Task Force included: transfer-pricing and other cross-border intra-group transactions; the negotiation of tax holidays and incentives; the taxation of natural resources; and the use of off-shore investment accounts. Secrecy jurisdictions are also a concern because of their role in facilitating tax abuses. For instance, Stephen Cohen, in an interview conducted on the day of the inaugural meeting of the Task Force, stated: ‘the existence of bank secrecy, which allows wealthy individuals to establish offshore bank accounts – and due to bank secrecy, the income earned by those accounts doesn’t get reported and doesn’t get taxed – deprives developing and emerging economies of the revenues that they need to meet the basic human needs of their people.’

From the perspective of the Task Force, the international standards that promote greater transparency and more effective exchange of information for tax purposes need to be further developed. There have been some important progress at the international level in recent months and momentum is gaining towards a multilateral system of automatic exchange of

information – which will put tax authorities in a better position to counter tax abuses.

The human rights dimension of tax abuses

A human rights analysis can contribute to the link that is increasingly being made between domestic resource mobilisation and sustainable development. As we approach the final milestone of the United Nations (UN) Millennium Development Goals in 2015, the international community has begun a new global conversation about effective poverty alleviation and sustainable development. In particular, countering tax evasion is being framed as part of the strategy for developing countries to diminish their dependence on development assistance, combat poverty and fulfill their international human rights obligations. As highlighted by Task Force Chair Thomas Pogge, ‘development assistance is like walking up a descending escalator. And the descending escalator here is the illicit financial flows that flow out of the poor countries and into the rich countries. As the numbers show, the escalator is descending faster than any human being can run up.’

The Task Force’s human rights analysis begins by making a link between human rights and extreme poverty. For instance, the UN Human Rights Council recently adopted Guiding Principles on Extreme Poverty and Human Rights (the ‘Guiding Principles’) that describe how poverty is connected as a cause or consequence of violations of 14 different human rights and all the key human rights principles – ranging from the right to food, the right to health, the right to education, the right to social security, to the principle of transparency.

Considering the negative impact that tax abuses have on poverty and human rights, the state has a number of obligations to counter tax abuses. These flow from the obligation of states to use the maximum available resources to progressively realise human rights – including the obligation to confront tax abuses as part of an overall plan to strengthen financial and tax governance.

Furthermore, states have an obligation to ensure coherence between corporate, fiscal, tax and human rights laws and policies, both at the domestic and international levels. This includes the corollary obligations to avoid corporate, fiscal or tax measures that have retrogressive impacts on human rights. The obligation to do no harm with respect to economic, social and cultural rights should be understood to include an obligation for States to assess and address the domestic and international impacts of corporate, fiscal and tax policies on human rights.

States have an obligation of international cooperation and technical assistance to support the realisation of human rights. This should be understood to extend into international cooperation in the field of taxation. Notably, states that contribute to the momentum towards greater transparency and effective exchange of information – including with developing countries – are supporting human rights. Conversely, those that cling to the last vestiges of secrecy and thwart the emergence of effective

‘The fight against poverty is often simplified to a fight that should be limited to governments. It is a fight that everyone ought to take part in. Corporates are particularly important in this regard’

Sternford Moyo,
IBAHRI Co-Chair; Senior Partner,
Scanlen and Holderness

information exchange are contributing to further infringements of human rights.

In conducting a human rights analysis of tax abuses, it is critical to look beyond tax enforcement and compliance to examine how revenues are actually spent. The collection of tax revenues presents an opportunity for governments to invest in infrastructure and social programmes that ensure that the full range of human rights are respected, protected and fulfilled. However, tax revenues can also be mismanaged, misspent and misappropriated, thereby resulting in no positive human rights

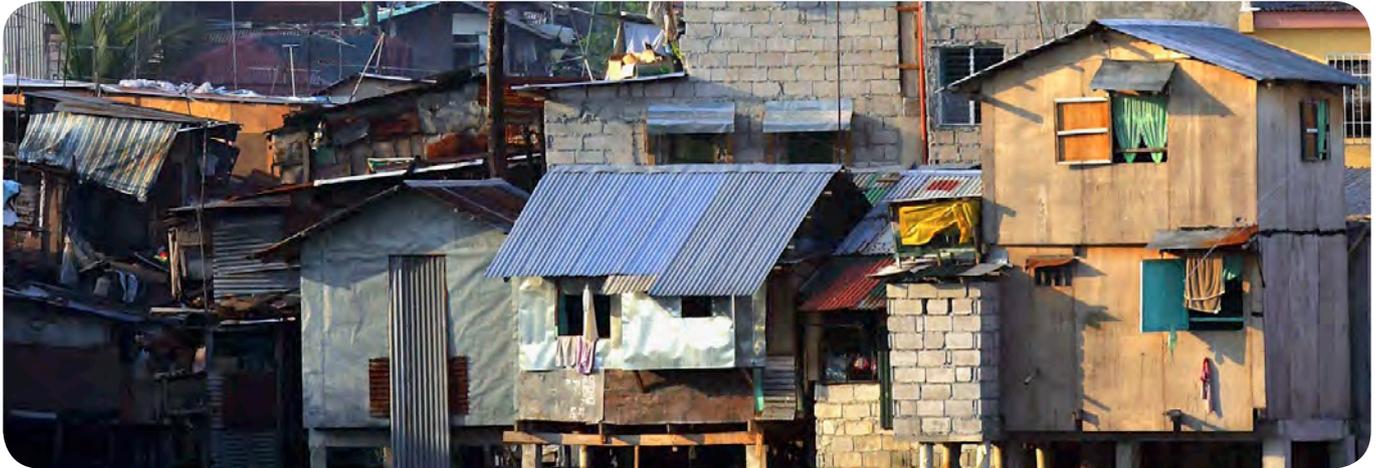
outcomes or even in negative human rights outcomes.

Transparency and access to information are fundamental elements of democratic governance and accountability, as well as the most powerful tools for confronting tax abuses. Human rights principles and instruments support greater transparency and access to information and therefore can strengthen current initiatives and efforts to address tax abuses at the domestic and international levels.

Business enterprises are important partners in the fight against poverty and can make important contributions to sustainable development. This was highlighted by Task Force member and IBAHRI Co-Chair Sternford Moyo. ‘For the first time, there is a shift on what corporates can do to alleviate poverty,’ he says. ‘The fight against poverty is often simplified to a fight that should be limited to governments. It is a fight that everyone ought to take part in. Corporates are particularly important in this regard.’ Business enterprises also have the responsibility to respect human rights through their corporate structures and throughout their operations. An international consensus has emerged about the nature and scope of the human rights responsibilities of business enterprises in the Guiding Principles that were developed by Professor John Ruggie. The Guiding Principles emphasise that business enterprises must have appropriate policies and due diligence procedures to ensure their entire operations are not having negative impacts on human rights. Therefore, multinational enterprises, as well as their advisors and financiers, need to understand that their tax planning strategies have potential negative impacts of their tax planning strategies.

Conversely, greater transparency and corporate social responsibility in relation to tax practices has the potential for significant contributions to sustainable development and positive impacts on human rights. For example, in order to confront the ‘natural resource curse’ (whereby resource-rich developing countries





‘The existence of bank secrecy, which allows wealthy individuals to establish offshore bank accounts... deprives developing and emerging economies of the revenues that they need to meet the basic human needs of their people’

Stephen Cohen

Professor of Law, Georgetown University

fail to realise adequate economic and social benefits from resource extraction), new legal and policy initiatives are requiring greater transparency on revenues from natural resource projects. These include regulations under the Dodd-Frank Act in the US, the European Union Accounting and Transparency Directives, as well as the protocols developed under the multi-stakeholder Extractive Industries Transparency Initiative. Moreover, there is increasing pressure for country-by-country reporting of payments by all multinational enterprises to governments – a key component in giving the public and tax authorities the information needed to confront cross-border tax abuses, corruption and other illicit financial flows.

Lawyers have a special role in addressing tax abuses. As business enterprises, law firms also have a responsibility to respect human rights, according to the Guiding Principles they should: take due diligence measures to identify, prevent, mitigate and account for their impacts on human rights. Merely complying with tax law is not enough when this results in violation of human rights. Responsibility for human rights includes situations where lawyers are associated with third parties’ actions that violate human rights – including by their clients. In such

situations, lawyers should use their influence and leverage to encourage their client to not engage in that conduct.

Both states and businesses should provide better access to remedies. Currently, to address the negative impacts of tax abuses on poverty and human rights, the most effective remedies remain in the realm of domestic tax authorities. Consequently, it is important to strengthen good fiscal and tax governance and enforcement capacity in developing countries. Transparency and access to information are important human rights principles that support more effective remedies for tax abuses, especially in relation to the movement towards more effective and automatic exchange of tax information between authorities, as well as greater disclosure of information of the financial and non-financial impacts that business enterprises are having on a country-by-country basis.

