

# IBA GLOBAL INSIGHT

April/May 2015

## Change in the pipeline

Assessing the dramatic and widespread  
impact of falling oil prices

### Global Leaders:

Interview with Viviane  
Reding, Europe's first  
Justice Commissioner

### Sudan:

The challenges  
of fighting sexual  
violence in Darfur

# LOCAL ROOTS GLOBAL IMPACT

*"The only local arbitration commission which meets or surpasses global standards"* - The Economist Intelligence Unit

*"Professionalism, competence and transparency"* - Global Arbitration Review



## BAC/BIAC Profile

The Beijing Arbitration Commission (BAC), also known as the Beijing International Arbitration Center (BIAC), was established in 1995 as a non-governmental arbitration institution, and became the first self-funded Chinese arbitration institution in 1999. It provides institutional support as an independent and neutral venue for the conduct of domestic and international arbitration and ADR proceedings. It is operated by a Secretariat headed by its Secretary General under the supervision of its Committee. The BAC/BIAC Arbitration Rules 2015 were unveiled on December 4, 2014, and will be effective as of April 1, 2015. The 2015 rules widely adopt UNCITRAL Arbitration Rules and further accept up-to-date international practice.

## BAC/BIAC Growth

- \* From 7 cases filings in 1995 to over 24,000 cases in total by 2014
- \* 1500+ new filings on average per year since 2005
- \* 500+ international cases in total
- \* Parties from various jurisdictions including USA, UK, Germany, Australia, Japan, South Korea, Singapore, Hong Kong and Taiwan, etc.
- \* The sum in dispute of around 10 billion RMB (approx. 1.65 billion USD or 1.20 billion EUR) per year on average since 2010 with a highest claim amount of 4.2 billion RMB (Approx. 0.69 billion USD or 0.51 billion EUR) in 2011

## Recommended BAC/BIAC Model Clause:

All disputes arising from or in connection with this contract shall be submitted to Beijing Arbitration Commission / Beijing International Arbitration Center for arbitration in accordance with its rules of arbitration in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.



Hearing Room

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

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# Editorial

**A**s ever, we've aimed to cover a wide range of genuinely international themes in this edition of *Global Insight*. Our cover feature – 'Change in the pipeline' (page 16) – zooms in on the energy sector. The repercussions of falling oil prices are far from being limited to the oil and gas industries, though, and are being felt across the globe. Our piece looks at the dramatic changes that are likely to affect everyone, one way or another. As one of the experts quoted in our article says, 'Many in the industry believe that 2016 will see a return to more normal market conditions, but nobody agrees what "normal" now means.'

Our coverage of Latin America includes an in-depth look at the Petrobras case in Brazil (page 22). 'Operation Car Wash' – see feature (page 16) – has uncovered widespread corruption and 'collaboration agreements' have allowed the authorities to break new ground, providing important lessons for the anti-corruption movement. Meanwhile, Ruth Green's column – 'Watershed moment' (page 31) – captures potentially historic developments, as the thawing of relations between the US and Cuba could see the end of one of the world's longest-standing trade embargoes.

Our 'Global leaders' article – excerpts of the webcast interview with Viviane Reding (page 35) – gives a platform for Europe's former Vice-President and its first Justice Commissioner. She makes various insightful observations, particularly on rights and responsibilities regarding the fast-moving and increasingly significant area of data in the digital world.

Our 'Meet the officers' feature (page 40) gives some of the senior officers of the IBA an opportunity to give voice to their aspirations for the Association. Secretary-General Horacio Bernardes-Neto, for example, says, 'My intention is to work for the IBA to be a better agent of positive change in the world, by encouraging the adoption of laws and regulations that promote the rule of law, democracy, free speech and the fight against poverty and discrimination.'

The challenges of working in an environment where rule of law is absent, and the remarkably positive role that the IBA can play, is powerfully highlighted in the fifth feature in this edition – 'Sexual violence in Darfur' (page 49) – focusing on the work of the IBA's Human Rights Institute in assisting some of Sudan's most beleaguered people.

**James Lewis**

## ONLINE

You can find *Global Insight* on the IBA website, with extra features.

This month's online highlights:

- Poor questioning delayed Chilcot Inquiry, say top lawyers
- Eurozone crisis: ECB presses ahead with bond-buying plans
- Digital currencies, plus filmed interview with CEO, BTC China



## IN FILM

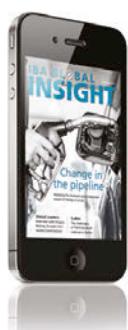
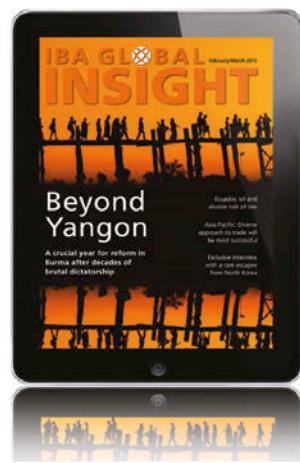
Watch the IBA's short films and in-depth interviews with high-level experts.

This month's film highlights:

- Webcast interview with Viviane Reding MEP
- Nobel Peace Prize-winner Aung San Suu Kyi
- Sessions and interviews from the IBA Annual Conference Tokyo, 2014



## ON THE MOVE



The IBA Global Insight app is moving to a new, improved platform. Details of how to access the new app will be published on the IBA website at [www.ibanet.org](http://www.ibanet.org).



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## International trade: focus increases on TTIP dispute mechanism

POLLY BOTSFORD

**S**erious concerns have been raised by both France and Germany over how disputes between states and foreign investors would be dealt with as part of the EU-US Transatlantic Trade and Investment Partnership (TTIP), currently being negotiated.

The proposed trade and investment agreement would be, if concluded, the largest in history. It would give protection to foreign investors in a host state against specific acts, such as expropriation or treatment that is not 'fair and equitable' or is discriminatory. If a dispute arises between a government and a foreign investor, under the current proposals it could be settled through international arbitration panels, rather than in the domestic courts of the host state. The agreement refers to this process as 'investor-state dispute settlement' (ISDS).

In Germany, the debate over ISDS has been raging since a similar arbitration was launched against the country in 2012. The case was brought by the Swedish company, Vattenfall, for €4.7bn worth of compensation. It followed Germany's decision to phase out nuclear power plants, which led to the closure of two of Vattenfall's atomic power stations in the country.

Opponents of ISDS argue that the mechanism allows a foreign investor to bypass domestic courts, and to challenge what may otherwise be a legitimate policy objective.

Professor Sebastian Dullien is Senior Policy Fellow at think tank European Council on Foreign Relations: 'Arbitration panels are allowed too broad an interpretation of the violation of "fair and equitable treatment" of investors. Nor do they define a legitimate public interest, which might trump the interests of the investors,' he says.

Critics also cite another investment treaty arbitration, brought by tobacco company Philip Morris against both Uruguay and Australia for introducing plain packaging laws on cigarette packets. The company argued that the laws were a form of expropriation. Although these cases are still pending, Dullien argues that 'ISDS provisions tilt the balance of power away from governments and towards global corporations'.

Peter Chase, Vice-President for Europe at the US Chamber of Commerce, disagrees. 'A state must offer an investor additional protection, because some areas of international law are outside the competence of domestic courts. These provisions are tried and tested and, if you look at the cases themselves, there is no lack of balance,' he suggests.

**“A state must offer an investor additional protection, because some areas of international law are outside the competence of domestic courts”**

Peter Chase  
Vice-President for Europe,  
US Chamber of Commerce

The French Senate recently called for 'fundamental reform' of the dispute mechanisms in TTIP, threatening to oppose the entire trade deal. One of its concerns is the lack of transparency of proceedings in ISDS. In most cases, there has been no obligation to be public about either the appointment of the arbitrators who make the decision – who are appointed by the parties themselves – the actual arbitration hearings, or the awards given.

However, there is some evidence to suggest that this concern is being addressed. Cristina Martinetti is a partner at Turin-based firm ELEXI and a Vice-Chair of the IBA International Sales Committee. She explains that the United Nations Commission on International Trade Law (UNCITRAL)'s arbitration rules, which are central to the operation of most arbitrations, now include transparency rules. The new UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration have also been adopted and are currently being signed. Signatories will commit to applying the UNCITRAL transparency rules to historical as well as

future trade agreements. Martinetti says: 'Transparency is important if taxpayers' money is involved. With this level of transparency in the future, arbitration will be open to the gendarmerie of public opinion.'

The French Senate has also demanded that the European Commission (EC) examines the issue of the independence and impartiality of the arbitrators themselves. Critics make a distinction between the domestic courts of a host state, which have an independent, state-funded judiciary, and arbitration, where the parties choose the arbitrators and the system is 'for profit'. Pia Eberhardt is a campaigner with the Corporate Europe Observatory based in Brussels. 'ISDS completely lacks the institutional safeguards that an independent judiciary has, such as fixed salaries or security of tenure,' she says.

Gaëtan Verhoosel is a partner at law firm Three Crowns, which specialises in arbitration, and is also Chair of the IBA Subcommittee on Investment Arbitration. He believes that the debate has become overheated. 'What we need is a sober analysis of the system based on facts,' he says. For this reason, the Subcommittee will be issuing a wide-ranging survey open to the public, to analyse how reported perceptions of arbitration match up with reality. The Subcommittee hopes to release the survey by the end of April. 'The Subcommittee will also endeavour to identify potential solutions for aspects of the system that do warrant consideration for reform,' Verhoosel says.

The initial reaction from campaigners to investor protection and ISDS was so strong that the EC launched a consultation on it last spring. With over 150,000 responses to that consultation, it finally produced a report in January of this year, committing to reforming, but by no means abandoning, the dispute mechanisms in TTIP. Negotiations on the agreement as a whole are ongoing, with the eighth round concluded in February and more intensive meetings to be held before the summer. Proponents hope that the substantive points of difference will be ironed out and agreed by the end of 2015. The question is whether or not ISDS will be part of that final agreement.

## Regulation of International Trade in Legal Services resource

The IBA has created a new valuable resource for global lawyers – an international database of information on regulation of trade in legal services. It's the result of extensive research conducted in more than 90 countries, on over 160 jurisdictions. The results will provide individual lawyers and law firms with information to assist them in representing their clients internationally and developing their businesses across continents. It will also assist bar associations, governments and other institutions that are looking to change the way they regulate practice by foreign lawyers. The database contains information broken down by country, and if relevant also by sub-national jurisdiction.

To find out more about the database, see [tinyurl.com/LegalServicesTradeDatabase](http://tinyurl.com/LegalServicesTradeDatabase)

To read the brief report on the findings which make up the database, see [tinyurl.com/LegalServicesTradeReport](http://tinyurl.com/LegalServicesTradeReport)

## Scholarships available for the 2015 Annual Conference in Vienna

Various sections and committees of the IBA Legal Practice Division are offering scholarships to young lawyers who wish to participate in the IBA Annual Conference, but may have financial difficulties in doing so. Scholarships include free registration to the Conference taking place in Vienna in early October, a contribution towards travel costs, and much more. The deadline for applications is Sunday 31 May.

Full details of the application procedure, ordered by section or committee, can be found at [tinyurl.com/Scholarships-Vienna-2015](http://tinyurl.com/Scholarships-Vienna-2015)



## Vienna 4–9 October 2015 ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION



### José Manuel Barroso announced as keynote speaker



The IBA is pleased to announce that José Manuel Barroso will be the keynote speaker at the opening ceremony of this year's IBA Annual Conference. This year's event will take place in Vienna from 4–9 October. Barroso is the immediate Past President of the European Commission. He served two terms, from 2004 to 2014, with the European Council unanimously nominating him, in June 2009, for a second term.

Vienna is a hub for Central and Eastern European (CEE) business. More than 1,000 international companies coordinate their regional activities from Austria, and over 300 international companies have their CEE headquarters in the city, which is also the seat of several international organisations such as OPEC and the third United Nations Headquarters.

The Annual Conference is the premier event for legal professionals worldwide to meet, share knowledge, network, build contacts and develop business. It also serves to advance the development of law and its role in business and society. The Conference is the world's largest and most prestigious international gathering of lawyers each year, attracting around 6,000 individuals representing over 2,700 law firms, corporations, governments and regulators worldwide.

The Conference is open to both members and non-members of the IBA, with lawyers from over 130 jurisdictions from all parts of the legal profession including those in

private practice, in-house counsel, human rights advocates, judges, bar leaders, regulators and government representatives attending. This unique mix of viewpoints provides a rich environment for discussion, debate and learning, as well as the opportunity to develop lasting business relationships and lifelong friendships.

The Conference will feature around 200 working sessions, varying widely in style and content. With the core substantive committee sessions at the heart of the programme covering most sectors and practice areas, the Conference will provide the opportunity to focus on your own areas of interest.



Austria Centre Vienna

Additionally there are sessions on a wide range of topics, such as law firm management and international relationships, ethics, the future of the legal profession, the rule of law and human rights. You can also hear from leading thinkers in law today through a series of showcase sessions highlighting the role the legal profession plays in society.

Full preliminary programme and registration details can be found on the Vienna 2015 website at [www.ibanet.org-Conferences/Vienna2015.aspx](http://www.ibanet.org-Conferences/Vienna2015.aspx)

## Tax evasion and money laundering: EU negotiators agree terms for comprehensive beneficial ownership register

JONATHAN WATSON

**A**t the end of 2014, negotiators for EU national governments and the European Parliament reached a compromise agreement on the terms for a fourth EU Anti-Money Laundering Directive. If adopted, the directive will, for the first time, oblige the EU's 28 Member States to maintain central registers listing information on the ultimate beneficial owners of corporate and other legal entities, as well as trusts.

'For years, criminals in Europe have used the anonymity of offshore companies and accounts to obscure their financial dealings,' said Krišjanis Karinš, the Latvian MEP who led the negotiations on behalf of the Parliament. 'Creating registers of beneficial ownership will help to lift the veil of secrecy of offshore accounts and greatly aid the fight against money laundering and blatant tax evasion.'

Transparency campaigners have their doubts. In their view, one drawback is that the directive does not insist that such registers should be fully accessible to the public. Only those with a 'legitimate interest' in the information they contain will be allowed to access them; unless, that is, individual Member States decide to make their registers available to all. Only Denmark, France, the Netherlands and the UK have so far promised to do this.

'At the moment there is nowhere you can go to find information about who really owns and controls companies,' says Robert Palmer, head of the money laundering campaign at pressure group Global Witness. 'The fact that this information is going to be collected in the first place and held in central national registers is really important.' However, a lot now hinges on how Member States define 'legitimate interest', he adds. 'Each country's

transposition of the directive into national law will be crucial.'

Bruno Cova, Co-Chair of the Milan office of Paul Hastings and the Regional Representative for Europe on the IBA Anti-Corruption Committee, says that limiting public access to the registers is likely to reduce their effectiveness as a deterrent for crimes like money laundering, corruption and tax evasion.

'Considering that the creation of national registers aims at preventing

birth, where they officially reside and details on ownership. The directive states that any exemption to the access provided by Member States would be made on a case-by-case basis in exceptional circumstances, such as exposing the beneficial owner to the risk of fraud, kidnapping, blackmail, violence and intimidation. Exemptions will also apply if a beneficial owner is a minor or incapable.'