At present, there are few human rights mechanisms that can deal effectively with tax abuses. However, several UN mechanisms certainly have the mandate and potential to articulate the links between tax abuses, poverty and human rights on an authoritative basis. Further attention and debate on tax abuses from a human rights perspective is important for developing more coherent international standards and good practice for states, multinational enterprises and their advisors and financiers. In the short-term, human rights can also make a valuable contribution by drawing further public and political attention to this fundamentally important issue. As pointed out by Task Force member Celia Wells, bringing together the perspectives of human rights and taxation may ‘enable transnational corporations to be brought under a much more effective regime so they can’t leap about the world escaping tax.’

Lloyd Lipsett was the rapporteur for the IBAHRI Task force, he can be contacted at lloyd@iklinternational.com



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UN moves to tackle sexual violence in conflict

Until the United Nations addressed it head on this summer, an all too prevalent human rights abuse – the use of rape as a weapon – had been largely overlooked in international human rights law. The move has highlighted the implications of America’s law on the use of foreign aid funding.

JOEL BRINKLEY

The United Nations Security Council took an unprecedented step this summer. Pushed principally by the United Kingdom, the Council passed its first resolution addressing what it calls ‘sexual violence in conflict.’ That’s a euphemism for an all-too-common problem in many parts of the world: using rape as a weapon of wartime intimidation. In the human rights world, it’s called war rape.

The Security Council resolution was a milestone because every other treaty and agreement under international human rights law refers to the rape problem only obliquely, if at all. And as

A rape victim visits Panzi Hospital in Bukavu, regional capital of South Kivu province in the Democratic Republic of Congo

a result, 'despite the endemic use of rape as a weapon, no state has ever been held accountable for the use of rape as a prohibited weapon of war,' the Global Justice Center (GJC), an American human rights group, reported. The GJC added that global indexes of wartime injuries and deaths never mention rapes, even though not infrequently military gang rapes end up injuring or killing the victims.

The World Health Organization estimates that as many as 535,000 women were victims of war rape during the Rwanda Genocide in 1994, and 67 per cent of them contracted HIV as a result. That finding set off advocates who tried to bring biological-weapon bans into the debate since HIV is a virus – given that no other laws or treaties directly addressed the problem. That tactic did not accomplish much.

Estimates of war-rape victims during the Bosnia war of the 1990s range from 20,000 to 50,000. After that became known, the International Criminal Tribunal for the Former Yugoslavia declared that 'systematic rape' in time of war is a 'crime against humanity'.

Nonetheless, Margot Wallström, the UN's special Representative on Sexual Violence in Conflict, said only 12 individuals from that war have ever been brought to trial – despite judges from the criminal tribunal ruling that Bosnian Serb armed forces used rape as an 'instrument of terror'. They declared that a 'hellish orgy of persecution' occurred in various Bosnian camps.

'The World Health Organization estimates that as many as 535,000 women were victims of war rape during the Rwanda Genocide in 1994, and 67 per cent of them contracted HIV as a result'

Syria joins the list of rogue states

Today, reports from Syria indicate that war rape is rampant there, too. For example, an Atlantic magazine reporter wrote earlier this year that Syrian government soldiers hauled a jailed rebel soldier's fiancée, sisters, mother and female neighbours to the prison and raped them, one by one, right in front of him. That, the report said, was not an uncommon occurrence.

At the United Nations (UN) last year, Norwegian Foreign Minister Espen Barth Eide angrily declared that what happened during the Bosnian war 'is repeating itself in Syria – tens of thousands of rapes.' And various reports indicate that militants are raping many thousands of women during the conflict in the Republic of the Congo.

At the same time, in Egypt, where violence against women is endemic, scores of women are being raped during the demonstrations for and against the former Morsi government. There, however, Islam and the general disregard for women's rights play a role in the problem. Asked about the rapes, a Muslim Brotherhood legislator remarked: 'How do you ask the Ministry of the Interior to protect a woman when she stands among men?'

All of this and more led UK Foreign Secretary William Hague to join actor Angelina Jolie in a campaign to bring attention to this issue earlier this year. They visited refugee camps in Goma, the Congo, and met rape survivors – while also dispatching British forensic experts to Libya, Mali, Syria and other conflict locations.

'When you get into the detail of it, it's too terrible not to do something about,' Hague explained. 'If your position in the world enables you to see and understand the extent of the horror, then you have a responsibility to do something about it.'

Jolie said: 'The hope and the dream is that the next time this happens, that somehow, during a crisis, during a war, it's known that if you abuse the women, if you rape the women, you will be held accountable for your actions.'

The new UN resolution carries no force of law, of course. It says the Security Council remains 'deeply concerned over the slow implementation' of rules and regulations 'to prevent sexual violence in armed conflict situations' occurring 'throughout the world'. Overall, it is intended to raise awareness and begin legal proceedings at the state or world level to address this great wrong. A Red Cross analysis of international human rights law notes that the laws are intended to 'protect those who do not take part in the fighting, such as civilians'.

One state stands in the way of solutions

But the surprising thing is that one western nation is the subject of widespread criticism on this subject. That nation is the United States. Neither the Obama administration nor Congress opposes controlling war rape; many government officials, past and present, have voiced serious concern.

Nonetheless, an archaic law prevents America from assisting victims, and we can blame former

United Nations High Commissioner for Refugees (UNHCR) special envoy, actor Angelina Jolie, listens during a United Nations Security Council meeting on women, peace, security, and sexual violence in conflict at United Nations Headquarters in New York, 24 June 2013.



Senator Jesse Helms, a richly conservative Republican from North Carolina who served at a time when most Republicans in the US Congress were considered moderates. Helms held a seat in the Senate from 1973 to 2001 – and died in 2008.

During his second year in office, he authored a now-infamous amendment that restricts the use of American foreign aid funds for abortion services abroad. And then, within days of taking office in 2001, President George W Bush added insult to injury. He issued an administrative order, his very first, forbidding the provision of US foreign aid for abortions.

The GJC, writing about that amendment and Bush's order, opined that 'the denial of abortion to women and girls impregnated by war rape constitutes torture and cruel treatment in violation of international human rights law.

'Given that pregnancy aggravates the serious, sometimes life-threatening, injuries from war rape – and prolongs the impact of the initial crime of sexual violence,' the GJC added, 'the failure to provide the option of abortion violates the prohibition against torture or cruel treatment under common Article 3 of the Geneva Conventions.'

That's just one of many complaints about the Helms amendment, which was a clear reaction to *Roe v Wade*, the 1974 US Supreme Court decision that gave American women the right to choose whether to have an abortion. Helms's amendment prohibits the use of foreign assistance funds 'to pay for the performance of an abortion as a method of family planning.' Bush's order, too, refers to family planning.

But obviously war rape has nothing to do with family planning – and many advocates complain that the law is being misinterpreted. Earlier this year, Louis Oswald-Beck, former head of the International Committee of the Red Cross legal division, wrote to President Obama asserting that the denial of abortion funding for women and girls impregnated by war rape is 'unlawful under Article 3 of the Geneva Conventions'.

And in a recent editorial, *The New York Times* made the same argument, saying: 'There is a strong case to be made that the current reading of the amendment violates Article 3 of the Geneva Conventions, which entitles all victims of armed conflict, including rape victims, to complete and nondiscriminatory medical treatment, like access to abortions'.

But abortion is such an explosive issue in the US that no president, democratic or republican, has been willing to take on this issue – afraid of the consequences. Still, the angry lobbying by human-rights groups and others continues.

The new Security Council resolution makes its own statement on this problem – carefully couched, as most UN pronouncements are.

'Recognizing the importance of providing timely assistance to survivors of sexual violence,' it says, the Security Council 'urges United Nations entities and donors to provide non-discriminatory and comprehensive health services, including sexual and reproductive health' for 'survivors of sexual violence.' ☒

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

Adaptive behaviour

Rwanda's move from civil law to common law and last year's accession of DR Congo to OHADA – Organisation pour l'Harmonisation en Afrique du Droit des Affaires – are just two examples of a continent embracing new legal and business ideas

SCOTT APPLETON

As countries enjoy greater political stability and build new economic destinies, more are considering the utility of adapting their legal systems to encourage and facilitate new investment. The emergence of strong trading and economic blocs over the past decade is also prompting member states to blend and homogenise legal structures – already a mix of colonial, traditional and religious influences – to create new regional regulation.

Walter White, a veteran of both African rule of law work and African deal-making, advised on the transition away from South Africa's apartheid-era financial regulation. He agrees that as countries move forward they inevitably take a more pragmatic view of the global influences on their own systems.

'Within Africa as elsewhere across the world the concept of jurisdictional law is to a certain degree becoming obsolete as we see ever-greater flows of international investment and cross-border trade, including intra-African trade, and as major industrial sectors formulate their own standard terms and agreements,' he says.

A United States lawyer, White relocated to Johannesburg in 1993 to help modernise the country's leveraged buy-out (LBO) laws. Under South African law, already a mix of Dutch civil law and English common law, leveraged transactions were then largely prohibited, so the US government looked long and hard to find someone with both an emerging markets and financial background to help advise on the creation of a new more international framework – US and United Kingdom LBO strategies facilitated the early transfer of acquisition opportunities to black South Africans.

'Understanding national legal principles is a critical aspect of doing business in any country. National law however is often idiosyncratic particularly regarding areas such as land ownership or labour relations. It may also

increasingly be perceived as a veneer which may be integrated into a framework of established international legal or business principles,' White adds. 'Countries competing for investment will sometimes make adjustments to better align their historical legal framework to international norms in order to better position themselves to attract new investors. Others choose to update their standards to comport with modern multinational protocols in an effort to better protect local environments and achieve longer term sustainability.'

Africa on the radar

There is no doubt that Africa is now on the radars of many more international companies and financial institutions; driven by a desire not only to capitalise on the continent's abundant natural resources, but also a process of increasing urbanisation and the rise of a significant middle class. Consumer spending across the continent is projected to rise to US\$1.4tn by 2020; by 2030 there could be 18 African cities with populations greater than ten million; and by 2040 Africa's working-age population is expected to rise from around 500 million to 1.1 billion – greater than both China and India.

Rwanda may be one of the smallest of Africa's 54 sovereign states, with a population of only around 11 million, but it is at the forefront of this adaptive behaviour. Driven in part by a desire to distance the country's legal system from the 1994 genocide that saw up to a million people murdered – but also to accelerate the integration of the country into the East African Community (EACOM) trade bloc – the government of President Paul Kagame has, since 2007, driven a process of economic reform that includes transitioning Rwanda's traditional German and Belgium-influenced civil law system to one more in line with English common law.



Such a decision is a pragmatic move forward, says Nick Johnson, Rector of the country's Institute of Legal Practice and Development and a former Professor at the University of Warwick in the UK. Rwanda joined EACOM in 2007 and the British Commonwealth in 2009 and Kagame has resolved to make English the official language of law and business. 'EACOM is a major driver of the commercial legal changes now underway in Rwanda and within which common law dominates in the other major EACOM member states, Kenya, Tanzania and Uganda; while the fifth member, Burundi – also French-speaking and equal in size to Rwanda – has mooted a similar transition.'

EACOM is also however now beginning to formulate its own legislation and a move towards greater legal harmonisation is regarded as inevitable. 'Rwanda is in effect now a tri-jural jurisdiction blending common law and francophone law in the commercial sphere, while still placing a strong focus on indigenous law for specific issues. The country has taken a very open approach to seeking out the best structures to suit its needs. We see this now in its commitment to EACOM and previously in the creation of the *gacaca* courts, to help deal with the backlog of genocide cases.'

Rwanda operates a system of national, provincial and district courts and mediation committees, but in 2001 introduced an additional tier of local *gacaca* courts – based on traditional village assemblies used to resolve theft, family issues, land rights, and property damage, but which in the context of the genocide

also emphasise confession and forgiveness. Post-1994, only a third of Rwanda's former judges remained and a sixth of its prosecutors, the majority having either fled the country or been murdered.

'The use of *gacaca* courts in terms of trying those accused of genocide-related crimes has largely come to an end but there is a similar community-based process in use with the mediation committees. These committees, known as *abunzi*, are still the predominant way in which day-to-day and low value disputes are resolved. Rwanda is in many respects quite a litigious country. The parties to a local dispute have various options albeit they will invariably resort to the traditional approach first and only if this fails will they embark on a formal legal process,' explains Johnson.

A plethora of Economic Communities

The question of the applicable law in any country is taking on greater importance as Africa enjoys greater political stability and unity, with a move towards deeper regional cooperation, and as flows of international investment increase. ‘Whilst the ministries involved with economic development are embracing common law based commercial laws, the courts’ approach is different. And there is a limit to what can be achieved through policy alone. So the increased integration of the regional trading blocs is providing the economic impetus necessary to move things along,’ says Johnson.

EACOM, founded in 2001, is one of a number of Regional Economic Communities (RECs) that now operate across Africa and in which countries often have overlapping membership. The other RECs are the Economic Community of West African States (ECOWAS – founded in 1975), the Economic Community of Central African States (ECCAS/CEEAC – 1985), the Common Market for East and Southern Africa (COMESA – 1994) and the Community of Sahel-Saharan States (CEN-SAD – 1998).

Distinct from these is the Southern African Development Community (SADC), the Intergovernmental Authority on Development (IGAD), and the Arab Maghreb Union (AMU), albeit the activities of the IGAD and AMU are currently frozen due to internal differences and the upheavals of the Arab Spring.

A number of RECs nonetheless have subgroups, such as the Economic and Monetary Union of West Africa (UEMOA) – a subgroup of ECCAS/CEEAC – while ECOWAS operates the West African Economic and Monetary Union (UEMOA) and West African Monetary Zone (WAMZ), and the SADC operates the Southern African Customs Union (SACU).

Each REC is utilised as an arm of the over-reaching African Economic Community (EAC), established in 1991 with the goal of encouraging the creation of free trade areas, customs unions, a single market, a central bank, and potentially a common African currency.

Indicative of the move towards greater legal harmonisation was the creation in January 2013 of the COMESA Competition Commission (CCC) and Board of Commissioners – establishing a

control regime that defines regional merger rules and will now enforce general competition law provisions.

Such a development has not however been uniformly welcomed by all 19 COMESA members, says John Miles, Chair of the Africa Legal Network – an association of law firms across the continent. The CCC may be designed as a one-stop shop for transactions affecting COMESA members, but it will still have to operate in parallel with national regimes.

‘COMESA is taking steps to further develop the common competition law regime that was first rolled out in January, 2013 – for instance, the recently published draft Guidelines aimed at providing clarification and guidance regarding the enforcement of the COMESA Competition

Regulations. But as welcome as such harmonisation may seem to be, it has raised tensions between certain members because it brings into the spotlight a number of countries where, because of the economic dominance of a limited number of wealthy or politically-connected families, there have been few significant competition developments,’ says Miles.

What is still lacking in order to bring

the different legal perspectives together is the ‘good faith’ principle that has so successfully underpinned legal thinking in the European Union, Miles suggests. ‘There has to be the willingness to pull things together yet this is still missing among some trade blocs, even as a process of harmonisation begins to gather pace.’

Massive oil and gas reserves in Angola and Mozambique

Much of the continent is nonetheless seeing the creation of new tiers of legislation and judicial entities as regional laws and decision-making bodies evolve. It has been suggested that such a process is inevitable as countries move away from a system of regulation imposed by one-time colonial rulers to one that sees the creation of new legal frameworks more influenced by the realities of modern African economics.

‘African Portuguese-speaking countries have not seen a “big bang” type legal reform in the same way that Rwanda has experienced, for example, but we have seen evolutionary strides,’

‘Within Africa as elsewhere across the world the concept of jurisdictional law is to a certain degree becoming obsolete as we see ever-greater flows of international investment’

Walter White
Head of the Emerging and Frontier Markets, McGuireWoods

says Claudia Santos Cruz, Managing Partner of the Lisbon office of Angola-based AVM Advogados and Senior Vice-Chair of the IBA's European Regional Forum.

'Legislatures generally create rules that are improved over time. It is only when a major development happens – such as the need for an LNG plant in Angola or the discovery of gas in Mozambique – that we see material steps forward, and in this respect we do see many more countries looking to cherry pick specific legal rules and tools.'

Angola and Mozambique are countries that have traditionally looked to Portugal, and more recently Brazil, for guidance on developing their own regulatory frameworks – given their historic and cultural ties – but which are now beginning to look further afield as greater levels of international investment begin to pour in and domestic transactions become more sophisticated.

'Many industries now bring their own standard terms and agreements and whether you are doing a mining, oil and gas or telecoms deal in sub-Saharan Africa or in Europe, the same general principles will underpin the transaction. I think that as African governments become more open and more sophisticated they are becoming more welcoming of such an approach, it brings as much certainty to them as the operators,' adds White at McGuireWoods.

Angola is one of Africa's leading oil producers and the state-owned oil company Sonangol, one of the continent's largest companies. Mozambique, meanwhile – which signed a cooperation protocol with Angola on natural resources issues – has experienced in recent years the discovery of some of the largest natural gas reserves found anywhere, prompting the US company Anadarko to lead a number of investors in the construction of a \$18bn liquefied natural gas (LNG) plant in the country, potentially the first in East Africa.

'The scale of investment now being proposed and the inadequacy of existing legislation means that governments often have to enact project-specific legislation to meet expectations in terms of modern finance, cross-border contracting and end-user agreements, as well as competition or health and safety concerns, and to provide international investors with the guarantees and safeguards they need before moving forward with such projects,' says Santos Cruz at AVM.

Yielding authority

In order to make the requisite leap forward in certain instances countries are importing entire new legal systems, such as the case of the Democratic Republic of Congo (DRC) which last year acceded to the Organisation

pour l'Harmonisation en Afrique du Droit des Affaires (Organisation for the Harmonisation of Business Law in Africa – OHADA) already the commercial framework of choice for 16 other West and Central African countries.