Ewout van Asbeck, a partner at

**“The concept of “legitimate interest” automatically moves the burden from the potential wrongdoers [to be more open] to the interested public”**

Bruno Cova

*Co-Chair, Paul Hastings, Milan; Regional Representative for Europe, IBA Anti-Corruption Committee*

companies and individuals from using non-transparent companies to hide the funds' source or destination, this would be guaranteed to the greatest extent only by ascribing to everybody the legitimate interest to know who owns, controls or benefits from companies,' Cova says.

Limiting access and leaving the assessment of the concept of 'legitimate interest' to the discretion of Member States could hinder the mechanism's ability to manage requests efficiently and deny meaningful public access, according to Cova. 'The concept of "legitimate interest" automatically moves the burden from the potential wrongdoers [to be more open] to the interested public,' he says.

Those who do pass the legitimacy test will be able to access the beneficial owner's name, their month and year of

Van Doorne's Amsterdam office and Co-Chair of the IBA Taxes Committee, says the directive in its current form goes too far. 'While I accept that we need to do everything we can to counter tax evasion and avoidance, to make all this information available for anyone in the EU who wants to know about the shareholders in a certain company is worrying,' he says. 'I am not convinced there is enough protection for personal data. Access should be limited to the tax authorities of the various jurisdictions.'

Limiting access to the relevant authorities is the arrangement that the directive currently proposes for trusts. Under the terms of the compromise, registers for trusts will only include those generating taxable income and only official bodies or regulators will be able to access information about them.

### Law Students' Committee pilot programme

The IBA Law Students' Committee is delighted to announce a new pilot programme that will allow students to publish alongside practitioners. The aim of the programme is to give law students the opportunity to research and write in an area of interest and co-author an academic research paper with a

practitioner in their chosen field. The Committee is looking for enthusiastic students to take part in this initiative. The authors, both student and practitioner, will then have several months in which to complete a well-researched article of approximately 10,000 words.

For more information about the programme, see [tinyurl.com/IBAAcademicResearchPilot](http://tinyurl.com/IBAAcademicResearchPilot)

## IBA President launches new judicial integrity initiative

**O**n 19 February, IBA President David W Rivkin hosted a high-level meeting in London to develop ideas for the IBA Judicial Integrity Initiative, a new project aimed at combating judicial corruption. Attending the inaugural meeting were current and former chiefs of justice from several jurisdictions and representatives including the Organisation for Economic Co-operation and Development (OECD); the United Nations Office on Drugs and Crime (UNODC); the World Justice Project; the Basel Institute on Governance; and global businesses.

The London meeting was followed by a similar meeting of experts – including judges, prosecutors, leading lawyers, civil society organisations and business representatives – in Singapore on 17 March.

Following these meetings, the

Initiative will develop a comprehensive work plan for the next two years. Among the activities being considered are: holding in-country dialogues with lawyers, judges and prosecutors on how better to promote integrity in the administration of justice; undertaking a typology study of how and when corrupt practices arise involving lawyers and members of the judiciary; issuing a comprehensive report before the end of 2016 to assist lawyers to better understand the nature of corruption in their respective jurisdictions and how to think and act when they are confronted with corruption in their dealings with the judiciary; and researching best practices in countries that have effectively reduced judicial corruption.

The IBA President commented: ‘The IBA Judicial Integrity Initiative is an extension of the anti-corruption work the IBA has been

doing around the world – training lawyers to identify corruption, and not to participate in it unwittingly. The IBA OECD UNODC Anti-Corruption Strategy for the Legal Profession was launched in 2010 and is a flagship programme of the IBA, promoting integrity compliance among lawyers. Corruption in judiciaries is a problem on every continent. Where it occurs, this corruption undermines the rule of law and civil society, because it causes citizens to lose faith in the ability of government to assist them. And where judicial corruption exists, it is impossible to eliminate corruption in other aspects of government. This issue requires the attention and resolve of the legal profession as a whole to overcome it, and the IBA, as the global association of lawyers and bar associations, can uniquely contribute to the fight against judicial corruption.’

## IBA Magna Carta essay writing competition



As part of the celebrations for the 800th anniversary of the Magna Carta, one of the world's most important constitutional documents, the IBA has launched an essay competition, the winning author of which will be provided a scholarship to attend the 2015 Annual Conference in Vienna. The competition is open to members of the Young Lawyers' Committee and the Law Students' Committee.

Subject to the competition's terms and conditions, the winning essay will entitle its author to the following:

- waived registration fee to the 2015 Annual Conference, Vienna;
- a contribution towards travel costs to attend the Annual Conference;
- a contribution towards accommodation costs while

attending the Annual Conference;

- two years' free membership of the International Bar Association Law Students' Committee – or two years' free membership of the International Bar Association, including membership of the Young Lawyers' Committee and choice of one committee under the Legal Practice Division; and
- the winning essay will be published by the IBA.

The deadline for submission of application form and essay is Sunday 31 May 2015.

For further details of how to enter the competition, see [tinyurl.com/MagnaCartaCompetitionLS](http://tinyurl.com/MagnaCartaCompetitionLS) or [tinyurl.com/MagnaCartaCompetitionYLC](http://tinyurl.com/MagnaCartaCompetitionYLC)

## IBA Digital

As part of the IBA's continued drive to improve services to its members and to bring quality content to the widest possible audience, a programme is underway to film key specialist conferences and make them available to view online through the IBA Digital portal. Topics covered so far this year are: tax law; arbitration; private investment funds; international wealth transfer practice; and BRICS and MINT country economics. More areas of interest will be added throughout the year, and notifications will be sent to members of the related committees via email. To view these films and more as they become available, please visit [www.ibanet.org/iba\\_digital.aspx](http://www.ibanet.org/iba_digital.aspx)



# Freedom of expression: lèse majesté laws prove a popular tool for Thailand's military junta

BANGKOK REPORTER

**L**ong before he came to power ten months ago in a military coup, Thailand's prime minister, General Prayut Chan-o-cha, made his fondness for the country's strict lèse majesté law well known. Literally translated, lèse majesté covers acts that might be considered an offence against the dignity of a reigning sovereign or against a state.

In 2010, he warned anti-government 'red shirt' protesters to expect a wave of arrests for what he claimed was an anti-monarchic movement. A year later, when academics and rights monitors clamoured for amendments to the notoriously harsh law, Prayut urged that anyone who found it unjust 'go and live abroad'.

Since seizing power on 22 May 2014, the junta has wielded the laws with vigour. Lèse majesté cases have soared post-coup, while the space for free speech has narrowed considerably.

Though precise case figures are hard to come by, there has been a marked uptick in lèse majesté arrests. The International Federation of Human Rights (FIDH) said 43 people are currently in detention compared with five before the coup. iLaw, a Thai centre that documents freedom of expression cases, reports that 690 people have been summonsed in such cases since the coup. Of the 142 people facing prosecution, 47 are on lèse majesté charges. In February alone, eight people were arrested under lèse majesté.

'In Thailand, which was once a force for democracy in the ASEAN context, the military authorities continue to silence opposition under martial law,' the UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, said earlier this month in a speech to mark the body's annual report.

'More than 1,000 people have been summonsed or detained since the May 2014 coup, and many of them brought before military courts. The legal prohibition on criticism of the monarchy has been increasingly deployed.'

## Insult to injury

Article 112 of Thailand's Criminal Code is one of the world's strictest lèse majesté laws. Anyone found guilty of defaming, insulting or threatening the king, queen, heir apparent or regent faces three to 15 years in prison.

While the nation's powerful and beloved monarchy has ancient roots, the law in its current iteration is a relatively new political innovation. Thailand's first lèse majesté laws arose in 1900, awarding fines and up to three years in jail for anyone who 'defames' the monarchy. It wasn't until 1956 that the law was amended with 'insult' and only after the 1976 military coup were the current extreme sentences put into place.

Over time, the law has proved a handy political tool. In the past decade, arrests and prosecutions under lèse majesté have

Cases, which can be brought by anyone, have been both arbitrary and political. At the far end of the spectrum is the case of two students arrested a full year after staging a play about a fictional king. Last month, both were sentenced to two-and-a-half years in prison for insulting the monarchy in a case strongly criticised by human rights groups.

There has also been a slew of trials directed at associates of the crown prince's recently divorced wife. The parents of the ex-princess were last week sentenced to two-and-a-half years

**“What is problematic in Thailand at the moment is the way the law is being used and abused politically by people on opposite sides of the political spectrum. It doesn't lead to a harmonious way of conducting public and private life”**

Mark Stephens  
IBAHRI Council Member

spiked – unsurprisingly – following coups or moments of political instability. Prior to Thailand's 2006 military coup, about five cases were heard each year. One year later, 126 cases were sent to court. When red shirt protests broke out in 2010, 478 people were charged that year alone.

Though it has thus far prosecuted only a fraction of the potential cases, the junta has pushed the lèse majesté law into worrying territory. Accused civilians are increasingly tried in military courts, which have the right to prosecute all crimes thanks to a martial law order issued post-coup. In February, the government passed an amendment allowing the military to detain civilians without charge for up to 84 days. The government has also increased internet surveillance and urged ISPs to take it upon themselves to block potentially defamatory websites.

'What is problematic in Thailand at the moment is the way in which the law is being used and abused politically by people on opposite sides of the political spectrum. It doesn't lead to a harmonious way of conducting public and private life,' says Mark Stephens, a media lawyer and IBAHRI Council Member.

in prison for defaming the monarchy. Her sister was given the same sentence a month earlier, while an uncle – a prominent police official – was sentenced to more than 30 years in January and February on lèse majesté and corruption-related charges. In all, reportedly at least 19 people connected to the former princess's family have been arrested and charged with lèse majesté among other charges.

'When you are in power you can exercise your power, but when you're out of power you may be exploited by this law. It's not good for any country... Obviously when you have martial law, it will be used widely, but not effectively,' Sulak Sivaraks, a prominent Thai scholar and royalist who has himself been sued for lèse majesté on multiple occasions, said last year. The interview took place before the latest political arrests, but shortly after Sulak received the distinction of having the most historical defamation complaint yet when two former generals filed complaints for his insult to the 16th century King Naresuan. 'This law is not helpful to the King or monarchy but it's helpful to those in power,' he says.

## Short film on the work of the IBAHRI launched



Over the last 20 years, the International Bar Association's Human Rights Institute (IBAHRI) has worked with the global legal community to promote and protect human rights and the independence of the legal profession worldwide. It has launched a short film focusing on projects selected from a total of more than 200 undertaken across 70 jurisdictions since the IBAHRI was set up. The film combines project footage, photos and infographics with interviews with IBAHRI representatives and those who have benefited from its work.

The film can be viewed at  
[tinyurl.com/IBAHRIFilm](http://tinyurl.com/IBAHRIFilm)

## Call for nominations: IBA Human Rights Award 2015

Nominations are open for the annual IBA Human Rights Award. Each year the IBA presents an award to an outstanding lawyer in the world of human rights. The award aims to recognise a legal practitioner who through their work has made an outstanding contribution to the promotion, protection and advancement of human rights, particularly with respect to the right to live in a fair and just society under the rule of law. The winner will be presented with the award at the IBA Annual Conference, Vienna, in October. Previous winners include Adilur Rahman Khan, founder and secretary of human rights organisation Odikhar (2014), and Somalian constitutional and international law professor Abukar Hassan Ahmed (2013). The award is sponsored by LexisNexis. The deadline for nominations is 31 May 2015.

Visit [tinyurl.com/IBAHumanrightsaward](http://tinyurl.com/IBAHumanrightsaward) for further details.

## IBAHRI expresses grave concern at arrests and further deterioration of rule of law in Venezuela



Workers of state-run oil company PDVSA hold placards during a rally against imperialism in Caracas, 18 March 2015.

**A**s President Maduro's popularity has nose-dived amidst ever-growing supermarket queues, plummeting oil prices and a growing war-of-words with the US, serious concerns are being raised about the deteriorating state of the rule of law in Venezuela. The IBAHRI has expressed grave concern at the deteriorating situation, where a growing number of arrests of legal practitioners have recently taken place, including those of Judge Alí Fabricio Paredes and lawyer Tadeo Arrieche Franco.

Judge Paredes was arrested by Venezuela's national intelligence agents less than 24 hours after he had convicted Walid Makled to 14 years' imprisonment for drug-trafficking and money laundering at the conclusion of a high-profile case. The Attorney-General's office announced that Judge Paredes had been arrested because the sentence given was considered too lenient, allegedly favouring the accused.

The IBAHRI has also called for the release of defence lawyer Franco who was arrested for his involvement in the case of the *Día Día Practimercados* supermarket chain, which the government has accused of destabilising the economy.

IBAHRI Co-Chair Baroness Helena Kennedy QC commented: 'The implications of continued attacks on the rule of law in Venezuela are of grave concern... In order for there to be public confidence in the fair administration of justice, the executive needs to respect the separation of powers. Sadly for the citizens of Venezuela, its government is unashamedly violating the democratic rights to which they are entitled both under Venezuela's Constitution and the international treaties to which it is party, including the United Nations Basic Principles on the Role of Lawyers, which states that "Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions".'

## New IBAHRI Council members appointed

The IBA Management Board met in Madrid on Saturday 21 February and unanimously adopted the Human Rights Institute's recommendations that two Council members' appointments be extended for a further two years, and appointed three new members of Council. Christine Chinkin, UK, and Yasushi Higashisawa, Japan, were both re-appointed to the Council. Sun Shiyan, China, Beatrice Mtetwa, Zimbabwe, and Marzuki Darusman, Indonesia, were appointed to fill the remaining vacancies on the Council.

Visit [tinyurl.com/IBAHRICouncil](http://tinyurl.com/IBAHRICouncil) to see the full list of IBAHRI Council members.

# Lady Hale, Deputy President, UK Supreme Court: access to justice becoming 'very hard in certain areas'

REBECCA LOWE

**R**eforms to legal aid and judicial review in the UK have damaged access to justice, which is 'becoming harder' and is 'very hard in certain areas', according to the first and only female justice on the UK's Supreme Court.

In the past, 'there were more and more remedies available for injustice', Baroness Hale of Richmond tells *Global Insight* in an exclusive filmed interview at the Supreme Court's premises in Parliament Square, London. However, now the barriers for members of the public are far higher, she says.

'For things like discrimination, employment problems, problems with landlords and tenants and so on, there were many more remedies [and] many more ways of getting those remedies [...]. The remedies are still there, but the access to them is becoming harder, and obviously the access to legal help when needed is becoming very hard in certain areas.'

Discrimination is another pressing concern for Britain's most senior female judge. The UK judiciary has one of the lowest percentages of women in Europe, according to an October 2014 report by the Council of Europe, with only Azerbaijan and Armenia performing worse. Likewise, only 3.3 per cent of High Court judges are 'black or minority ethnic', according to government statistics.

Women and ethnic minorities should be actively encouraged to apply for suitable jobs 'in a fair, open and transparent way', Hale believes. A key problem is that responsibility is now shared among the judiciary, court service, Judicial Appointments Commission and Ministry of Justice, she says. 'So the responsibility is now diffuse, which makes it harder to make concerted progress.'