OHADA was created in 1993 and comprises a system of business laws and institutions based on modern French civil law rules. To date, almost all the signatories are former French colonial territories, but nonetheless the adoption of OHADA enables each to benefit from an established legal system – covering commercial, corporate, securities, insolvency and arbitration issues – and overseen by a Supreme Court (located in Abidjan, Ivory Coast) to ensure uniformity and consistency of interpretation.

'The adoption of OHADA introduces a strong element of legal certainty, particularly for foreign investors who will inevitably feel more comfortable transacting under a familiar regime, especially as any amendments to the core Uniform Acts – which have direct applicability – have to be agreed by all 17 signatories, thus removing the possibility of significant unilateral changes,' says Camille Astier, Coordinator of Hogan Lovells' Africa practice.

'Rwanda is in effect now a tri-jural jurisdiction blending common law and francophone law in the commercial sphere, while still placing a strong focus on indigenous law for specific issues'

Nick Johnson
Rector, Rwanda's Institute of
Legal Practice and Development

In adopting OHADA, countries cede control over their commercial legal regulation but as there is no provision for family or criminal law issues the national and international frameworks complement each other. 'An additional benefit of OHADA is that it brings with it an established arbitration framework, which is often lacking in many domestic African legal systems but is the default dispute resolution mechanism for many international investors. Issues may potentially arise over the enforcement of arbitral awards – although the OHADA regime does provide for

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comprehensive enforcement of foreign awards – but what is important is that it keeps foreign companies out of the domestic courts.’

A credible dispute resolution process is a must or foreign investors will simply not invest, she adds. Access to arbitration is thus a key factor in the way many companies determine the relative ease of doing business in a country. It is also one of the areas in which countries have been most ready to yield authority – virtually all of Africa is now a signatory to the 1953 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

A leap into the known

Arbitration is an area in which Rwanda is again hoping to make an impact. Following on from the introduction of dedicated Commercial Courts, 2012 saw the launch of the Kigali Arbitration Centre to help resolve national and especially EACOM or COMESA commercial and trade disputes.

With a remit encompassing ad hoc and institutional arbitration – under Hong Kong International Arbitration Centre (HKIAC), International Chamber of Commerce (ICC), or London Court of International Arbitration (LCIA) rules – its goal is to act as a venue or seat for disputes that might otherwise prove too costly for parties to undertake elsewhere.

‘A key challenge in all this however is the willingness of the local legal community to accept and adapt to outside influences. The transition processes in both the DRC and Rwanda have also inevitably been accompanied by a significant emphasis on the training of lawyers and judges,’ says Paul Crook. The former Global Head of Corporate Know-How and Training at Allen & Overy and a Director of International Lawyers for Africa has been involved in such programmes.

The DRC’s accession to OHADA was originally agreed in 2010, while Rwanda’s legal transition is expected to take the best part of a decade.

Vital to the success of both is also the need to train government officials in modern international business and legal structures to place them in a better negotiating position vis-à-vis potential multinational counterparties.

‘At the most basic level language is often a key issue. The majority of older

Rwandan lawyers and judges, for example, were trained and spent the majority of their careers in the francophone tradition and may not be comfortable working in English. So there has to be an emphasis on adapting principles to the situation in the country; in Rwanda there was not a simple move from civil law to common law but the creation of a hybrid system,’ says Crook.

Such an approach is indicative of the wider changes seen across Africa. Many countries’ wealth may be underpinned by natural resources, but there is a common goal of building more knowledge-based economies and the legal sector is perceived as fundamental to this.

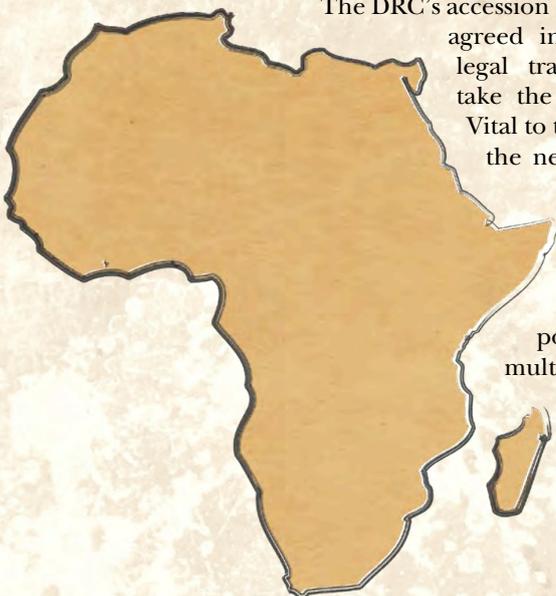
‘Because of the economic dominance of a limited number of wealthy or politically-connected families, there have been few significant competition developments’

John Miles
Chair, Africa Legal Network

And such a process can pay off. The recent World Bank Doing Business Report cited Rwanda as the second most reformed country in the world (2005–2011), the third easiest African country in which to do business (after Mauritius and South Africa) and rates it higher than China, India and neighbouring Kenya for political stability.

‘Countries are making significant legal steps forward and part of the willingness to do this is because it is a leap into the relatively known – they are cherry-picking legal best practice, wherever they find it,’ says Crook. ‘National law will always have its place but many idiosyncrasies are diminishing and in Africa, as elsewhere, the most successful lawmakers, lawyers and businesses are increasingly those best able to adapt international expectations to the regional or local reality.’ ☒

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Military oppression violence in Egypt



Members of the Muslim Brotherhood and supporters of ousted Egyptian President Mohamed Morsi shout slogans against the military as they show the 'Rabaa' or 'four' gesture, in reference to the police clearing of Rabaa al-Adawiya protest camp on 14 August 2013

sows seeds of

The bloody coup d'état has claimed the country's newly-elected government and the lives of hundreds, putting democracy and the rule law in a precarious position.

EMAD MEKAY



Gruesome social media images that fuelled the global jihadist surge into Syria 18 months ago are back. This time, however, they are coming from Egypt. Pictures on Facebook and Twitter show rows of bodies wrapped in white burial sheets lying in morgues, hospitals and even mosque hallways, others show charred bodies with victims' heads bloodied by sniper shots. Most of the posts urge one thing: justice.

This is Egypt less than three months after a violent military coup d'état that removed the country's first elected government, claimed the lives of hundreds of people and sent thousands of anti-coup activists, mostly Islamists, behind bars.

One of the greatest, but mostly unsung, achievements of the Arab Spring – the embrace of democracy by previously militant armed groups – is now teetering on the verge of collapse. Al-Qaeda's ideology of violence as the only means of change has now received a new lease of life.

After former-President Hosni Mubarak's ousting in February 2011, Facebook and Twitter posts eulogised the advent of democracy and the dawn of rule of law. Now these are lamenting the acquittal of almost all members of his regime, including police officers who shot and killed protestors.

Hopes of a repatriation of funds by Mubarak's cronies have virtually been dashed, while business tycoons who benefited from Mubarak regime's corruption and patronage roam Egypt free again. The vicious secret police notorious for human rights abuses are now back with a vengeance, rounding people up in much-

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dreaded dawn raids that Egypt hoped were gone for good.

After the Arab Spring, radical groups such as Jihad and the Gamaa Islamiya, which once took up arms against the Mubarak regime, quickly snatched the opening long denied to them. They rushed to give media interviews, build political parties and contest elections. Many acknowledged that the Muslim Brotherhood model of gradual non-violent change was now the way to go.

After the Arab Spring, radical groups such as Jihad and the Gamaa Islamiya, which once took up arms against the Mubarak regime, quickly snatched the opening long denied to them

Rubbing shoulders with society clearly helped militant groups on their path to moderation. Members of the Gamaa Islamiya launched a million-man march in Cairo in February titled 'No to Violence', while Gamaa Islamiya leader Tarek al-Zumor appeared on a children's talk show to teach youngsters how to be good citizens. Meanwhile, his older cousin Abboud al-Zumor – released after 30 years in prison for his role in masterminding the 1981 assassination of former President Anwar Sadat – wrote a newspaper column, in which he routinely opined about forgiveness and re-building the nation.

The coup has not only upset democracy, but threatened to roll back these profound changes. Amnesty International estimates that at least 1,089 people were killed in just four days between 14 and 18 August, during the military operation to disperse anti-coup protestors at Rabaa al-Adawiya square and al-Nahda square in Cairo. Human Rights Watch called the carnage the largest mass killing event in Egypt's modern history.

The military crackdown is still raging and the total death toll is rising by the day. Check points manned by heavily-armed police clog Cairo's streets in scenes not witnessed since the brutal era of former Egyptian President Gamal Abdel Nasser in the 1960s. Rallies of protestors have been repeatedly attacked with live ammunition, and prisons are filling up fast. Morsi has so far been held incommunicado at an unknown location for nearly three months, facing allegations of espionage for Hamas.

Social media posts indicate that the war on the Islamists may push them to desperation and 'self-defence'. 'By God, our self-control now is not triggered by fear or intimidation. It's out

of concern for the value of human blood and for the safety of our country,' said a post on an Islamist Facebook page. 'If we are pushed too hard and our back is pressed against the wall, we'll have to defend ourselves.'

The largest Islamist group remains the Brotherhood, which asserts that it will not be lured into taking up arms. However, its leaders may be losing the support of younger members. In private talks, members have criticised the group for failing to respond to verbal and physical attacks, even when Morsi was in power. This, they believe, enticed the coup leaders to work behind the scenes, confident that their plans would go undetected.

If the young decide to take up arms, it could happen on a massive scale. Senior Brotherhood leader Salah Sultan estimates active membership at between 800,000 to one million. Indeed, last time the Brotherhood endured a similar crackdown under Nasser in the 1960s, some sympathisers renounced the group's peacenik line and splintered off to create their own jihadist factions.

Currently, Egyptian security forces are emboldened to continue with their clampdown. They have the backing from rich ruling families in neighbouring Kuwait, Saudi Arabia and the United Arab Emirates. Internationally, they have political cover from Israel and the United States. They are also spooked by the spectre of the hangman in case the coup eventually fails: the military overthrow of government is punishable by death under all of Egypt's different constitutions.

The coup has not only upset democracy, but threatened to roll back these profound changes

Like the 2011 Arab protests that happened slowly over social media while Western powers gave little attention, calls for the return to armed resistance are currently just trickling quietly on Facebook and Twitter. But if, or when, it happens, the return to violence will be another global security storm nurtured by military and police brutality, desperation and an overwhelming sense of lack of justice. ☒

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Conflict or consensus

The dispute resolution industry has never had it so good; the financial crisis has given rise to a seemingly endless stream of parties seeking redress for their losses, but there are often better ways to settle disputes than the traditional courtroom battle

JULIAN MATTEUCCI

When the global financial crisis hit in 2008, many expected it to herald an immediate boom for litigators. Not so, as it turned out. There was an early flurry of activity as some of the more aggressive hedge funds and their advisors tested the water. There was a less obviously perceptible spike of advisory work. But, at first, there was no boom in litigation.

According to Joseph Tirado, the London-based Global Co-Chair of Winston & Strawn's International Arbitration Group and Senior Vice-Chair of the International Bar Association (IBA) Mediation Committee, the actual litigation took some time to come through. But, due in part to the length and depth of the crisis, Tirado – along with his peers in London, New York and other financial and dispute resolution centres – has since seen large numbers of 'bet-the-company' actions in which clients will throw everything at a case, as they fight for survival.

The traditional dispute resolution forum – courtroom battles in the context of litigation – is not the only option for those with a pressing dispute to resolve, of course. Arbitration, in particular, is booming. Around the world, indications are that international arbitration is now the preferred method of dispute resolution in cross-border disputes.

The upshot includes the elimination of perceived uncertainties regarding unfamiliar national courts – with arbitration resulting in awards that can be enforced within the many countries that are signatories to the 1958 New York Convention on the Recognition and Enforcement of



Foreign Arbitral Awards (the 'Convention'). 'For most cross-border disputes, where neither party would accept the home jurisdiction of the other, there is no alternative to arbitration,' says Martin Bernet, head of dispute resolution at Zürich-based firm Schellenberg Wittmer. Other perceived positives are that international arbitration is viewed as quicker, cheaper, confidential, and more reliably equitable than conventional litigation.

Can't please all of the people...

Nonetheless, certain concerns, similar to those associated with litigation, have arisen in arbitration, with regard to the increased level of discovery and volume of documents. 'Critics of arbitration complain that it is taking too long and becoming too expensive,' says Debevoise & Plimpton's Hong Kong Partner Christopher Tahbaz.

Moreover, everyone prospers when the international arbitration industry's docket is full: lawyers, arbitrators, expert witnesses, the institutional arbitration bodies themselves. Consequently, detractors are inclined to say that the significance of the financial self-interest of all concerned has a perniciously corruptive influence on the entire arbitral process, according to Charles Adams, head of Akin Gump's Geneva office.

At Debevoise & Plimpton, the firm has developed a Protocol to Promote Efficiency in International Arbitration, which contains concrete steps that can be taken to maximise speed and efficiency in the arbitral process. The use of such tools can result in a well-run arbitration, which in turn yields tremendous savings of time and cost in resolving large commercial disputes.

The type of work spawned by the economic crisis has varied. Akin Gump, for example, has been instructed in a number of disputes over claw-back provisions in cross-border M&A agreements, where asset valuations made at the time of the transaction came to be substantially overstated in the subsequent down-market. Such agreements frequently have dispute resolution clauses providing for international arbitration.

There have also been a number of disputes arising from the rescue of businesses in trouble, where the deal intended to salvage has later gone aground. Such deals are typically large, cross-border transactions. Again, more often than not they provide for arbitration in the event of a dispute.

With regard to specific sectors, the downturn produced a string of cases for law firms in defending major banks against allegations by, mostly, private clients over mismanagement of assets. Other prevalent claims relate to the sale of investment products that failed

to perform, as well as substantial disputes with insurers concerning insurance cover for the alleged liability of insured banks for the mismanagement, mis-selling and non-performance of financial products.

Energy, particularly oil and gas – but increasingly renewable energy – disputes have also kept international arbitration practitioners busy. Infrastructure and joint venture battles, likewise, figure prominently in caseloads, with Energy Charter Treaty disputes also picking up momentum. Winston & Strawn's Tirado expects this trend to continue.

Cultural capitals

Geographically, certain capital cities attract particular types of litigants and certain kinds of cases. Stockholm remains an important centre for Eastern European disputes and Vienna is a popular choice for CEE-related arbitrations. For Commonwealth of Independent States (CIS)-related cases, London is very much a preferred destination for both international arbitration and litigation.

Furthermore, international arbitration is becoming increasingly regionalised, with strong centres developing in the Far East and Middle East, particularly in Hong Kong and Singapore. Africa and Latin America are also regions to watch.

Some practitioners anticipate increased levels of commercial and investor-state arbitration coming from these parts of the world. 'The pie is not getting smaller. There are now more pies and the work is increasingly scattered,' Tirado says.

For some would-be litigants, mediation is the happy alternative. Cross-border contracts will usually include mediation provisions, and tiered dispute resolution clauses are increasingly common within contracts. Whether the parties end up in arbitration or mediation is then a matter of choice. Many factors need to be taken into consideration in deciding whether and when to mediate. Mediation may not work, or be appropriate, in every case: where a precedent is required or the values involved are just too high, for example.

But, if used in the right way, at the right time, mediation can be an extremely cost effective and time-efficient way of resolving disputes. Instead of being against each other, the clients together work out an agreement that is in their collective interest; and because of the flexibility of the mediation process, in addition to the case in hand the parties can bring up side issues such as future payments or matters upon which they might potentially dispute in the future.

'I am surprised that mediation is not used more often,' says Tirado. 'Parties still get their day in court but mediation is less confrontational and more collaborative, and removes some of

the bitterness from traditional litigation.'

Another incentive for choosing mediation is that the enforcement of awards or judgments can still be problematic. In traditional litigation or arbitration, it is a court or tribunal imposing a decision on a losing party, who might attempt to overturn or obstruct it. It is rare for mediated agreements not to be enforced, this being due to mediation's collaborative elements.

The popularity of mediation as an alternative method by which to resolve a dispute can depend on the jurisdiction. In Switzerland, for example, mediation has never really taken off in commercial matters because the court's role is not limited to following the procedural rules through to judgment. 'Swiss judges will always try and assist the parties in seeking out compromise,' Bernet says. Particularly in the German-speaking part of the country, it is common for the judge, at some point during the case, to summon the parties to a conciliation conference and settle the case.

Other jurisdictions have actively encouraged the use of mediation at government level. In 2010, the Italian government utilised a 2008 European Union Mediation Directive to bring in a mandatory mediation scheme. Even though the law did not compel parties to settle disputes at mediation – just to attempt to do so – some of the country's legal services sector reacted indignantly, culminating in a national strike in 2011.

Subsequently, in October 2012, Italy's Constitutional Court ruled that the Italian government had exceeded its legislative authority by making mediation a mandatory precursor to trial. 'For a while mediation became optional again,' notes Milan-based Mauro Rubino-Sammartano, Chair of the IBA Mediation Committee and Partner at LawFed-BRSA.

But in June 2013, the Italian government reintroduced mandatory mediation through an executive order, the approval of which was confirmed by Italy's Parliament two months later. If mandatory mediation is now challenged for being in breach of the constitution, such a challenge should be based on the merits of the matter – for example, on the ground that mandatory mediation interferes with a citizen's right to immediate access to justice.