The Baroness draws the line at positive discrimination, however, 'in the sense of appointing somebody who isn't the best candidate available at the time'. Maria Isabel Tostes da Costa Bueno, partner at Brazilian law firm Mattos Filho and Senior Vice-Chair of the IBA Women Lawyers' Interest Group, is similarly cautious about such policies, but believes they should not be completely discounted. 'Whenever meritocracy is overruled by gender discrimination, positive discrimination can be used as a



**‘The whole point about discrimination these days is that it’s not overt. It goes on beneath the surface and people will always have good reasons for making the decisions they make’**

Baroness Hale of Richmond  
Deputy President, UK Supreme Court

powerful tool to help women progress in their career,' she tells *Global Insight*. 'However, such actions are to be applied with parsimony, otherwise they may result in more discrimination.'

Similar concerns exist regarding social discrimination. According to a report by the government's Social Mobility and Child Poverty Commission, published in August 2014, 71 per cent of senior judges were privately educated, while 75 per cent attended Oxford or Cambridge University. The former is the 'more bothering' statistic for Hale – the product of a grammar school and Cambridge education – because Oxbridge degrees are only problematic due to the large intake of public school students. However, the solution is not more grammar schools, she believes, but more 'good' state schools.

Asked whether she has ever experienced discrimination, Hale acknowledges she may have, but 'wouldn't really know'. 'The whole point about discrimination these days is that it's not overt. It goes on very much

beneath the surface and people will always have good reasons for making the decisions they make.'

In 1984, Hale became the first woman and youngest person to be appointed to the Law Commission, where she oversaw several significant reforms to family law – an area of law recently compromised, she believes, by its removal from the legal aid system. Now, more people are forced to represent themselves, she says, clogging up the courts with cases that could have been resolved through lawyers in out-of-court settlements. 'So many more cases are going to court, or cases that should go to court aren't going to court.'

Equally worrying is the fact that 'loads' of cases have one-sided legal representation, she adds. 'The whole point about family law is that it's meant to be trying to level the playing field between the two parties where, in almost all situations, one or other of them is the more powerful. It's not always the man; it can be the woman.'

For Hale, 'accessibility and transparency' have vastly improved since the Supreme Court took over from the House of Lords in October 2009. The public and students can visit the new building far more easily, while proceedings are now live-streamed online. Asked whether transparency could be further improved by adopting a US-style system, in which justices are assessed at Senate Judiciary Committee hearings, her answer is a resounding no. However, one 'radical idea' she suggests is having a politician from the government and opposition sitting on the appointments panel to bolster 'legitimacy' and 'bring a different perspective'.

Discussing how she and her colleagues come to decisions in cases, Hale recognises the significant role played by ethics and principles. 'Yes, we all do come with particular world views. This has always been the case, and judges have acknowledged this for a very long time, that people have different ways of thinking about the law and different underlying values.'

Having just reached another significant milestone (she turned 70 at the end of January), Hale outlines her chief career goal: 'I would like to achieve three or four, at least, women justices on the UK Supreme Court and then I could leave it happy.'

# Azerbaijan's deteriorating human rights record

Photo: Ramil Aliyev / Shutterstock.com



**“The potential disbarment of Mr Bagirov appears to be in line with the Azerbaijan authorities’ attempts to suppress critical voices, and stamp out any form of dissent**

Azerbaijan will be receiving plenty of media attention this summer when the country hosts the first ever European Games in the capital Baku. Currently, however, it feels like all eyes are focused on Azerbaijan for the wrong reasons. The country is experiencing a significant deterioration in its human rights record. Throughout 2014, the year in which Azerbaijan held the Chairmanship of the Committee of Ministers of the Council of Europe, the authorities have arrested or prosecuted an increasing number of human rights defenders and political activists, as well as shut down independent media outlets and persecuting journalists and bloggers – a trend which appears to be continuing this year.

In recent months, lawyers representing imprisoned human rights defenders have been called as witnesses in their own clients' cases, in what appears to be a strategy designed to frustrate their ability to represent their clients. It's also an indication that the government is casting its net wider by targeting human rights lawyers themselves.

In February, the IBAHRI called on Azerbaijan's Nizami District Court not to disbar criminal defence lawyer Khalid Bagirov, and to ensure that any hearing respect his right to a fair trial. A prominent defence lawyer, Bagirov represented opposition leader Ilgar Mammadov, who is currently serving a seven-year prison sentence for organising mass disturbances

and resisting the police, despite the European Court of Human Rights' decision that Azerbaijan had violated a number of basic human rights provisions in arresting and sentencing him.

IBAHRI Co-Chair Hans Corell said: 'The IBAHRI is deeply concerned by the Azerbaijan Bar Association's application to the Nizami Court to suspend Khalid Bagirov's licence. As a defence lawyer of a number of high-profile political opposition clients, the potential disbarment of Mr Bagirov appears to be in line with the Azerbaijan authorities' attempts to suppress critical voices and stamp out any form of dissent. In short, to silence civil society.'

'As documented in the IBAHRI's fact-finding report *Azerbaijan: Freedom of Expression on Trial*, the Azerbaijan Bar Association is not an independent institution capable of protecting the interests of the legal profession in Azerbaijan. Instead, it seems to act as an arm of government, frequently subjecting members involved in politically motivated trials to biased disciplinary proceedings resulting in disbarment. The IBAHRI calls on Azerbaijan's judiciary to adhere to the principles laid down in the United Nations Basic Principles on the Role of Lawyers, which states that "Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions".'

For more IBAHRI coverage on Azerbaijan, see [www.ibanet.org/Azerbaijan.aspx](http://www.ibanet.org/Azerbaijan.aspx)

## IBAHRI concerned by sentencing of prominent Tajik human rights lawyer

The IBAHRI has expressed concern for the sentencing of Shukhrat Kudratov, a high-profile human rights lawyer, in Dushanbe, Tajikistan. He was found guilty on charges of fraud and bribery and sentenced to nine years of imprisonment by Dushanbe City Court on 13 January 2015.

Kudratov had been part of the defence team of Tajikistan's former Minister of Energy and Industry, Zayd Saidov, whose trial ended on

25 December 2013 with him being found guilty on a number of counts of fraud and bribery, and sentenced to 26 years in prison. At the time, Mr Kudratov was openly critical of procedural aspects of the trial and publicly described threats and harassment he endured as a result of his involvement in the case.

Following its Expert Opinion published in December 2013, which welcomed the Tajik Government's efforts to reform the law relating to

the legal profession and provided recommendations to improve the current draft law on advocacy and the bar, IBAHRI hosted a major seminar in May 2014, in partnership with the seven Tajik bar associations, to share expertise on best practices for bar associations and to discuss the requirements for a new bar system for the country.

For more IBAHRI coverage on Tajikistan, see [www.ibanet.org/Tajikistan.aspx](http://www.ibanet.org/Tajikistan.aspx)



# Vienna 4–9 October 2015

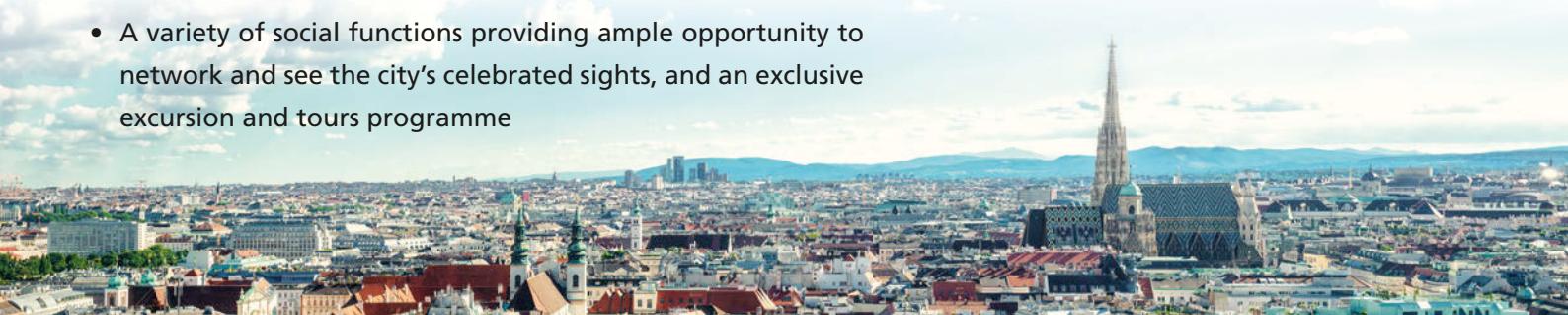
## ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION



In October 2015, the IBA Annual Conference will be held in the baroque splendour of Vienna, with its Hofburg Palace, Spanish riding school and famous Viennese coffee houses. More importantly, Vienna is the hub for Central and Eastern European business, with more than 1,000 international companies coordinating their regional activities from Austria. Over 300 international companies have their CCE headquarters in Vienna and it is the seat of several international organisations such as OPEC and the third United Nations Headquarters. With these links and connections Vienna is a fitting and inspiring setting for the International Bar Association's 2015 Annual Conference.

### What will Vienna 2015 offer?

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#### OFFICIAL CORPORATE SUPPORTERS





# Greece and the eurozone: the art of the possible

Europe's latest debt crisis has entered a new phase. The existing bailout has been extended, but a long-term solution remains elusive.

JONATHAN WATSON

The latest phase of Europe's debt crisis sees the Greek government attempting to pull off the tricky task of reconciling the demands of creditors – under the terms of post-financial crisis bailouts – and the demands of its citizens. The Greek people have made clear their disapproval of the extreme austerity measures being imposed upon them as a result of the bailouts.

A key development came on 20 February, when Greece reached an agreement with its eurozone creditors to extend the terms of the

bailout agreed in 2012 for another four months. These arrangements had been due to expire at the end of February. In return for this, Greece has to submit a list of economic reforms that can form the basis of a further round of negotiations to determine a new financial settlement for the country. As *Global Insight* went to press, the final version of this plan had yet to be agreed.

Several draft proposals have been circulated, but nothing definitive has been signed. And, as the partners continued their discussions, Greece

was apparently in danger of running out of money in April. Prime minister Alexis Tsipras wrote to German chancellor Angela Merkel to say it would be ‘impossible’ for Athens to cope with debts due to be repaid in the next few weeks unless the EU provided short term financial assistance.

‘This government needs to become more realistic and it will take a bit of time for them to do so,’ says Dimitris Paraskevas, Managing Partner at Athens-based Elias Paraskevas Attorneys and European Regional Forum Liaison Officer of the IBA Banking Law Committee. ‘At the same time, the European partners need to understand the Greek people. Unemployment is high and we have lost 25 per cent of our GDP.’

Hendrik Haag, a partner in the Frankfurt office of Hengeler Mueller and the former Chair of the IBA Financial Crisis Task Force 2008–2010 (the ‘Task Force’), believes the agreement is designed to buy some time. ‘The aim is to give the Greek government more space to come up with a new list of reforms,’ he says. ‘It’s been left intentionally vague so as not to narrow down the margin Greece has for coming up with a definitive list. Fundamentally, the parties are still pretty far apart. At the end of these four months, the situation will still be quite open.’

Many fear that if the eurozone group does not reach a deal with Greece, it could go to Russia or China for funding instead. Initially, this seemed unlikely. Russia’s finance minister, Anton Siluanov, said at a recent G20 ministerial meeting in Istanbul that the country had not received any requests from Greece. And, with the value of the rouble reaching record lows, it is clear that Russia has its own financial problems to deal with. ‘There is very limited hope for Greece to receive money from Russia,’ says Paraskevas. However, it has now been confirmed that talks between Athens and Moscow are continuing. Who knows what that could lead to?

China is also yet to receive a request for funding from Greece. It is unlikely to be pleased about Greece’s apparent determination to suspend at least some of the privatisations it was obliged to carry out in return for bailout money; Chinese conglomerate Cosco has been involved in the bidding process for the port of Piraeus and already has a 35-year concession to expand the two main container terminals there.

That said, the list of proposed reforms Greece submitted to its European creditors in February included a commitment not to roll back any completed or ongoing privatisations. Perhaps existing plans will be going ahead after all.

‘The most likely outcome is that Greece will leave the euro,’ says Roger McCormick, visiting professor at the London School of Economics, and a former member of the Task Force. ‘Government ministers will try to present it as something that is being imposed on them, but

it’s simply not realistic to expect the rest of the eurozone to give them what they want in order to end so-called austerity,’ he says.

‘I would not bet on Greece staying in the eurozone,’ adds Haag. ‘Athens is between a rock and a hard place.’ If it does leave the euro, using a weaker currency will certainly help to put the economy back on its feet. On the other hand, the ‘poison’ of the euro means Greece is no longer

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**“ Even if Greece does not reach an agreement with the eurozone group, there is room for it to stay in the euro**

Dimitris Paraskevas

*Managing Partner, Elias Paraskevas Attorneys;  
European Regional Forum Liaison Officer,  
IBA Banking Law Committee*

self-sufficient in many things, so it would be reliant on imports, even for vital supplies such as medicine. These can be very difficult to pay for with a weak currency. ‘That could even create a humanitarian problem,’ Haag says.

One of the main reasons that Greeks want to stay in the euro is that they are used to having a currency that has a value outside their country. ‘But it’s difficult to figure out how they can reconcile the euro with their conviction that they want to stop reforms that are in any way painful to the people,’ Haag says.

For the EU, a so-called ‘Grexit’ would be a huge risk. Leaving the euro would be extremely painful for Greece, but if its economy starts eventually to pick up once the exit process is over, then there will be major political consequences in countries such as Portugal, Spain and others. ‘People will begin to argue that their countries should do what Greece has done, and the euro will begin to unravel,’ McCormick says.

However, a Grexit could actually strengthen the concept of the euro. ‘If you have to keep members in at any price, this reflects badly on the eurozone,’ Haag says. ‘People want to keep Greece in, but not at the price of letting the government move on without any reforms.’

Paraskevas argues that a Grexit is not inevitable. ‘Even if Greece does not reach an agreement with the eurozone group, there is room for it to stay in the euro,’ he says. ‘The government could introduce capital controls and potentially some kind of progressive taxation on deposits. The

government has repeatedly said it wants to stay in the euro and something like 80 per cent of the population says it wants to stay in the euro. It will be difficult, but it is not impossible.'

The biggest challenge for Greece's new government could be to sell any agreement it makes to the Greek people – many of whom feel that the bailouts were designed not to help them, but to protect Europe's banks, especially German ones, from the consequences of their own bad decisions.

**“Fundamentally, the parties are still pretty far apart. At the end of these four months, the situation will still be quite open”**

Hendrik Haag

*Partner, Hengeler Mueller; Chair, IBA Financial Crisis Task Force 2008–2010*

'The people of Greece continue to carry the burden of debts caused by reckless, unaccountable banks,' says Sarah-Jane Clifton, director of the Jubilee Debt Campaign. The campaign claims that almost all the money lent to Greece by the International Monetary Fund, European governments and the European Central Bank has been used to pay off 'reckless lenders', with less than ten per cent reaching the Greek people.

Europe's banks do have a good deal at stake in Greece. According to German banking industry

group BdB, German banks had around €23.5bn in credit exposure to the country at the end of September 2014. State-backed development bank KfW was responsible for most of this (€15bn), with the largest commercial banks, Deutsche Bank and Commerzbank, accounting for €298m and €400m respectively. According to figures from JP Morgan, French bank Credit Agricole was the most exposed to Greek debt out of all Europe's commercial banks, with €3.5bn at the end of 2013.