Other out-of-court techniques include conciliation, a term often used interchangeably alongside mediation. Conciliation is another dispute resolution process that involves building a positive relationship between the parties of a dispute. However, it is fundamentally different to mediation and arbitration.

Conciliation is generally understood to mean a more evaluative form of mediation, where the neutral party adopts a more proactive, even assertive role. 'If mediation were a genre of

music, it might be described as jazz. Conciliation, on the other hand, is jazz with a conductor,' says Winston & Strawn's Tirado.

Other dispute resolution experts maintain that any distinction between mediation and conciliation is artificial because the distinction between evaluative and facilitative mediation

'Critics of arbitration complain that it is taking too long and becoming too expensive'

Christopher Tahbaz
Partner, Debevoise & Plimpton, Hong Kong

fully covers such ground. 'One can say that mediation is a proceeding that helps the parties reach conciliation,' says Rubino-Sammartano.

Money is no object

International dispute resolution has created a global industry, not only of leading litigation and arbitration partners and mediation experts, but also of ancillary services such as litigation funders, computer forensics and expert witnesses.

It is par for the course that certain claimants have viable cases but lack the finances to pursue their claim. Alternatively, some companies prefer to allocate their resources internally to core projects rather than financing litigation. This is where litigation funding comes in. A third party agrees to provide all – or part – of the litigation costs in return for a share of the winnings, if the litigation is successful. As for the funding, it is repayable when the claim succeeds and monies are recovered; if the case is lost, the funder bears the costs that it agreed to fund.

The major advantage of litigation funding is the provision of access to justice for parties that would otherwise be outgunned by the other side and that could not bring legitimate claims or mount proper defences. Examples of prominent investors in litigation include UK-based Calunius Capital ('Calunius'), which was co-founded in 2006 by Partners Mick Smith and Mark Wells when the *Stone & Rolls v Moore Stephens* case came to prominence. The case focused attention on litigation funding and it became apparent that the judiciary's previous resistance to litigation funding had all but dissipated, so long as it was conducted in a sensible manner and without abuse of process.

The financial rationale for Calunius was evident; there was a never-ending quest for alternative investment products among financial institutions. But the financial world seemed

Some of the big battles keeping leading global dispute resolution partners busy...

The dispute: a series of arbitration proceedings before a Stockholm forum under the United Nations Commission on International Trade Law (UNCITRAL) rules. The dispute arose from the Anglo-Russian joint venture, TNK-BP, formed between the BP Group (BP) and its Russian joint venture partners for the exploration, production and refining of oil and gas in Russia and the Ukraine. 'The arbitrations were significant in that they played out and were part of an ongoing shareholder dispute over the governance and control of TNK-BP,' says Michael Stepek. Ultimately, there was a negotiated settlement, with a final award agreed in light of each side's sale of its interests in TNK-BP to Kremlin-controlled oil company Rosneft, the March 2013 transaction reportedly in the region of \$55bn.

The client: Renova Holding and Renova Oil & Gas (Renova) – forming part of the Alfa Access Renova Group (AAR)

The firm: Akin Gump

The partner: Geneva and London-based Michael Stepek was lead Partner

The client: various other AAR Group members

The firm: Skadden, Arps, Slate, Meagher & Flom

The partner: London-based Partner David Kaufman

The client: BP

The firm: Linklaters

The partner: London-based Partner Michael Bennet

The dispute: an investment treaty dispute, representing the investors in two multi-hundred million dollar treaty claims brought against the Laos government under the China-Laos and Netherlands-Laos bilateral investment treaties in relation to the cancellation of a hotel and casino project and licences to operate slot-machine clubs.

The client: Sanum Investments and its parent company, Lao Holdings

The firm: Debevoise & Plimpton

The partners: New York Partner and IBA Vice-President David W Rivkin assisted by Hong Kong Partners Christopher Tahbaz and Catherine Amirfar in New York

The dispute: a \$2.3bn investment treaty dispute with Ecuador over the cancellation of a 30-year oil concession.

The client: Occidental Petroleum

The firm: Debevoise & Plimpton

The partner: New York Partner David W Rivkin

to lack a clear understanding of the legal environment and vice versa. Calunius aimed to bridge these worlds.

With the global economic crisis only a couple of years away, the timing was apt. 'We knew the market was due a correction but we never imagined it would be as long and deep as it has been,' says Smith.

But in addition to convincing the legal profession that litigation funding was a credible enterprise, Calunius needed to raise capital. It was only in 2010 that Calunius' fund business took off. In the previous three years, the cases were there but the capital was slower to arrive.

Litigation funding is now here to stay. It is already a billion-dollar market and will continue to grow. In addition to its doorway to justice, from a pure investment perspective the potential returns to investors in the current economic climate could far outstrip what they might get back from conventional bonds and equities.

Nonetheless, ethical questions have been raised about the industry. Difficulties can occur if funders' review procedures for claims are not sufficiently robust, such that they allow poor claims to go forward to litigation or arbitration, thereby forcing parties to incur the cost of a defence. It is also important to distinguish between funders that can provide capital and funders who are effectively brokers. There have been reports of instances where such parties have promised funding to claimants that has not materialised.

The Association of Litigation Funders of England & Wales is in place in the United Kingdom so as to address the various concerns linked to litigation funding. It is dedicated to promoting best practice in the litigation funding industry, while its Code of Conduct promotes awareness of litigation funding in the UK. Calunius' Smith believes that there are very few sceptics left. Notwithstanding the common law concept of champerty – which ensures that the claimant retains control of his own case – the judiciary, litigators and arbitration counsel now feel comfortable with third party funding that is handled properly. 'Ultimately, in addition to our wealth of experience of disputes, we bring a sensible, commercial option to the table that provides a source of capital for parties who would otherwise not be able to finance meaningful cases,' Smith says.

Forensic technology

Another industry to gain from the litigation boom is the computer forensic sector, leading to Winston & Strawn establishing its own state-of-the-art in-house offering. The firm's eDiscovery & Information Management Practice Group is experienced in managing large-scale collections and reviews of electronically stored



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The dispute: a multi-billion dollar Energy Charter Treaty claim brought before the Stockholm Chamber of Commerce and filed by a number of entities and individuals related to Moldovan businessman Anatoli Stati, in connection with the alleged expropriation of hydrocarbon assets. The final award is awaited.

The client: the Republic of Kazakhstan

The firm: Winston & Strawn

The partners: Joseph Tirado, Global Co-Chair of International Arbitration Group and Senior Vice-Chair of the IBA Mediation Committee; Tirado's Co-Counsel is Frankfurt-based Patricia Nacimiento at Norton Rose

The client: Stati

The firm: King & Spalding

The partners: Global Disputes Practice Head Reginald Smith in Houston; and Paris-based International Arbitration Partner Ken Fleuriet

information, handling complex litigations, and navigating tricky eDiscovery issues in high-stakes government and regulatory investigations.

Examples of Winston & Strawn's specialised expertise include its project managers conducting forensic collection using Guidance's EnCase, a forensic collection and analysis system. The group also utilises Nuix, an advanced data processing and investigatory software system, to conduct filtering, culling, and early case assessment; and by using the Nuix system, the practice can fully process large volumes of data behind its own secure firewall.

With the use of forensic experts also growing greatly in relation to internal investigations for companies, multidisciplinary firms such as Deloitte have likewise benefited. It now has one of the largest forensic practices in the world, boasting over 1400 dedicated practitioners in more than 30 countries, including forensic accountants, legal and law enforcement specialists, and business intelligence experts. And because Deloitte also uses state-of-the-art forensic technology to ensure that data is handled with maximum efficiency, its services are increasingly sought by both companies and lawyers in relation to detailed investigations or dispute resolution.

The global economic crisis has also permitted expert witnesses to continue to play their own vital role in international dispute resolution. They contribute increased clarity to the issues on which they testify – and potential cost savings – should they be witnesses that can summarise and report findings taken from voluminous records. 'Service industries, such as the provision of expert witnesses, are ever more competitive, especially in construction arbitration claims,' says Schellenberg Wittmer's Bernet.

Going forward, global dispute resolution practices face a number of challenges. Although

litigation before national courts still tends to be handled by local practices, international arbitration is global by nature, and there is a huge push by firms from all over the world into this field. And because clients can choose who they wish to instruct, the greatest challenge for the modern dispute resolution practice, which already has a full caseload, is to have the necessary manpower ready at any given moment to handle the most complex, document-heavy and time-consuming cases.

Akin Gump's Adams considers that the type of dispute resolution practice best placed to face the future is one with a global footprint, which has the capacity to deal with cases arising out of contracts that are governed by any number of systems of law. It should also be able to provide for the arbitration of disputes before any one of

'The pie is not getting smaller. There are now more pies and the work is increasingly scattered'

Joseph Tirado

Global Co-Chair of International Arbitration,
Winston & Strawn; Senior Vice-Chair of the
IBA Mediation Committee

the proliferating number of global and regional arbitration centres.