However, the prevailing current sentiment is that Europe's banks are now better equipped to weather these storms than they were five years ago. Peder Hammarskiöld is senior partner at Hammarskiöld & Co in Sweden, and a member of the Task Force. 'I understood that without the agreement of 20 February, there would have been a run on the banks in Greece and so they needed the time to work something out,' he says. 'As for the German banks, the extent of their exposure has been exaggerated. They are quite solid, and the German state and taxpayer stands behind them, which is quite safe.'

Credit rating agency Standard & Poor's says the direct impact on foreign banks from a Grexit, or from continuing uncertainty about it, is limited, as they have significantly reduced their lending since Greek government debt was last restructured in 2012.

Hammarskiöld remains optimistic that a solution can be found, though he recognises it will be far from easy. 'Perhaps the partners can come up with a deal that seems to reduce the austerity programme, but at the same time, remains committed to seeing it through, so that both sides can claim victory. But it's very difficult.' ☀

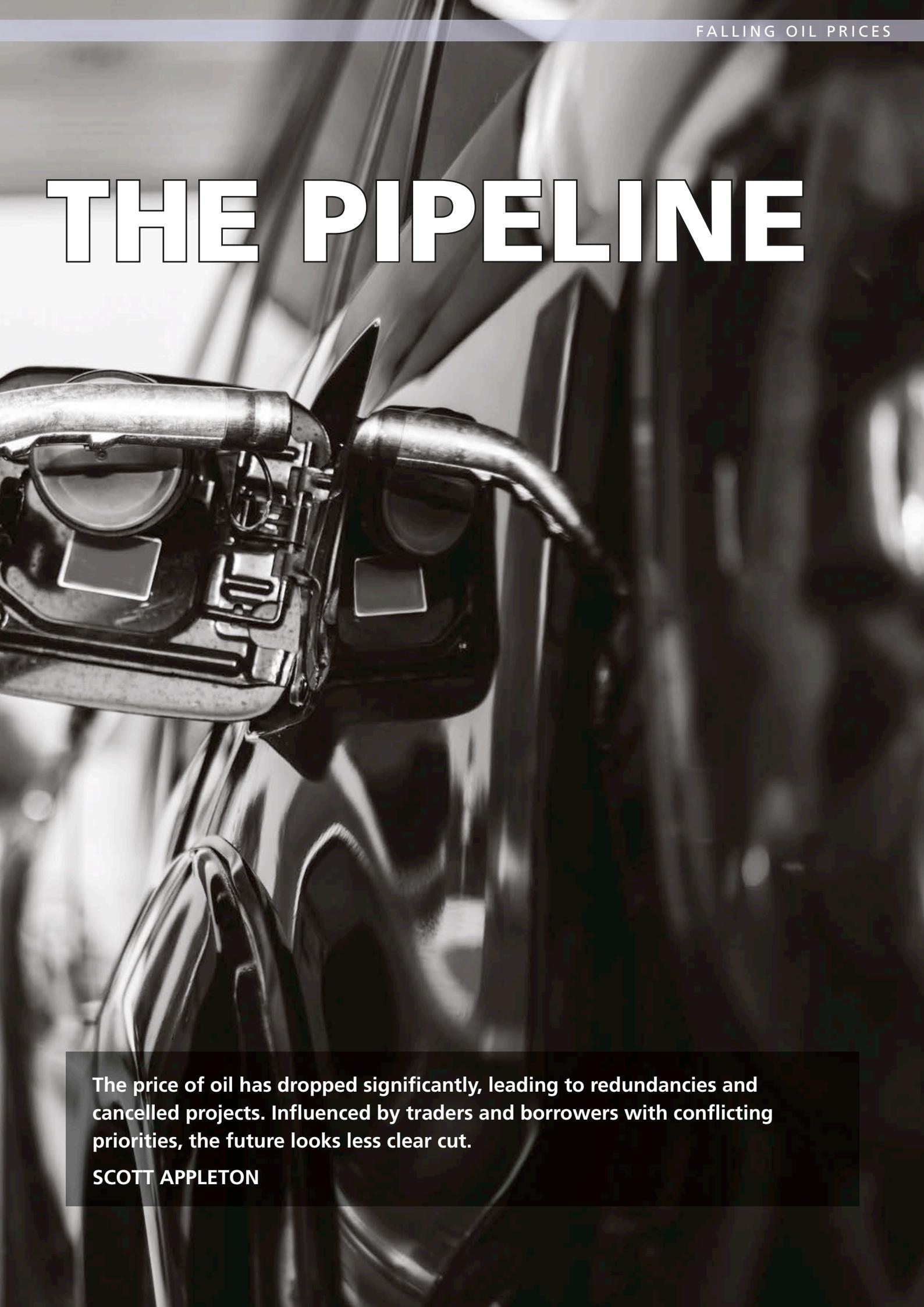
Jonathan Watson is a freelance journalist and can be contacted at jwatson@gmail.com

FALLING OIL PRICES

# CHANGE IN



# THE PIPELINE



The price of oil has dropped significantly, leading to redundancies and cancelled projects. Influenced by traders and borrowers with conflicting priorities, the future looks less clear cut.

SCOTT APPLETON

**B**etween June 2014 and the start of 2015, global oil prices dropped by 60 per cent to around \$50 per barrel (pb). Analysts say the cause is global supply simply outstripping demand. The glut is driven predominantly by record US production, alongside continued high output by the Organization of the Petroleum Exporting Countries (OPEC). In contrast, US and European demand has fallen and the Chinese economy is slowing.

Yet a macroeconomic view alone does not explain all that is happening. ‘We know the headlines, but this does not entirely justify the rapid rate of the decline we have seen,’ says Paul Griffin, an oil and gas partner at Allen & Overy in London and Vice-Chair of the IBA Oil and Gas Law Committee. ‘A lot of what is reported is based on hindsight, so if you didn’t see the cause of the malaise, it’s not so easy to identify the remedy.’

Russia (10.93 million bpd) and Saudi Arabia (9.53 million bpd).

‘It is no overstatement to say that shale has revolutionised the US oil industry and had a significant impact on global supply,’ says Robin Miles, finance and energy partner at Bracewell & Giuliani in New York.

‘In the heavy industries energy supply is the major fixed cost. So, in the US, companies are very welcoming of cheaper, closer sources of supply. [...] There is also obvious goodwill in encouraging the development of new distribution infrastructure, along with the expansion of new upstream industries, such as petrochemicals.’

Nonetheless, the shale industry has not been immune to the price shock. Rick Farmer is a partner at Bracewell & Giuliani and a former Council Member of the IBA Energy, Environment, Natural Resources and

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**“ From a financial perspective it is all a gamble, but are we looking at a discrete crisis in the sector, or the precursor of a very major financial bet gone wrong? ”**

Guido De Clercq

*Deputy Secretary General, GDF Suez;  
Senior Vice-Chair, IBA Power Law Committee*

A similar belief is held by Rui Amendoeira, Chairman of Lisbon-based Miranda Correia Amendoeira, who has 20 years’ experience in the international oil markets. ‘The accepted explanations reflect the fact that the broader market sentiment is clearly now more pessimistic. But there are more than simple market forces at work.’

### Global flows

Change has undoubtedly occurred in the oil market over the past decade, with new sources of supply diluting the influence of established producers. OPEC, for example, now supplies less than a third of the world’s oil: down from 50 per cent in the 1970s.

US shale oil has also played an important role. From a virtual standing start at the beginning of the millennium, it now produces an estimated four million barrels per day (bpd). The US currently satisfies around 90 per cent of its energy needs with domestic sources, up from 70 per cent from as recently as 2005, and oil production in the country is at levels not seen since the early 1980s. In 2014 it became the world’s biggest oil producer at 11.75 million bpd, ahead of

Infrastructure Section (SEERIL). He says: ‘Rising US production is still being matched by the Saudis, so you have high output in a period of reduced global demand, helping to further depress oil prices. There is a sense that the new US economic growth we have seen is thanks to the upturn in the oil industry, but we are now seeing companies with reduced revenues, making large numbers of lay-offs and reducing capital expenditure.’

### Planning for the worst

The speed of the price drop has affected all levels of the industry, from the multinational majors, to national and independent exploration and production (E&P) companies, to producing states.

Recent months have seen thousands of job cuts at BP, Shell and Chevron, as well as at the leading service companies Baker Hughes, Schlumberger and Halliburton. ‘Across the board there is a clear focus on reducing cost, including headcounts and capital expenditure,’ says Miles. ‘The majors are, however, better placed to capitalise on economies of scale in a way that is out of the reach of many mid-size national and most independent E&P companies.’

The potential for current price levels to influence future revenues also means that a growing number of companies are stalling or looking to renegotiate new supply deals. The hope is that they can gain a clearer sense of the direction of prices before taking action. Therefore, the positions taken by oil futures traders are significant. Many believe that speculation has been important in bringing about the degree of price volatility recently seen.

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**“ Across the board there is a clear focus on reducing cost, including headcounts and capital expenditure**

Robin Miles

*Finance and energy partner,  
Bracewell & Giuliani, New York*

Oil prices have a history of volatility. It may have been trading at \$100 pb last summer, but little over a decade ago, it was at around \$25 pb. ‘There is a belief that in recent years, producers have been seduced into thinking that \$100 pb was a natural benchmark, so there was less focus on a

rising cost base,’ says Griffin.

‘We may one day consider \$50 pb an anomaly, but the current situation has caused many to stop and think about what is the “right” figure both companies and governments should be using.’

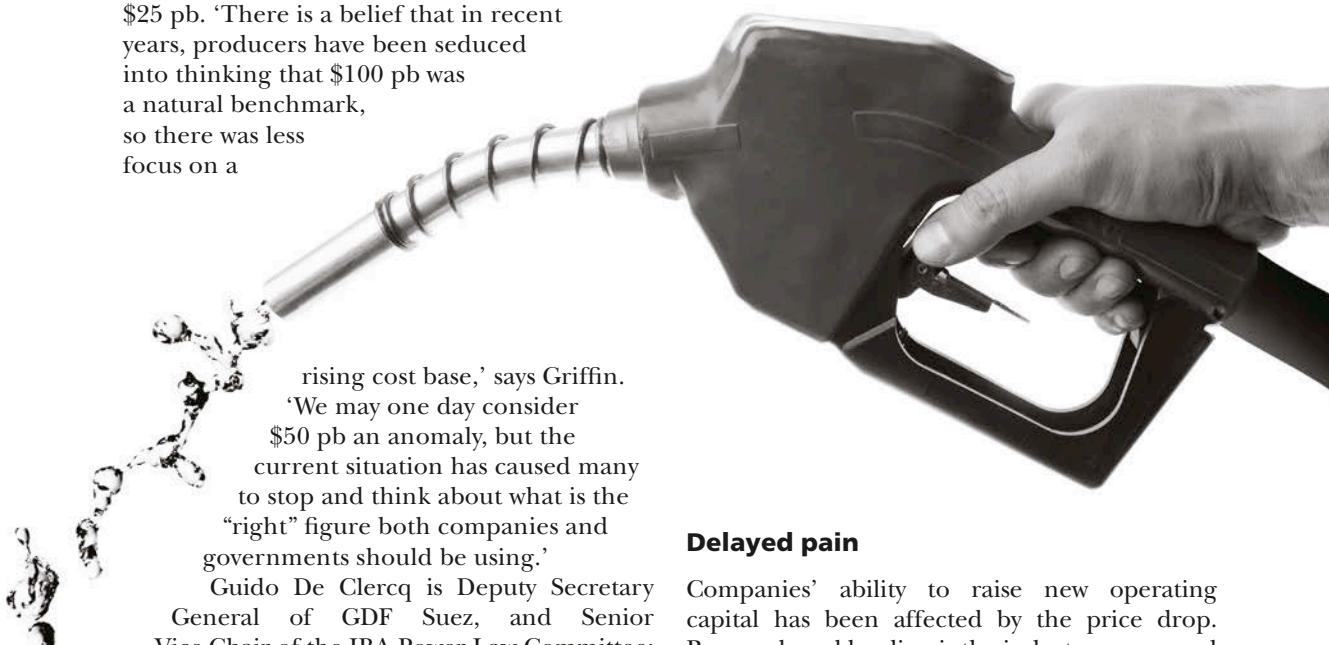
Guido De Clercq is Deputy Secretary General of GDF Suez, and Senior Vice-Chair of the IBA Power Law Committee: ‘Oil comprises a relatively small piece of the global energy and pricing matrix, so why is it falling? Ultimately, we have to look at the financial and hedging markets that operate around oil, but which now outstrip it in terms of value many times over.

‘Cumulative investment decisions have had the effect of amplifying the statements of oil

chief executives and governments ministers, creating a negative spiral,’ he continues. ‘From a financial perspective it is all a gamble, but are we looking at a discrete crisis in the sector, or the pre-cursor of a very major financial bet gone wrong?’

The net effect is that volatility may well be a feature of oil prices for months to come. Amendoeira says: ‘There is a prevailing sense of negativity that is maintaining the pressure on prices. I wouldn’t be surprised to see a spike in prices towards the end of 2015, but if it does happen it will not be driven by demand: supply and demand will not have an impact for some time yet. Instead, it will likely be the result of renewed speculation, traders buying oil futures and stocks now wanting to sell at a higher price.’

It may take time to understand fully the impact this kind of volatility could have. ‘The spot price is not necessarily reflective of companies’ true financial realities,’ says Farmer. ‘The vast majority of production is hedged, with output pre-sold at rates decided months or even years ahead. The vast majority of the 2015 production is already sold, as is probably half of the 2016 supply. The question is, what happens if the price stays where it is, or falls further over the coming year?’



### Delayed pain

Companies’ ability to raise new operating capital has been affected by the price drop. Reserve-based lending is the industry norm, and is calculated on current proven reserves and the prevailing spot price.

‘Lenders do not always look to the future, and will often base loan decisions on a calculation of companies’ balance sheets as they currently stand. If the price goes down, so does the calculation of the value of the oil that companies hold. So we may yet see bond owners or banks

demanding more security, or taking on a more activist role within companies,' says Griffin.

Recent weeks have seen a flood of announcements by listed companies of reduced dividends and capital reductions, as they look to stockpile cash. 'Significant in the US is the twice annual recalculation of companies' holdings, which occurs in the spring and fall,' says Farmer. 'So, many companies' financial positions are being reassessed at a time when the market

**“We are seeing companies putting pressure on their suppliers to reduce rates, usually by two digit percentages, and for it to take effect almost overnight”**

Rui Amendoeira

Chairman, Miranda Correia Amendoeira

price is at its lowest. It is an issue that is obviously critical to already highly leveraged companies, as well as the single asset or block operators, which are unable to hedge their operations, in the same way that the majors are able to do.'

There is little doubt that the largest E&P companies will ride out the current storm. Even with a prolonged price dip nobody yet predicts a repeat of the consolidation of the late 1990s/early 2000s, when the 'super majors' – BP, Chevron, ExxonMobil, Royal Dutch Shell and Total – emerged.

Nonetheless, even the top of the market is scaling back its more speculative plays. Shell's Chief Executive Ben van Beurden recently announced plans to cut capital expenditure from \$46bn to \$37bn, and divest up to \$15bn worth of assets. The company has also cancelled its planned Arctic drilling campaign, as have Chevron and ConocoPhillips, while Norway's Statoil handed back three out of its four costly Greenland offshore oil and gas exploration licences in January, echoing moves by GDF Suez and Denmark's Dong Energy.

'Longer-term, each operator will be affected in its own way. Many are, however, now reassessing their options, given that they may have based their projections on a seemingly unsustainable or unstable price point. We may not see consolidation at the top end, but at the national and independent level, a rise in distress may produce integrations, reorganisations and opportunistic acquisitions in strategic areas of operation,' Griffin says.

Ultimately, the single biggest saving many producers can make is to stop drilling. 'When you consider that it costs around \$5m to keep a horizontal well going, reducing the number of rigs would seem to be a relatively simple cost reduction measure,' says Farmer. 'The operating costs of the more complex shale rigs can be significantly higher. But if you don't drill you don't produce the product.'

### New deals, new advice

Such pressures are inevitably having a ripple effect. Less revenue and tighter budgets mean that companies are looking to cut costs down the supply chain. Elisabeth Eljuri is the Caracas-based Head of Latin America at Norton Rose Fulbright, and Vice-Chair of the IBA Oil and Gas Committee: 'The economic weight of the major E&P players is such that they are able to tell their suppliers and service providers that they are not going to accept rate rises. In fact most are seeking rate reductions and they expect solidarity.'

This trend also extends to the renegotiation of deals. 'Most production and supply contracts are flexible – usually, however, in favour of the producer, in terms of allocating risk, adjusting prices or even termination. We are seeing companies putting pressure on their suppliers to reduce rates, usually by two digit percentages, and for it to take effect almost overnight,' says Amendoeira.

Legal services are also inevitably in the firing line. 'Pressure on fees is always there. But certainly as companies re-evaluate their balance sheets they are looking at all their partners to come onside with them,' says Griffin.

The past decade may have seen a growth in companies' legal departments, with in-house teams now managing much more of their own licensing, transactional and day-to-day requirements, but the current situation still demands external expertise.

'We may be seeing less transactional activity – for now – but there is an upturn in refinancing, restructuring and reorganisational skills, as well as in areas related to financial compliance and even sanctions – companies may be comfortable managing issues relating to Iran, for example, but Russia is altogether new,' says Griffin.

Clients are particularly interested in assessing the potential to avoid or renegotiate deals that are marginal, or no longer commercially viable, which includes assessing the impact of defaulting. Paul Stockley is Head of Oil and Gas at Bond Dickinson in London and a member of the IBA Oil and Gas Committee. 'Litigation is a growing area and we are seeing a clear rise in pre-litigation support, as companies begin to take positions,' he says.

'This is especially true for smaller operators, some of which may be over-reliant on the development of, or production from, a particular asset. If they face an issue with that asset, it could be game-changing for them and so they often find themselves compelled to do something about it. In mature provinces such as the North Sea, this is a definite contrast to the past, when the dominant larger players often took a less confrontational approach, believing that what goes around comes around.'

### **Winners and losers**

The rapid price drop experienced by the oil industry over recent months will inevitably produce winners and losers. The current situation favours the most efficient producers, who can maintain the highest operating margins. Saudi Arabia sits on reserves worth \$900bn: it can afford to play the waiting game and remain at odds with its fellow OPEC members, many of whom need an oil price over \$100 pb to balance their budgets.

'No one knows whether the current price curve is u-shaped, v-shaped or simply downhill, so the question facing many is how long can you hold out,' says Farmer.

Equally, nobody wants to be caught out when the upturn comes. So, while companies are currently implementing aggressive short-term cost reductions, they will continue to invest in long-term strategic projects. 'In the US there is a long way to go to create the infrastructure

necessary to get much of the shale production from the drill heads to consumers,' says Miles. 'So we have projects underway and that will likely last two years or more. The question is what happens when all the connections are made? The hope obviously is that the price will have recovered by the time all the plumbing is in place.'

**‘A rise in distress may produce integrations, reorganisations and opportunistic acquisitions in strategic areas of operation’**

Paul Griffin

Allen & Overy; Vice-Chair, IBA Oil and Gas Law Committee

The major focus of market speculation therefore, is on when we may see a return to stability. 'Many in the industry believe that 2016 will see a return to more normal market conditions, but nobody agrees what "normal" now means,' concludes Griffin. ☈

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# Brazil's 'Operation Car Wash'

As investigators attempt to reveal the truth behind the allegations swirling around the county's major oil company Petrobras, collaboration agreements have been used to great effect. However, they're not without controversy and not everyone's in favour.

BRIAN NICHOLSON



**B**razilians love their soap operas. The country's most-watched TV channel normally shows at least three per evening, interrupted only by the national news. Now the news, too, has a nightly drama of its own, albeit without the customary starlets and eternal triangles, but just as gripping, far more serious and promising to run for quite some time. Like any blockbuster, it combines intrigue with a novel twist: malfeasance that cynics say is remarkable, mainly for the enormous sums involved, is being exposed by energetic use by federal police of a new organised crime law and a type of collaboration that's a cross between plea bargaining and turning state's evidence.

*Operação Lava Jato* – literally, ‘Operation Car Wash’ – started more than a year ago as a garden-variety federal police investigation into money laundering through a chain of petrol stations. Since then it has blossomed into a near-nightly parade of handcuffed executives, police raids and filmed depositions – not to mention apoplectic defence lawyers and indignant politicians.

With investigations ongoing, details still emerging and no convictions handed down, the broad outlines of Car Wash were clear. More than a dozen major Brazilian construction companies stand accused of paying bribes via middlemen to secure million- and billion-dollar contracts with Petrobras, a publicly quoted oil company in which the Brazilian government holds a controlling stake and (it has been alleged) pro-government parties controlled appointments to key positions that handle procurement. Most bribes were split between the middlemen, Petrobras executives and parties that support the government, investigators say, with much channelled via offshore shell companies into campaign slush funds. A few allegations of bribes for opposition politicians are also being investigated.

Almost lost in the noise is a potentially huge antitrust angle. Witnesses have said that the

construction companies formed a multi-year cartel to share out contracts and pad prices, perhaps extending beyond petroleum to highway and hydropower contracts.

With the exception of those who have agreed to cooperate, all companies, executives, middlemen, politicians and parties mentioned have denied any wrongdoing. Petrobras says it was a victim, while construction companies and some foreign suppliers to Petrobras say they faced de facto extortion – a situation of ‘pay to play’.

How much was syphoned off? No final figure has yet emerged, but certainly hundreds of millions of dollars. Witnesses have mentioned skims of up to three per cent on contracts worth tens of billions of dollars between 2003 and 2012.

How many people are involved? Possibly more than 100, counting company executives, intermediaries and politicians.

‘The real lesson appears to be the existence of some form of ongoing, endemic corruption within state-owned enterprises that are responsible for dishing out very large contracts that should be for the public benefit,’ says Australian lawyer Robert Wyld, Co-Chair of the IBA Anti-Corruption Committee, who has been watching Car Wash unfold from afar. Some people, he says, treat public companies as ‘a personal cash cow’.

‘Car Wash is undoubtedly Brazil’s biggest-ever corruption case – and it’s still emerging,’ says São Paulo-based lawyer Leopoldo Pagotto, the Regional Representative for Latin America on the IBA Anti-Corruption Committee.

### Like a can opener

Brazil is no stranger to corruption. However, several attempts to bring major cases to trial have failed to achieve convictions, sometimes because of police work, sometimes because Brazil’s anti-corruption laws offer innumerable possibilities for technical challenges, particularly when



evidence comes from wiretaps, and frequently because the convoluted judicial system allows cases to drag out until they prescribe, particularly when elected officials are involved. In Car Wash, police and prosecutors are bending over backwards to avoid previous errors.

The snag with corruption cases is often a multi-player version of the prisoner's dilemma: as long as everyone denies everything, the hard evidence may be inconclusive. In Car Wash, the secret has been persuading some suspects to provide detailed confessions in exchange for reduced penalties. In Portuguese it's called *colaboração premiada*, which translates literally, albeit awkwardly, as 'rewarded collaboration'. Journalists and even lawyers frequently call it *delação premiada* ('rewarded accusation'), and it is often mistranslated simply as plea bargaining. In fact, it's closer to turning state's evidence, or Queen's evidence. The Organisation for Economic Co-operation and Development (OECD) Working Group on Bribery, in its latest (Phase 3) report on implementing the OECD Anti-Bribery Convention in Brazil, published October 2014, calls it 'cooperation agreements and judicial pardon'.

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## **“Car Wash is undoubtedly Brazil’s biggest-ever corruption case – and it’s still emerging**

**Leopoldo Pagotto**

*Regional Representative for Latin America,  
IBA Anti-Corruption Committee, São Paulo*

Whatever the name, collaboration has made all the difference in Car Wash. 'Federal police have used *delação premiada* like a can opener, to prise the case apart,' says Pagotto, whose doctoral thesis at the University of São Paulo focused on the contribution of economic law to fighting corruption.

Collaboration has existed in Brazilian criminal law since at least 1995, but formalised agreements have only now come into their own with the Organized Crime Law of 2013 (Law 12.850). This defines organised crime, lists acceptable investigatory methods and provides a detailed road map for collaboration. One or more of the following results must be achieved: identification of co-authors and participants in the criminal organisation, with their respective crimes; exposure of the hierarchical structure and division of functions within the organisation; total or partial recovery of proceeds; prevention

of further crimes; and the safe release of victims. Prosecutors can ask the judge to grant a full judicial pardon, reduce the collaborator's sentence by up to two-thirds, or substitute prison with a lesser penalty.

Collaboration is voluntary, with defence lawyers present, but collaborators must tell the truth – and the whole truth. Any future discovery of lying, concealment or omission can lead to the agreement being revoked. The process starts with a signed statement detailing what the suspect will reveal, and the leniency that prosecutors will recommend in return.

For each collaboration agreement, prosecutors weigh factors including the importance and novelty of the information to be provided about crimes and those responsible, the proofs to be offered and the amounts to be recovered. 'A group of prosecutors conducts a careful analysis... the agreement goes ahead only if there is consensus that the benefits significantly outweigh the costs for society,' the federal prosecutors' office says.

When all has been revealed, it falls to a judge to decide if the agreement has been kept. Charges are filed against the collaborator as investigations progress, but any sentence will reflect the agreement.

As of early March, prosecutors say they have negotiated 12 collaboration agreements with individuals including currency dealers, former Petrobras executives, middlemen and businessmen. Charges were filed against 87 individuals for crimes including corruption, participating in a criminal organisation, and money laundering. For reasons explained below, none of those initially charged were politicians.

One of the great motivators for collaboration appears to have been the landmark 'Big Monthly' case (see *Global Insight*, June 2012), in which Brazil's Supreme Court imposed sentences of up to 40 years for corrupting public officials, graft, money laundering and illegal currency transactions. It was widely noted that the businesspeople involved received far longer jail terms than the politicians. Now, in Car Wash, businessmen have been leading the rush to confess.

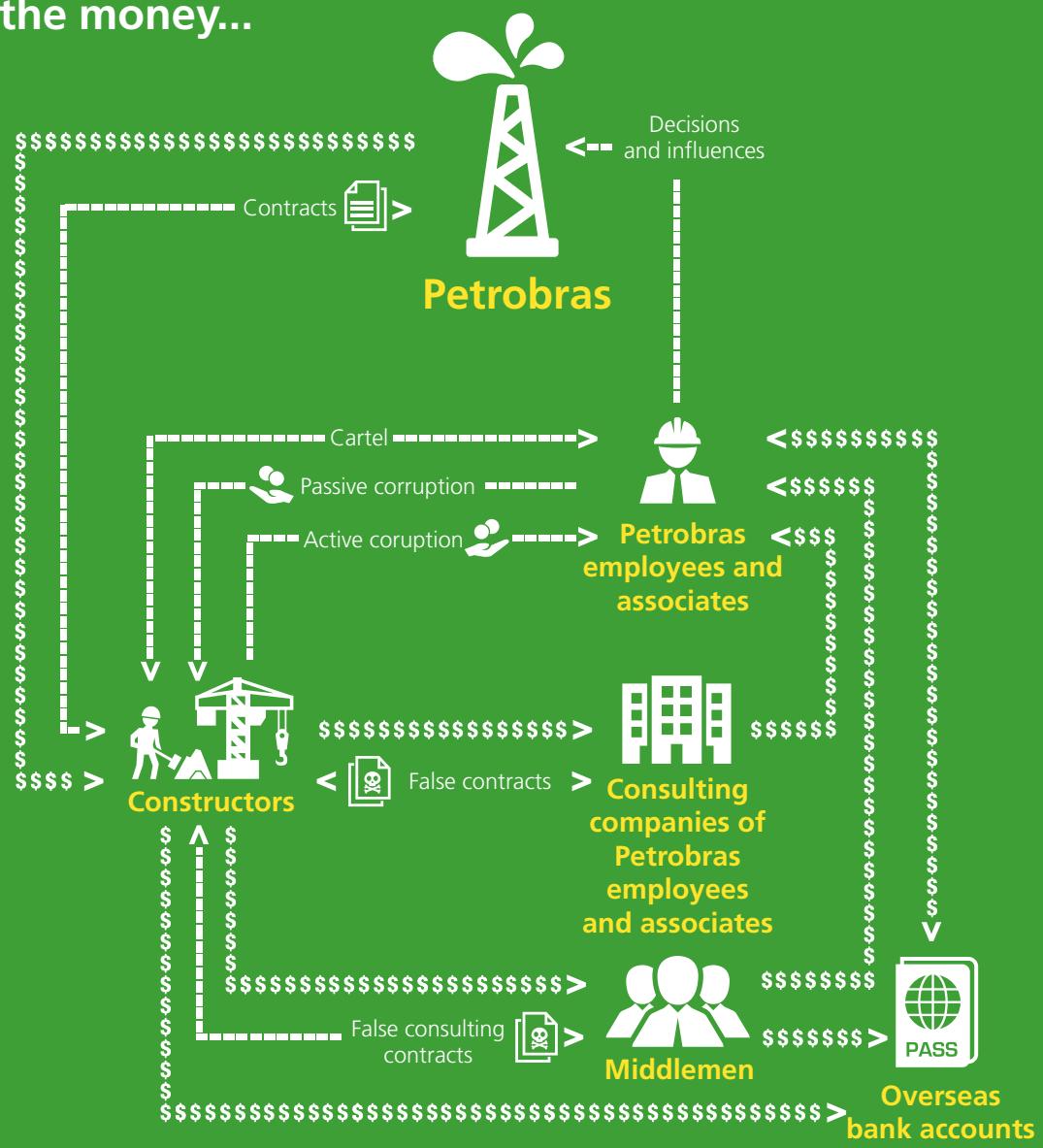
### **Like a dragon**

As in a children's cartoon, where pulling the tip of a tail may uncover a huge dragon, the Car Wash case has grown and grown. The petrol station investigation originally sought someone called Primo (Cousin). He was identified as Alberto Youssef, a black-market currency dealer known from an earlier corruption case. Investigators kept pulling the tail, and discovered that Youssef had given an expensive imported car to Paulo Roberto Costa, a Petrobras director responsible for billion-dollar procurements. Both Costa

## Following the money...

This flow-chart\* offers a simplified view of the 'bribery' part of Car Wash, as alleged by Brazilian prosecutors: some senior Petrobras employees steered padded contracts to selected construction companies, which channelled back bribes via middlemen, often using false consulting contracts and overseas shell companies. Not shown is the final destination of the bribes, alleged to include several political parties.