Keeping the client content, naturally, remains a top priority. More than ever, international dispute resolution practices need to be as business-savvy as the clients who rely on them, and flexible enough in their approach to deal with the increasingly complex business problems faced every day in the modern global business environment. 'Helping clients come up with the right dispute resolution solutions is an enormously rewarding challenge, and something you have to enjoy, in order to succeed in this field,' says Debevoise & Plimpton's Tahbaz.

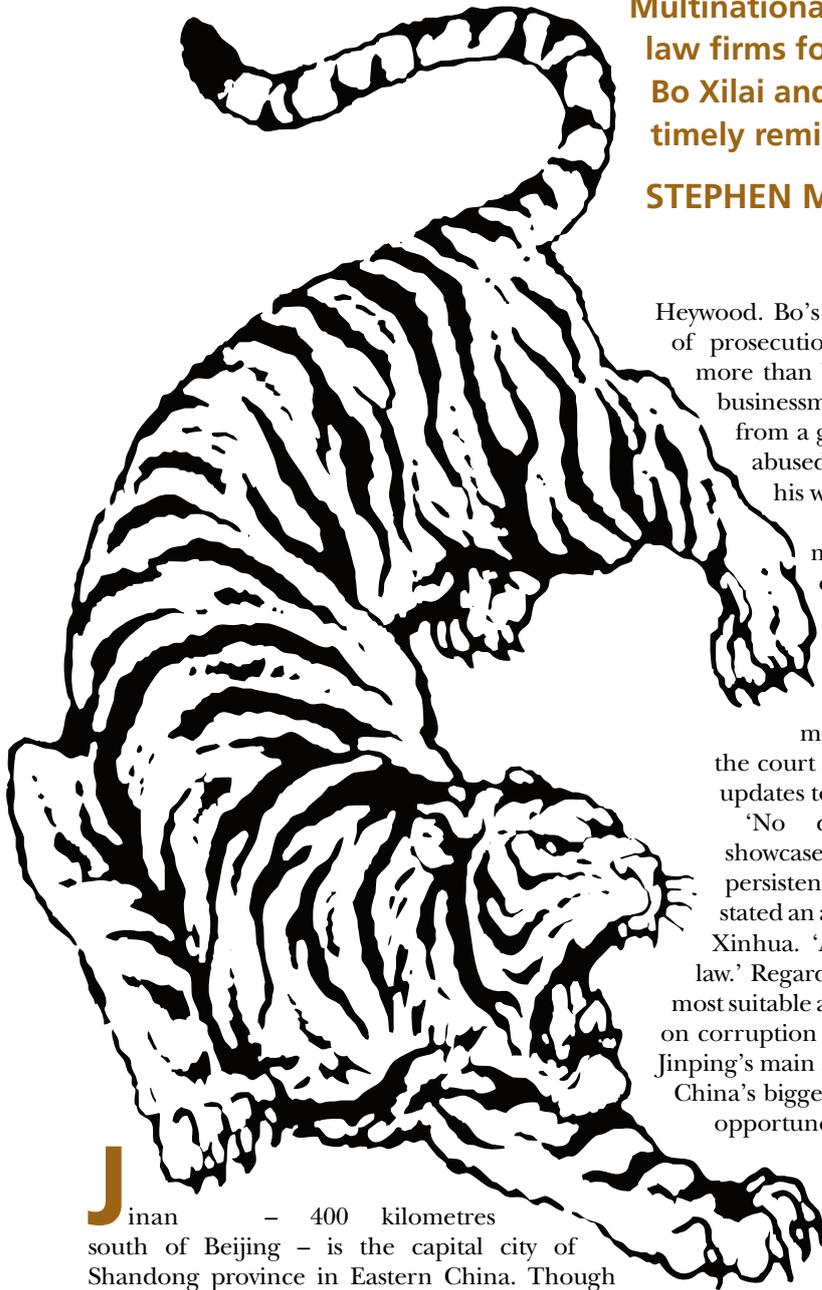
The cost of dispute resolution is another big worry for practitioners moving forward; the ability to be creative in relation to fee structures is fundamental. Because clients are increasingly concerned with the expense and duration of the dispute resolution process, they demand that their lawyers achieve the best results on the merits, in record time, and at minimum cost. 'Our challenge is to make that happen, at least often enough to keep the clients coming back for more!' says Adams. ☒

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China corruption push making companies wary

Multinational companies are paying millions of dollars to law firms for FCPA investigations. In China, the trial of Bo Xilai and recent experiences of GlaxoSmithKline are timely reminders not to overlook local laws in this area.

STEPHEN MULRENAN



Heywood. Bo's presence in Jinan was the result of prosecution allegations that he accepted more than ¥20m (£2.1m) in bribes from two businessmen, embezzled another ¥5m from a government building project, and abused his power in trying to cover up his wife's crime.

The world awaits a verdict that many believe to be a foregone conclusion. Meanwhile, of more interest to legal observers was the format and public nature of the trial. Though proceedings were not broadcast live, with foreign media banned from the courtroom, the court did release frequent and detailed updates to its official micro-blog.

'No doubt Bo's transparent trial showcases the (Communist Party's) persistent crackdown on corruption,' stated an article on China's official newswire Xinhua. 'All citizens are equal before the law.' Regardless of whether 'persistent' is the most suitable adjective to employ, the crackdown on corruption is very much one of President Xi Jinping's main aims during his first year in office. China's biggest political trial in decades was an opportune way of grabbing the PR initiative.

Jinan – 400 kilometres south of Beijing – is the capital city of Shandong province in Eastern China. Though the city is a major national hub, with a bustling population of seven million, it was only in August that it suddenly attracted world media attention. The trial of Bo Xilai, once considered to be among the most powerful people in China, attracted reporters from across the globe.

The fortunes of the former Politburo member crashed spectacularly following a murder scandal in which his wife, Gu Kailai, was convicted of poisoning British businessman, Neil

Battling tigers and flies

China's fifth generation of leadership came to power at the 18th Party Congress in 2012, when Hu Jintao stepped down as Party Secretary. Befitting the entrance of a new political leader, President Xi called for a new 'Chinese dream': the aspiration of self-improvement. This would involve tackling corruption, encouraging continued market economic reforms, and adopting an open approach to governance.

Critics initially argued that Xi's war on corruption was merely a populist move designed to



curtail social tensions that may arise due to slowing growth (China 'hosts' thousands of protests each year, with many of the complaints focused on corruption). But, from the outset, Xi described fighting corruption as a priority, particularly any bribe taking within the Communist Party, which he believed threatened the Party's very survival.

'Corruption in China is endemic,' says a lawyer at a private equity firm in Hong Kong. 'Business people on the Mainland are scathing about it.' Targeting all levels of government, Xi vowed to go after the powerful 'tigers' at the top of the Party to the 'flies' at the bottom. And he has been as good as his word.

In contrast to the global media frenzy in Jinan, recent sensitive cases have been comparatively tame, efficient and straightforward affairs. In June, former government official Lei Zhengfu was jailed for accepting bribes in a sex tape extortion scandal. A month later, former railways minister Liu Zhijun was given a suspended death sentence for corruption and abuse of power after just three and a half hours in court. Then, in August, the former deputy head of the National Development and Reform Commission (NDRC), Liu Tienan, was expelled from the Communist Party for accepting bribes. He is now the subject of an investigation.

At the time of writing, the latest 'lamb' to the slaughter is Jiang Jiemin, head of the State-owned Assets Supervision and Administration Commission (Sasac) and former head of the China National Petroleum Corporation (CNPC). Significantly, Jiang is also the first member of the Party's 205-strong Central Committee to face charges of 'suspected serious disciplinary violations'.

Targeting the corporations

Shortly after the close of Bo's trial, President Xi appeared to widen his campaign, launching a high-level probe into corruption at China's leading oil and gas firm. No fewer than four senior officials at Hong Kong-listed state-run PetroChina, and parent China National Petroleum Corporation (CNPC), are being investigated over alleged wrongdoing. CNPC vice-president Wang Yongchun and group deputy general manager Li Hualin, together with PetroChina vice-president Ran Xinquan and chief geologist Wang Daofu, have all since resigned from their posts.

While some legal commentators cite the investigation into PetroChina officials as evidence of just how seriously the Chinese Government is about tackling corruption, others believe it to be slightly serendipitous – allowing the Government to target some 'tigers' by going after an industry that offers plenty of low-hanging fruit. Referring to Chevron's 2007 settlement of charges under the US Foreign Corrupt Practices Act (FCPA)

in the Iraq oil for food programme, one lawyer, who wishes to remain anonymous, says: 'It's the nature of the business rather than the country.'

Carl Cheng, senior of counsel at Zhong Lun, advises multinational companies on both national and international corruption laws and says that he will withhold judgment on the Government's efforts until completion of the PetroChina investigation. 'The Government and the Party needs to be careful,' he says. 'Its campaign on corruption must be seen to be fair, rather than being just another stick to beat those people who are not in political favour.'