\*Chart kindly made available by the Brazilian Public Prosecutor's Office (MPF); unofficial translation by Global Insight.



and Youssef have since provided police with copious detail under collaboration agreements – Youssef's collaboration testimony exceeds 100 hours, all recorded and encrypted.

'Were it not for the collaboration agreements between federal prosecutors and those under investigation, the Car Wash case would not have uncovered evidence of corruption beyond that involving Paulo Roberto Costa,' the prosecutors' office says. 'We had evidence of bribes of less than R\$100m [some US\$31.5m at early April exchange rates]. Today we are investigating dozens of public officials as well as major companies, and there is evidence of crimes of corruption involving values far in excess of R\$1bn [US\$315m]. Just through the collaboration

agreements, we have already recovered around R\$500m [US\$157m].'

Investigations are being conducted in the southern city of Curitiba, where federal police and prosecutors have established a nucleus of expertise in financial crime. The Car Wash group works simultaneously on two fronts: interrogating witness and suspects; and conducting collaboration agreements. Contents of the agreements are supposedly kept secret until approved by the judge, although some leaks have occurred, while regular witness statements are normally made public.

Prosecutors have split Car Wash into dozens of individual cases, in part to prevent the whole thing collapsing should one element be

## Q&A with the OECD's Director of Legal Affairs, Nicola Bonucci

As Director for Legal Affairs at the Organisation for Economic Co-operation and Development (OECD), Nicola Bonucci is closely involved in the organisation's anti-bribery work. He chaired the IBA Anti-Corruption Committee in 2011 and 2012.

**Global Insight (GI):** The OECD convention focuses on foreign bribery. Does that mean you are not interested in what we might call domestic bribery?

**Nicola Bonucci:** No, it doesn't. When the Anti-Bribery Convention was negotiated in 1997 many countries had laws to punish bribery within their borders, but only the United States had legislation to punish bribery of a foreign official, so the convention sought to address this omission. I cannot comment specifically on Petrobras, but when you look at cases of that kind, you see that foreign and domestic bribery issues are often related. Also, the OECD has done much work concerning the passive side of bribery – the integrity of public officials and procurement processes, and other issues that are more targeted to domestic bribery.

**GI:** Are you following the Petrobras case?

**NB:** Let's say we are keeping an increasingly close eye on it, because it appears to have ramifications outside of Brazil.

**GI:** Some Brazilian commentators have compared the Petrobras case to Italy's '*Mani pulite*' ['Clean hands']. Would you agree?

**NB:** The '*Mani pulite*' case involved thousands of people. It covered wider, systemic corruption that went far beyond one single company. From what I have seen so far there may be similarities in terms of the impact on public opinion, but differences in terms of scale.

**GI:** How does Brazil compare with other countries at a similar level of development, in terms of combatting corruption?

**NB:** Unfortunately, even some major countries are not implementing the Foreign Bribery Convention as fully as we would wish; we see very uneven levels of implementation. Talking specifically about preventing foreign bribery, I would say Brazil is around average – neither particularly good nor particularly bad. Our latest (Phase 3) report on Brazil was focused less on legislation and regulations, more on what effectively happens on the ground. There are various ongoing foreign bribery investigations in Brazil; it's not just the Petrobras case.

**GI:** So is it fair to say Brazil's main challenge is implementation?

**NB:** Yes. Brazil's Corporate Liability Law (12.846/13) is good legislation, it incorporates good elements, but now we have to see if the legislation will bite. The proof is in the pudding.

**GI:** What is the OECD's attitude to collaboration agreements?

**NB:** The OECD secretariat has no preconceived notion about what is good or bad. However, we note that this kind of mechanism is being used more frequently; there are similar systems in the US, the UK and the Netherlands, for example. Without taking a position on substance, one can understand why. One of the difficulties in bribery cases is getting the evidence. There can be a lot of suspicion, but finding the smoking gun is not easy. When it is foreign bribery, there are additional problems. Pragmatically, we can see that a number of foreign bribery cases outside Brazil have been resolved using a similar mechanism.

successfully challenged. They have also taken care to separate non-elected suspects from elected office-bearers and other senior officials. This is because the Brazilian constitution provides 'privileged jurisdiction' – federal ministers and congressmen can be investigated and tried only by the Supreme Court (STF); state governors only by the Superior Court of Justice. To this end, prosecutors and police in Curitiba instructed suspects and witnesses to restrict their testimony to what might loosely be called the 'business' part of the bribery chain: origins of the money; mechanisms for arranging the padded contracts; and skims received by executives and middlemen. The second part, transfers to political parties, was initially excluded from testimony because the involvement of any person with privileged jurisdiction would require the Curitiba unit to immediately halt that investigation and send it to Brasília.

Collaboration agreement statements are a different matter; they involve full disclosure. Copies go to the prosecutor-general who uses allegations of involvement by politicians to ask the STF to authorise investigations. In early March, the prosecutor-general submitted 28 investigation requests involving 54 people, mainly elected politicians, several of them household names. Investigation requests targeting at least two state governors were being prepared for the Supreme Court of Justice.

The question of multiple jurisdictions plagues Brazilian justice in cases that potentially mix defendants of different status – often the case with corruption. When the Big Monthly trial began in the Supreme Court in 2012, defence lawyers argued that the non-politicians among the 37 accused should be tried in state-level courts. Judges agreed with prosecutors that politicians and non-politicians alike were involved in a single conspiracy, and must be tried together. In Car Wash, defence lawyers have argued that, because politicians are apparently involved, everything should be moved to Brasília.

### **Psychological torture?**

Not everyone is a fan of collaboration agreements. Luciano Anderson de Souza, a criminal law professor at São Paulo University, is far from alone in expressing reservations. 'Brazil still lacks a detailed and precise discipline with respect to collaboration agreements,' he says, 'and that means the form of collaboration depends almost entirely on subjective calls by the authorities. This creates judicial insecurity.'

Another criticism, echoed by several lawyers, is that collaboration, theoretically a voluntary

process between equals, in fact entails a degree of compulsion by the stronger party. 'It's often like extorted collaboration,' Souza says. Federal police kept a dozen Car Wash suspects in prolonged temporary custody, with the investigating judge ruling that some might flee the country; others might seek to tamper with witnesses or evidence. Senior executives, more accustomed to private jets and five-star hotels, were held four to a spartan cell, 12 metres squared with an open squat toilet. Defence lawyers claimed they were being pressured into collaboration, but the Supreme

**‘Were it not for the collaboration agreements between federal prosecutors and those under investigation, the Car Wash case would not have uncovered evidence of corruption beyond that involving Paulo Roberto Costa’**

The Prosecutors' Office

Court rejected several habeas corpus pleas.

Significantly, the CEO and deputy CEO of a major construction company signed individual collaboration agreements in late February after 105 days in police custody, and just five days after judges turned down another habeas corpus request. Prosecutors deny coercion and say the majority of collaboration agreements were negotiated with suspects in liberty.

Finally, says Souza, there is a risk of collaborators lying: 'It's natural for suspects who are tortured – in this case, psychologically tortured – to say whatever their captors want to hear.'

Collaboration is also seen as somewhat dishonourable: 'Paying for your crime at the cost of another's freedom does not seem a very worthy form of defence,' says one lawyer representing a major constructor.

### **Fallout**

The impact of Car Wash is sending ripples through the Brazilian economy. Shares of Petrobras fell

60 per cent in the six months to March, albeit also hit by lower oil prices. With shares traded in Brazil and also in New York as depository receipts, the company faced investigation by both the US Securities and Exchange Commission and its Brazilian counterpart, CVM. Civil suits were filed in the US by shareholders who claimed losses exceeding US\$500m due to mismanagement. Moody's Investors Services downgraded the company to junk. According to Bloomberg, the downgrade could increase Petrobras' costs for financing debts estimated at US\$135bn, and the company announced it would divest US\$13.7bn of assets through 2016. Investments have been rescheduled and there were layoffs at shipyards building oil rigs.

A new president and board were appointed, with the first task being to issue a long-delayed, independently audited third-quarter earnings report with a credible estimate of graft-related losses. Before resigning in early February, outgoing president Maria das Graças Silva Foster estimated direct corruption losses were at least R\$4.1bn (US\$1.3bn) based on statements by former executives.

Many other companies are also suffering. Most of Brazil's largest constructors have been implicated, and Petrobras has banned them all from bidding for new contracts. If found guilty of bribery the companies would face an automatic



reportedly approached the government seeking a deal, offering fines to wipe the slate clean. Several lawyers have argued that such an outcome would apparently conflict with Brazil's new Corporate Liability Law (12.846 of 2013), although that law still lacks government regulation.

Lurking in the background is the possibility of a massive antitrust case. One businessman who signed a collaboration agreement has reportedly provided a detailed description of a 'constructors' club' dating from the late 1990s. Apparently it was formed to share out Petrobras contracts, without any initial suggestion of political rake-offs. The club reportedly doubled in membership through the last decade and extended its scope to other areas of infrastructure. According to a spreadsheet provided under a collaboration agreement involving a Petrobras manager, 11 club members influenced the results of 87 Petrobras contracts between 2004 and 2012, totalling R\$47bn (US\$14.8bn) in Brazil and US\$11bn abroad, with skims between one and two per cent. Brazil's antitrust agency, the Administrative Council for Economic Defence (CADE) says the Brazilian subsidiary of a Japanese engineering company and Petrobras supplier has already signed a leniency agreement admitting to a cartel.

Finally, there is the political fall-out. Most allegations concern the period from 2003 onwards, although a few mention bribery before then. Questions have inevitably arisen about Rousseff's role as chair of the Petrobras board, 2003–2010, which approved top appointments and major contracts. But, Rousseff was not implicated in any testimony published or leaked through early March and has denied all knowledge of corruption. She has pledged a thorough investigation, 'no matter who gets hurt'. More damaging could be the impact in

A policeman in front of the Petrobras headquarters during a protest in Rio de Janeiro March 2015. REUTERS/Sergio Moraes

**“Brazil still lacks a detailed and precise discipline with respect to collaboration agreements, and that means the form of collaboration depends almost entirely on subjective calls by the authorities. This creates judicial insecurity”**

Luciano Anderson de Souza  
Criminal law professor, São Paulo University

ban on participating in any public tender, in any sector. Given that these companies handle the lion's share of Brazil's much-needed infrastructure development, including new railroads, highways and huge hydroelectric dams, the implications could be severe. In January, however, President Dilma Rousseff stated: 'We should punish the people; we should not destroy the companies, which are essential to Brazil.' Company lawyers

## A *fleur-de-lis*, by any other name

Brazilian federal police have a tradition of assigning catchy codenames to their operations. Perhaps the best known before Car Wash were ‘Satyagraha’, recalling Mahatma Gandhi’s philosophy that translates roughly as ‘insistence on truth’, and ‘Sandcastle’. The former was a major investigation into financial fraud, the latter a smaller precursor to Car Wash, but both collapsed under defence allegations of procedural irregularities by federal police or prosecutors.

Many codenames would do credit to a minor crossword compiler with a penchant for languages, history and mythology: ‘Icarus’, for investigating cloned credit cards used to buy air tickets; ‘P.O. Box’, for illegal medicine distribution via the mail; ‘Hygieia’, for corruption in state government cleaning contracts; ‘Eros’, for smuggled Viagra; ‘Workaholic’, for fraud by labour inspectors; and ‘Rowland Hill’, for counterfeit postage stamps.

While the codenames are supposed to conceal the nature of the operation – and many appear to be random – several offer a reasonable clue. ‘Dirty Net’, ‘Persian Carpet’, ‘Peter Pan’, ‘Wizard of Oz’, ‘Dragon’s Cave’, ‘Sweet Innocence’ and ‘Little Martyrs’ were all operations against paedophilia and internet pornography, while ‘Man Overboard’ related to falsification of seamen’s documents and ‘Las Vegas’ tackled illegal casinos. Likewise, ‘Bad Trip’ went after smugglers of chemicals needed to produce illegal drugs. ‘Walking Dead’ and ‘Resurrecting the Dead’ both targeted gangs defrauding the state pension system, while ‘Fort Apache’ sought to disarm the leaders of an Indian reservation, allegedly exploiting their own community. ‘Control+Alt+Del’ was an early attack on internet bank fraud. Sadly, though, ‘Cheops’ related to mundane contract fraud, rather than a pyramid scheme.

One name to catch the eye of any God-fearing criminal was ‘Psalm 96:12’. Even the most recalcitrant of churchgoers could at least use the internet to discover the verse: ‘Let the fields be jubilant, and everything in them; let all the trees of the forest sing for joy.’ Nevertheless, the 2012 operation netted 18 inattentive public officials accused of facilitating illegal deforestation in the Amazon.

And *fleur-de-lis*? A 2013 operation to arrest a federal policeman turned ‘bad scout’, accused of helping criminals. The name came from the Boy Scouts’ badge.

Apparently, the naming tradition was started by a pun-loving federal police director who later failed to wonder about an investigation called ‘Cutthroat Razor’ – an instrument that turns on itself, with potentially dangerous results. The operation nabbed him for warning colleagues about internal investigations.

Congress, which must deal with having several senior members under criminal investigation. Worries are that this could paralyse government just when Brazil must enact unpopular spending cuts to reduce the public deficit.

São Paulo lawyer Luciano Santos, national director of the Movement to Fight Electoral Corruption, says events such as those being investigated at Petrobras occur because of the way Brazil’s political system is financed. Santos helped lead a successful national campaign for a 2010 law banning anyone convicted in second instance by a collegiate of judges from standing for election. Now he is working to curb the cash. ‘We are in favour of public financing of campaigns, allowing individual donations but banning all corporate support,’ Santos says. He argues that, while many democracies allow corporate donations, Brazil – still consolidating its democracy after the 1964–1985 military

dictatorship – suffers from a ‘non-republican’ relationship between companies and parties. Banning company donations would not prevent off-the-books support of the kind alleged in Car Wash, but that could be tackled by energetic use of the 2013 Anti-Corruption Law – once the government gets round to regulating it.

‘Fighting corruption means fighting to reduce the suffering of thousands of poor people,’ Santos says. ‘The problem is not lack of public money; it is misuse of public money and its diversion via corruption. Brazil fails to resolve problems of health and education because money disappears down the drain.’ ☈

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To learn more about the IBA’s work on issues covered in this article, go to [anticorruptionstrategy.org](http://anticorruptionstrategy.org)



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Pictured L-R: Che Guevara, Camilo Cienfuegos and Julio Antonio Mella, three leaders of the 1959 Communist Revolution

## Watershed moment

**Cuba and the US have announced an end to five decades of hostility, which could draw to a close one of the longest-standing trade embargoes in the world. However, questions remain over the precise impact talks will have.**

**RUTH GREEN**

**A**fter years of negotiations behind closed doors, the US and Cuba finally brokered a deal last December, which saw the release of US government contractor Alan Gross and three Cuban agents convicted of spying on anti-Castro groups in Miami.

The significance of the move cannot be underestimated. Fernando Peláez-Pier is a former IBA President and a partner at Hoet Peláez Castillo & Duque in Caracas. He says: 'It has been an enormous step to take the decision to re-establish diplomatic relations between the US and Cuba and to lift the embargo in the short term, although it is not yet envisioned that it will lead to a reopening of embassies in each country.'

'This is the most important decision since Carter and Castro decided to establish representation of each country's interests in Havana and Washington. It's the beginning of a new era in the relations between both countries, marking a before and an after.'

However, the process is far from over. 'Whoever thinks this process will be fast would be mistaken and would fail to understand the complexity of the case and what it implies for the re-establishment of relations between two countries after more than 50 years,' says Peláez-Pier.

The road to reconciliation was always likely to be long. Edmund Sim, Chair of the IBA International Trade and Customs Law Committee

and a partner at Appleton & Luff in Singapore, says: 'Complete normalisation of trade relations will require legislative changes, but with the US Congress controlled by the opposition, such changes will not come so soon.'

**“ It's the beginning of a new era in the relations between both countries, marking a before and an after**

Fernando Peláez-Pier  
Hoet Peláez Castillo & Duque  
Caracas; Former IBA President

'However, the US had similar experiences in re-engaging with China, Vietnam and Myanmar,' he says. 'In that case normalisation of trade relations was a relatively drawn out process. Looking to those precedents, I think we will see some initial euphoria in the business community, followed by the inevitable let-down when economic reform is not as fast as anticipated.'

Carl Micarelli, a partner at Debevoise & Plimpton in New York, says: 'The US embargo on Cuba does remain largely in place. There's some legislation enacted by the US Congress – including the Helms–Burton Act [which effectively formalised the US trade embargo on Cuba] – that remains in effect, so there's still a long way to go until there's completely liberalised trade with Cuba. Whether and how fast we move in that direction is going to depend a lot on the situation here in the United States.'

Although talks held so far in Havana in January and Washington, DC in February revealed several sticking points – such as Cuba's ongoing inclusion on the US list of state sponsors of terrorism – ultimately the US wants to see economic, legal and political reform in Cuba.

Stephen Propst is a partner at Hogan Lovells in Washington DC. He says: 'The US government is looking for democratisation, loosening of Cuban state control over essentially all parts of the economy and social life, greater access to free speech, communications – essentially human rights – and the ability for individual Cubans to own property and engage in private business.'

Although it is still early days, the changes could have a big impact on business between the two countries. 'One thing that is very significant for US companies doing business in third countries

is the relaxation of the more draconian aspects of the prohibition on dealing with Cuban nationals,' Micarelli says. He recognises that such prohibition was never easy to enforce, but says that it has proved problematic for certain companies in the past; for example, when European and Latin American hotels owned by US companies hosted Cuban delegations. A change to this restriction would, he says, 'ameliorate those types of headaches'.

As well as opening up trade generally, it is already apparent that certain industries are set to benefit from the changes. 'There are some specific industries, like telecommunications, where the opportunities have been expanded pretty significantly,' Propst says. 'This includes consumer communications devices, which means for instance that Apple can now legally sell iPhones to Cuba. Whether there's a real market there in terms of people who can afford to buy them is another issue, but at least the opportunity is there.'

In the insurance sector, US companies will now be able to offer global travel insurance policies that include Cuba – something which had previously been unthinkable. Less clear, however, is what the wider impact will be for the rest of Latin America.

'Normalisation with Cuba eliminates a stumbling block to increased US–Latin American trade integration,' says Sim. 'However, anti-US

**“ We will see some initial euphoria in the business community, followed by the inevitable let-down when economic reform is not as fast as anticipated**

Edmund Sim  
Appleton & Luff, Singapore; Chair, IBA International Trade and Customs Law Committee

sentiment in Venezuela and other countries continues. Yet if those countries also come around, we could see the resurrection of the Free Trade Agreement of the Americas one day.'

Improved relations between Cuba and the US could place other countries in a better position to openly engage with Cuba. 'The bottom line,' says Propst, 'is it makes it easier for some Latin American countries to engage with Cuba without fear of a negative impact on their relations with the US.'

It is difficult to predict the effect that the talks will have on the provision of legal services in Cuba, which comprise the National Organization of Collective Law Offices and the National Union of Jurists of Cuba.

'Legal services have been regulated and controlled by the state since 1965 and so the profession cannot be exercised freely and foreign law firms are not authorized to establish a presence or practice law,' says Pelaez-Pier.

In Cuba there are currently around 22 collective law offices, which can advise Cuban citizens on family law, criminal issues, litigation, commercial law and real estate, but they have no experience of cross-border transactions. There are also three firms that have traditionally been authorised to represent the interests of foreign entities.

Normalising trade relations could change the legal profession in Cuba beyond recognition. 'Extensive changes to the regulatory framework governing the profession and the provision of legal services will be necessary in order to help Cuban lawyers cope with the likely influx of capital and foreign investment and inevitable flurry of commercial and financial transactions,' says Pelaez-Pier. 'Not because they are lacking in competence, but simply because they lack experience of these types of transactions and negotiations.'

Former IBA Presidents Michael Reynolds and Fernando Pelaéz-Pier and IBA Executive Director Mark Ellis recently met with the legal profession in Havana to structure a long-term cooperation programme to strengthen the capacity of commercial lawyers. This was the second such visit over the past year as part of the IBA leadership's assistance to Cuba's legal profession as it enters a new era of expanding international commercial relations.

**‘It makes it easier for some Latin American countries to engage with Cuba without fear of a negative impact on their relations with the US’**

Stephen Propst  
*Hogan Lovells, Washington, DC*

'What I can say categorically is that organisations and institutions such as the IBA and other multilateral organisations can play an important role in providing technical assistance and the necessary support to Cuba's legal profession, to help educate them in areas of the law in which they haven't had the opportunity to practise over the past 50 years, and to help them draft the new regulatory framework.'

Ruth Green is a freelance journalist and can be contacted on [ruthsineadgreen@gmail.com](mailto:ruthsineadgreen@gmail.com)

A car flying a Cuban flag parked near El Capitolio, the seat of government in Cuba until after the revolution in 1959, now home to the Cuban Academy of Sciences, Havana, 2014





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“ I was the first Minister of Justice,  
the first Attorney General of Europe,  
and I needed to create the basis for a  
future continent of justice

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**GLOBAL LEADERS**

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# Viviane Reding

**The first IBA webcast of 2015 featured MEP Viviane Reding, currently European Rapporteur for the Trade in Services Agreement, and former EU Vice-President responsible for Justice, Fundamental Rights and Citizenship. In conversation with Todd Benjamin, she emphasised her fundamental belief in the individual's right to data privacy, and the need for trust to be restored in order for the digital economy and free trade to thrive.**

**Todd Benjamin:** The digital world is very encompassing. How do you see it being different from what you've done in the past?

**Viviane Reding:** The digital world is a horizontal world. It encompasses everything you can imagine and today is only the beginning, because tomorrow everything will be digital. So even the things, which today we think are independent, tomorrow will be part of the digital world.

**TB:** So, as a legislator, how do you deal with the digital world? It's moving so quickly, in ways that perhaps other parts of the law don't.

**VR:** That is the danger. It is easy to take decisions with people who [have the same level of understanding as you do]. However, because things are going so quickly, very often you have a lot of explaining to do, and it takes a lot of time.

**TB:** And, of course, there could be a lot of differences in cultural sensitivities and cultural interpretations.

**VR:** The biggest wealth we have in Europe is our cultural diversity; we are proud of it and we are going to keep it. It's very different, like a melting pot, in the United States... Here in Europe, we have our different cultures built on different histories and we unite them now, but, the roots are different and they remain different. So, when you develop policy, you have to bring these differences together. You cannot eliminate them; you have to find room for each of them. That makes European policy so fascinating.

**TB:** But if there's a common denominator, especially when it comes to data, it's your strong belief that data is the property of the individual. This is borderless to you and should be protected as such. You stated that following the US data spying scandal and the Snowden revelations, data protection is more than ever a 'competitive advantage'. Why do you feel so strongly about this?

**VR:** I spoke about Europe, which is built on different histories. Many of our countries came out of dictatorships or of terrible war situations, of occupations. People were not free and had to regain freedom from their government. So there is mistrust, which is always there, and [there is a] necessity to protect the people against misdoing: misdoing of a government; misdoing of a company; misdoing of anybody. That is also the reason why, for Europeans, the protection of personal data is a fundamental right; it is inscribed in our constitution, in our basic rule of law: for the Europeans it is a must. So, lawmakers do not have a choice [as to whether] they want to protect personal data or not. They have to do it because it is fundamental law.

**TB:** You've argued that the individual should be informed of a data breach as soon as possible. What was your reaction to the recent high-profile data breach, where pictures of celebrities were obtained by hacking the iCloud and then published online? Was this theft in your eyes?

**VR:** That is absolutely theft. If I'm sitting with a journalist and he brings a photographer with him, it is obvious that these pictures will be published,

so that is not my data. My data is my personal data, which belongs to me, as a person. I am the only one who has the right to give it out or not to give it out. So hacking, for me, is stealing, simply.

## “Without trust, you cannot build a digital world; trust is the basis for a digital world”

**TB:** So do you think there's any merit in the argument that individuals should not store data on services like the iCloud if they don't want to risk it potentially being hacked?

**VR:** Well, if you want nothing to be hacked, you must put nothing outside your own house, your own body. But a cloud is as secure as its infrastructure, and that is why it is very important that those who are creating a cloud make it cybercrime-averse, so that it cannot be hacked easily: that there are securities, that the key to the personal data only belongs to the person who has rented a part of this cloud. I see more and more clouds now getting the stamp of the European data protection authorities to verify that they are really secure. We know absolute security exists nowhere. But you can protect yourself as much as possible, so that the feeling of security is enhanced.

**TB:** You should protect yourself as much as possible so the feeling of security is enhanced. How do you do that?

**VR:** I have always pleaded to have privacy by design, so that privacy is already included in the service somebody is buying. That is where I believe the future lies. I believe it is a commercial advantage if you can offer to your customers a secure space for storing their data.

**TB:** Where does the responsibility lie – with the individual or the company?

**VR:** Well, if we continue this to the end, then you stay in your room with the windows closed and no sun coming in, in order to hide yourself. That's not the way we want to live. We want to exchange, we want to be social animals. That means we have to give a part of our data out in order to be capable of communicating and exchanging. But we must be sure that the data we entrust to somebody else – to a company, to a server, to a social network – is handled carefully under the terms and conditions you have given it out. And that it is not sold to third parties or utilised for a purpose you have not authorised.

**TB:** How can we make sure that our privacy is being protected?

**VR:** Well, in Europe, we are making rules and those who do not obey the rules have to go to court.

**TB:** You're a very strong believer that the individual should be given the right to give explicit consent for their data to be processed, instead of consent being assumed.

**VR:** The data belongs to the individual and the individual does with the data what the individual wants to do. They can hand it out to somebody; they can take it back and hand it out to somebody else; they can keep it with them. Data neither belongs to a government, nor does it belong to a company. It belongs to the individual. That's European fundamental law and that is also how we translated the fundamental law into applicable legislation.

## “My data is my personal data, which belongs to me, as a person; I am the only one who has the right to give it out or not to give it out. So hacking, for me, is stealing”

**TB:** Some might argue that stringent data protection laws make Europe less business-friendly. You would argue exactly the opposite, wouldn't you?

**VR:** Yes, because I think that sooner or later people will understand that there are hackers around who steal their data. If people understand that their data are precious and that they need to be protected, then they will also look at the companies [and ask]: to which company do I give the data? With which company will my data be secure?

**TB:** Do you think that business could be put off by the potential compliance burden and risk of ramifications for non-compliance?

**VR:** No, because in Europe we have a different system than in the US. In Europe, it's only the wrongdoing that is brought in front of the court, not the potential wrongdoing as a hypothesis. So we have strong laws, and these laws are applied, and those who are going against the law are brought to court.

**TB:** You're a very strong believer in the digital economy. What, in your mind, will make it succeed, ultimately?

**VR:** Oh, it's underway and it will succeed. The question is, how are we going to create equilibrium between the family, privacy and the open world? Is it going to be that our pictures are everywhere? Or do we have also a space of privacy? This has to be clarified. I believe that data is the most precious wealth the world will have in the future and this has to be protected. I also believe that the digital economy will be a horizontal one. It will go everywhere: it will be in agriculture, it will be in security, it will be in education. It will change the whole way we are functioning in our society and in our economy in the future.

**TB:** The European Court of Justice gave its landmark 'right to be forgotten' decision recently. The right to be forgotten is a key proposal in the general data protection regulation. Why do you believe this right is so important?

**VR:** The right to be forgotten comes automatically out of the fact that the data belongs to the individual – the individual can hand it out and can take it back. The concept is already in our law. We're only speaking about personal data. When you write about our conversation today and you publish this, then I do not have a right to take that back because that is not personal data; that is your journalistic work. So the right to be forgotten has its limits when it comes to the right to information.

**TB:** Do you think search engines such as Google can cope with all the requests they may get?

**VR:** If the reform of the 1995 [EU data protection] rules had been in place, things would have been much easier. I always say to the Googles of this world that you should have lobbied less against having the reform and more about making this reform visible and applicable. We are going to have the reform this year, with new rules on the right to be forgotten, which are more elaborate. The court had to decide [in the case last year] on the existing rules, which date from a pre-internet time of 1995.

**TB:** The Commission proposes that companies should only have to deal with one data authority in the country that is their main base. This proposal has been controversial – is it still feasible?

**VR:** Oh, yes, it will be done this year. We have 28 territories with 28 regulators, who interpret the law in a different way. What I proposed is the following: one continent, one law, one regulator. And who is going to be the regulator? It's going to be the nearest one for the individual and for the company. For the companies that means savings

of several billion euros per year, because instead of adapting to 28 territories and to 28 rules, they only have to adapt to one rule. The interpretation of this rule will lie in the hands of the regulators, who will apply the same law everywhere in Europe. So it is a big saving and quite an important opening of the market. It is the prerequisite to having a real digital market in Europe.

**TB:** National security is an area that's received a lot of attention, certainly with the Edward Snowden revelations. Do you think there could ever be a situation in which national security could legitimise the type of state surveillance of individuals revealed by Snowden?

**VR:** No. That was completely unacceptable and also against the rules, because we do have rules. We have, for instance, between US and Europe, a memorandum of understanding about how security forces can get the data they need. Because, of course, if you are looking for a terrorist, if you are looking for a crime gang, you will need to get data in your hands in order to protect society. Those rules exist and there is also the quick authorisation of courts, which are given. If you bypass the rules and you force companies to get the data illegally, then we have a big problem, and we have to solve that problem.

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**“ If you are looking for a terrorist, if you are looking for a crime gang, you will need to get data in your hands**

**TB:** If you are dealing with a potential terrorist, do national governments have the right to go in [to social media or email] and check phone numbers of those that they suspect of criminal activity or potential terrorist attacks?