But President Xi's corruption purge has not been limited to local government officials. Prominent multinational companies are typically scrutinised whenever the Chinese Government wants to be seen to be tackling an issue of social concern. This held true for Wal-Mart, over mislabelled meat, and Unilever, over pricing policies. In July, British pharmaceutical company GlaxoSmithKline was added to the list, when Chinese authorities accused it of directing up to £320m through travel agencies to facilitate bribes to doctors and officials. GSK has admitted that some of its employees may have behaved inappropriately, but it has consistently denied that they were acting on instructions from the company and it continues to deny corporate involvement in the alleged wrongdoing.

The subsequent allegations against Eli Lilly – that it bribed doctors to prescribe its drugs – have only reinforced the notion, from overseas at least, that it has more to do with 'the nature of the business', and that the current targets have been unfairly singled out. It may also be true that the Government is keen to address the high cost of foreign sourced medication, the net effect on other companies is that they are running scared. 'Most major MNCs take local corruption laws seriously,' says the lawyer from a Hong Kong-based private equity firm. 'And those in China that didn't get the message five years ago certainly have the message now.'

China sea change

China has always had anti-bribery legislation, but recent developments suggest the Government's now giving it teeth. Consistent with the requirements of the UN Convention against Corruption, China amended its Criminal Law in May 2011 to cover bribery of foreign officials. This broadened its anti-corruption efforts beyond its own borders and joined an expanding group of nations that prohibit such conduct.

FCPA in the US prohibits providing anything

of value to a foreign official to obtain or retain business. The UK's Bribery Act not only prohibits bribery of foreign officials, but also criminalises acts of bribery related to commercial transactions. Both require companies to be relatively certain that no bribery is taking place with Chinese subsidiaries and their supply lines. But this can be a tough call to make given the sheer number of 'pressure points' along the supply chains, not to mention operating in a culture that relies on personal favours and gift-giving.

CITIC Capital Holdings' head of legal and compliance Yong Kai Wong says: 'It is generally agreed that foreign anti-corruption regulations may not give due credence to the local culture and practices of the market. What may be a gesture of general decency under local practice may be viewed differently through the perspective of foreign regulations.'

One of the hardest aspects of navigating China, for many, is the line between money spent on corruption versus developing relationships. 'Every transaction carries the potential for corruption,' says the lawyer from a Hong Kong-based private equity firm. 'So you have to show a good-faith effort to meet this challenge head-on.'

Many take the view that the best defence is a good offence, so they hire the necessary people to conduct risk evaluations – even for such mundane activities as leasing cars. But the costs associated with putting in place proper anti-internal bribery controls, as well as managing any investigation, can be huge. In the first quarter of 2012, Wal-Mart reportedly spent \$1.6m per day on an FCPA investigation and compliance review.

Cheng says that, while the target should of course be full compliance, a lot of corporate money is being spent on these small FCPA cases, which is a real drag on the economy. 'The US Department of Justice and the Securities and Exchange Commission should have a summary procedure with a materiality threshold for MNCs to deal with this. For example, at the moment, it's not clear when they should self-report or not.'

He adds: 'When self-reporting, because of the potential criminal charges, without a clear summary procedure, MNCs end up spending large amounts on outside counsel and investigators, even on trivial matters.'

At a time when corporate finance transactions are few and far between, FCPA compliance-related work has been responsible for keeping many law firms in Asia in business. And yet, with FCPA liability focusing on the corporate entity as a whole, senior executives enjoy the relative luxury of being able to give a detached business analysis on whether the payment of millions of dollars to law firms for investigations is an appropriate use of shareholders' money.

In stark contrast, with the Chinese authorities

apparently ushering in a new era of enforcement by demonstrating a propensity to jail those under suspicion, many senior executives fear for themselves and their families. Risk consultancy Control Risks assists a number of firms in dealing with these issues. Hong Kong-based director of corporate enquiries for Greater China and North Asia, Ben Woolfitt says his firm has seen an increase in MNC enquiries since the investigation into GSK began. 'We are seeing a bit of a sea

'It is generally agreed that foreign anti-corruption regulations may not give due credence to the local culture and practices of the market'

Yong Kai Wong
Head of legal and compliance, CITIC Capital Holdings

change going on,' he says. 'Many multinational companies have just got their head around the FCPA, but there is now a strong realisation that this is also a China problem.'

A lawyer at an insurance company in Hong Kong that provides insurance to corporates and law firms against such risks adds: 'From an insurance standpoint, multinational companies are asking what should our response be if we find something? Who are the regulators we have to turn to, and what support can we have?' Small steps

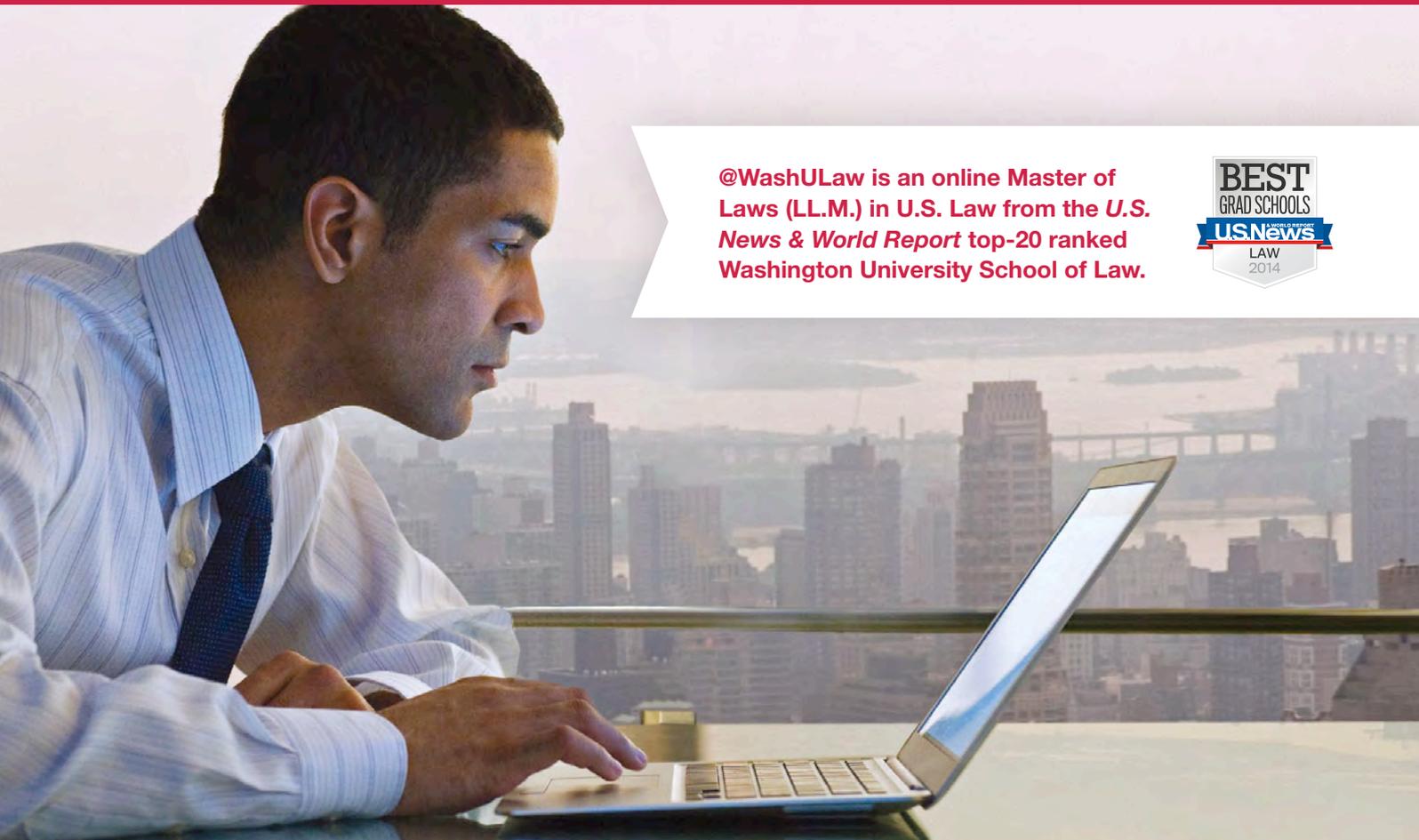
While there is concern among China's MNC community over the prospect of being 'singled out' as part of the current purge on corruption, there is equally recognition that the May 2011 criminal law amendments and the GSK investigation are positive steps forward in China's battle in this area.

'If there is concern from international players that the Chinese authorities are becoming more, or perhaps overtly, proactive with enforcement of its local anti-corruption regulations,' says Wong, 'one perspective is that the enhanced enforcement regime can be a good thing for educating and disciplining a market that was often (previously) viewed by the international community with suspicion.'

The key, for many, will be the next steps. Targeting doctors and sales representatives – under the GSK investigation – might produce positive results in the short term, but it is unlikely to solve the problem. The challenge for the Chinese Government will be to go after the larger, harder targets. ☒

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