**VR:** Of course, and they even have to do it in order to protect our society. In order to allow them to do that, we also have rules, and these rules say that you can touch the personal data of somebody under very specific circumstances and for a limited action. You cannot take everything from everybody, but from a group of persons you think are preparing an attack, you can. This is also foreseen by our national rules, by our European rules and by the bilateral agreements between the US and Europe.

**TB:** To what extent do you think the Snowden revelations damaged the relationship between the EU and the US?

**VR:** In a major way, because the trust was gone, and not only the trust between European citizens and the US, but also the trust in the new technologies. These two elements together are very, very damaging. If you read analyses of our society today, most people do not trust the way their data is stored by companies. In order to regain that trust, we really have to redo the rules, and people have to be secure [in the knowledge] that the rules are applied, because without trust, you cannot build a digital world. Trust is the basis for a digital world.

**TB:** What further work needs to be done to repair this? Is there anything from a legislative standpoint that needs to happen?

**VR:** Yes, the data protection rules – one rule for everybody and for all companies operating on the territory of the EU. One very solid rule about how to handle data, which is going transatlantic, and one solid rule about how security forces can get hold of personal data.

**TB:** Would the EU's Network and Information Security Directive have more impact if it were extended to include the cloud, social media and other areas, which seem particularly vulnerable to attack?

**VR:** I believe it has to be neutral technologically, because if you make a law now, you make it for the future. But this future is developing so quickly – in terms of digital, new inventions come every day. If you make a law, which is only concentrated on the inventions of today, then you miss the whole [scope] because just one or two weeks from now, you are going to have something new. The rules have to be adaptable to all these situations, and that is why I've always wanted our rules to be neutral from the technological point of view.

**TB:** In some ways, the internet, with its lack of physical borders, what you called this horizontal world, is the embodiment of your vision of what Europe should be. Do you think that Europe should take the lead in developing cross-border defences against cybercrime? And, if so, how can this be accomplished?

**VR:** Well, I believe Europe has already taken the lead. The first cyberattack against a Member State was in 2007, and since that moment, we [have been] thinking about how we can defend our administrations, our public, our companies. In 2013, Europol created a very important cyber security body, which is in continuous collaboration with the police forces in our 28 Member States. Such a body does not yet exist in the US. President Obama has, after the Sony question, now announced the creation of one. So, here we are already, some years before the US.

**TB:** Would you agree that traditional legal jurisdictional boundaries are meaningless in relation to the internet? Do the differences in law between the Member States hinder Europe's response to cybercrime, which does not respect physical or legal boundaries?

**VR:** Yes, that is a problem we have everywhere. The judicial system is not a European one, it is a Member State one. For the first time, six years ago, with the Treaty of Lisbon, a part of the competencies were given to Europe. I was the first Minister of Justice, the first Attorney General of Europe, and I needed to create the basis for a future continent of justice. What I have tried to do, instead of wiping out the national systems and replacing them with a European one, is to be a bridge builder between the national systems so that they can function together.

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**“I believe that data is the most precious wealth the world will have in the future and this has to be protected”**

**TB:** You once commented that the debate over net neutrality was really about 'trying to use regulation as a means to get a better position around the negotiation table'. How do you think the two sides of the argument can be reconciled in the best interests of the European digital single market?

**VR:** Well, net neutrality is not a European invention. It is a terminology that has been utilised in the US, and it means that you give precedence on the access and the transport of data according to the payments you make. I always said, we actually do not need a net neutrality discussion in Europe because, due to competition in the market, the citizen can buy whatever package the citizen needs for its own purpose. But now we have a net neutrality debate in Europe too and, as things go strangely sometimes, in the US the FCC [Federal Communications Commission] has taken a decision to go to an absolute net neutrality... that means, in favour of the net community and in disfavour of the telecoms community. In Europe, where we never needed something like this, the miracle has arrived that now the ministers want to eliminate net neutrality in Europe. The European Parliament will never accept this. But you see how the evolution can go very quickly from one extreme to the other.

**TB:** Where do you stand on it?

**VR:** I think that we need some kind of net neutrality. You need to have, for all citizens, equal access to a good level of internet speed, and you

need to have that everywhere – that means no more digital divide.

**TB:** There's a paradox here because America is seen as the innovator when it comes to the digital revolution. If you look at companies leading [it], many of them are American, be it Facebook, Google or Amazon. Do you think that the Europeans are not getting enough credit, or do you think that the Europeans are ahead... on how they've legislated... the digital revolution?

## “ Those who know the laws of everybody will be the lawyers who make the biggest money in the end ”

**VR:** The big internet companies are all coming from the US – that is true. Why have they developed in the US and less in the EU? I think that it has nothing to do with laws. It has a lot to do with mentality and culture. When you go to Silicon Valley, you see all these brilliant minds, which are very much linked to the University of Stanford, so business and thinking and university research go together. You can easily get money, and if you fail it is not a catastrophe. Now, we do not have that in Europe, because we have more divisions, not so much working together of universities and commercial entities. And, certainly, we are very much risk-averse: to invest money into a start-up is still not a usual thing to do in Europe.

**TB:** What are your main priorities as a Rapporteur for the Trade in Services Agreement [TiSA]?

**VR:** The TiSA agreement is being negotiated by 24 states, Europe counting for one, America also counting for one. We are trying to create a bigger opening of the markets to get rid of non-tariff barriers, for instance. If I look at the US and Europe, mostly our non-tariff barriers are very low – around six per cent. If a European wants to export a service, let's say into Turkey, the non-tariff barriers would be around 40/50 per cent, to China, around 60/70 per cent. That is not the reciprocity, the open markets we are imagining, and we would like to come to an opening of the market, so that services can freely flow and be a commodity, like everything else.

**TB:** Do you think it's a weakness that TiSA is not being negotiated by any of the BRIC nations?

**VR:** They [were] not excluded... Those countries... who want to come to an agreement [came together]. The agreement] should be capable [of being] taken over by the World Trade Organization [WTO]. That is why the terminology of this

agreement is [that of] a WTO agreement. But it is the friends of the service industry [negotiating]. We like to advance; we like to put standards on the table. Of course, this agreement should be open to all those who would like to join. I do believe that you cannot have such an agreement without China, for instance.

**TB:** What about legal services across borders? It's a very complex area, given that each jurisdiction has specific rules covering this area. How might TiSA take this into account?

**VR:** Well, I think it will facilitate and eliminate barriers because, already today, many lawyers are international lawyers who know much more than their own small national system; they know also the system of their neighbours. Business law is, by definition, international law, isn't it? Civil or criminal law can sometimes be much more nationalised. But in Europe, for instance, where I built bridges between different law systems, it is clear that those who know the laws of everybody will be the lawyers who make the biggest money in the end.

**TB:** The UN Convention on Transparency in Treaty-based Investor–State Arbitration is due to be signed this month. Signatories will commit to applying the UN transparency rules to historical, as well as future, trade and investment treaties. Would you be happy to see the Investor State Disputes Settlement Mechanism (ISDS) included in major trading agreements, such as TTIP (Transatlantic Trade and Investment Partnership), following the signing of this Convention?

**VR:** As a journalist, you will know that this is one of the most discussed elements of TTIP. Many people discover ISDS as if it had never existed. Well, it has existed since the 70s, and it is included in 1,400 European trade agreements. So, if we want it or if we don't want it, it is there. It is far from being perfect and that is why, in the latest agreements, which Europe has made with Canada and with Singapore, we have majorly reformed the ISDS... I'll tell you what I believe personally. Because we have 1,400 agreements and because we have countries with very different development of independence of courts, I believe that the only solution would be to create an international court with appointed judges, who create a basis of jurisprudence, so that we have legal certainty in all these questions... I know that this is not possible to be done at short notice, but it should be the goal to obtain, and maybe we could introduce into TTIP, an embryo of this international court. ☈



This is an edited version of a longer interview, which you can view in full on the IBA website at [tinyurl.com/VivianeRedingWebcast](http://tinyurl.com/VivianeRedingWebcast)



Here, some of the senior officers who took up new positions in January give their insights into their personal and professional backgrounds, and outline their vision for the future of the IBA and legal profession.



## IBA President, David W Rivkin

**Why law:** I grew up in New York City in a family that was always involved in international affairs, politics and the arts. I always knew that I wanted to become a lawyer. I saw how much my father, a lawyer, enjoyed the practice, working with clients to resolve their issues. I also saw that lawyers play an important role in civil society and that we have a special ability to effect change. Few other professions offer the ability to engage in intellectual challenges on a daily basis while at the same time dealing with the real world.

**Career highlights:** Besides the success of our clients and my IBA activity, I have also been pleased to be active in the development of the practice of international arbitration. I have served on the boards of many different arbitration institutions in the US, London, Stockholm and Singapore, and as a member of the Council of the American Law Institute. Through that work, and frequent speeches and articles, I have aimed to make international arbitration more efficient and have tried to focus practitioners on what is most important in serving our clients. I have also served on various US State Department committees, including the Sanctions Subcommittee and the NAFTA 2022 Commission. The NAFTA Commission developed mechanisms to encourage greater use of arbitration in the NAFTA region, such as judicial training.

**“ The IBA intends to bring further attention to lawyers who are not celebrated for this [pro bono] work and do the right thing without expectation of compensation or attention**

**Career challenges:** I have been very fortunate in my career to be part of a firm that gave partners freedom to develop interesting and successful practices and also encouraged lawyers to engage in pro bono and other public service activities. Overall, maintaining balance has been the greatest challenge. Doing all the work necessary to advance our client's case, manage our practice, work with the IBA and other organisations and raise a family have filled my days (fortunately, my wife Marilyn made the last of those tasks significantly easier).

**Challenges facing the legal profession:** First, we need to do more to improve the reputation of lawyers worldwide. No other profession devotes as much of its time to pro bono work and working for the public interest as the legal profession. The IBA intends to bring further attention to lawyers who are not celebrated for this work and simply do the right thing without expectation of compensation or attention. A second broad challenge is to resist

**Age:** 59

**Nationality:** American

**Education:** BA *magna cum laude* in history from Yale University; JD from Yale Law School

**Family:** married with two daughters and one grandson

**Hobbies:** baseball, theatre, opera, visiting the farms and vineyards on the North Fork of Long Island, where we have a holiday home

**Current position:** partner and Co-Chair of the International Dispute Resolution Group at Debevoise & Plimpton

**Specialism:** international dispute resolution

attempts in certain jurisdictions to restrict the independence of the legal profession. Lawyers must remain independent in order to preserve their important role as a check on government power. We are also all aware of recent attacks on the attorney-client privilege and on the privacy of lawyer communications. I have, therefore, formed a Presidential Task Force to work with the Bar Issues Commission and the IBAHRI to defend against these attacks.

**Why the IBA:** My activities have given me the chance to serve the profession globally and to have a positive impact on the lives of the people that lawyers serve. I am particularly proud that the IBA Arbitration Committee, beginning with the IBA Rules of Evidence and continuing through other guidelines that it has adopted, has done so much to improve the practice of international arbitration throughout the world.

**Key IBA priorities:** Besides working on the challenges mentioned above, I intend to expand the IBA's already outstanding work in promoting the rule of law and human rights, and in serving the needs of the profession. I have begun a new IBA Judicial Integrity Initiative, which will work to combat judicial corruption where it exists. I plan to continue the work of former President Michael Reynolds' Task Force on Climate Change Justice and Human Rights, as well as the President's Task Force on Human Trafficking, which will focus in the next two years on developing training programmes.

## Vice-President, Martin Šolc



**“** There is an ever-present identity crisis of whether law is a profession or a business or both. Some behave as professionals and others as aggressive businesspeople, failing to comply with the rules of ethics

**Why law:** I was passionately keen to become a theatre director or study anything to do with the stage. Unfortunately (and with rather theatrical timing), the family friend who was supporting me died just before the performing arts school exams. I was unsure of my next steps, so I enrolled in the law faculty. I don't think I was the keenest law student to begin with. In fact, it wasn't really until I had completed my studies that I began to be fascinated by the law.

**Career highlights:** I became Vice President of the Czech Bar in late 1989, and I took a lead role in re-establishing the Czech Bar as a force in the then-Czechoslovakia's justice system after the fall of the Iron Curtain. I was elected Lawyer of the Year 2007 and 2011 in Commercial Law by the Czech Bar Association and epravo.cz. Becoming the first lawyer from Central Europe to attain the post of IBA Vice President has also been a particular personal highlight.

**Career challenges:** With the fall of the Iron Curtain, I was thrown into deep, uncharted waters, both as regards client work and in relation to my new role in the Czech Bar Association. So I had to learn to swim very quickly! There was no reasonable regulatory framework in place and we were asked to help draft the new legislation, which was constantly evolving. Launching a new firm in the immediate aftermath of 40 years of communism was genuinely challenging. I am proud to say that we learned quite fast and soon started to compete with international law firms.

**Challenges facing the legal profession:** I believe there is an ever-present identity crisis of whether law is a profession or a business or both. Some behave as professionals and others as aggressive businesspeople, failing to comply with the rules of ethics. There have been lingering effects of the ongoing global financial crisis with respect to investor confidence in the Central and Eastern Europe region. Additionally, political turmoil within the region, such as Ukraine, makes markets vulnerable.

**Why the IBA:** The opportunities for learning and dialogue have been incredible and the chance to build lasting friendships all around the globe is something I treasure very much. You discover what is needed in various regions and countries, and together there is perhaps even an opportunity to do some good at the end of the day.

**Key IBA priorities:** I firmly believe it is crucial that the IBA is perceived throughout the world as a global voice of conscience of the legal profession. We must ensure that it is not considered externally as a mere conference organiser. More specifically, I have three key priorities at the IBA. First, the 'IBA Digital Hub', due to go live this year, which will connect lawyers worldwide by streaming content and putting other resources online. Secondly, improving benefits for group member firms and having an in-depth discussion about what kind of content can maintain their interest. On an intuitive level, I would prefer to draw content from the world of PPID – pro bono, ethics, human rights etc – as the quality of legal practice education in these firms may exceed that offered by the IBA. Lastly, my 'friendliness' project, which aims to help people have easy access to the organisation and functionality of the IBA, such as through the 'My IBA' user profile.

**Age:** 61                    **Nationality:** Czech

**Education:** Faculty of Law, Charles University, Prague, CZ (MA, 1976; Dr.Iur, 1982)

**Hobbies:** music, theatre, literature, history, exploring new technology

**Current position:** Founding Partner, previous Managing Partner and currently Senior Partner of Czech law firm Kocián Šolc Balaštík

**Specialisms:** mergers and acquisitions; corporate restructuring

## Secretary-General, Horacio Bernardes-Neto

**Age:** 59

**Nationality:** Brazilian

**Education:** Bachelor of Law, Universidade de São Paulo; Bachelor of Pedagogy, Universidade Oswaldo Cruz de São Paulo; post-graduate, Institute of International Commercial Law, Universität zu Köln, Germany

**Family:** married, with one son and two daughters

**Hobbies:** horse riding, cooking, reading, travelling

**Current position:** Senior Partner of Motta, Fernandes Rocha Advogados, São Paulo and Rio de Janeiro

**Areas of practice:** corporate M&A, antitrust, arbitration, contracts



**Why law:** My big interest when I was young was the study of foreign languages. The joke at home was that my parents' fear was that I was preparing myself to be a hotel concierge! I come from a family of lawyers: my father was a practising lawyer; my grandfather a notary; and my sister a law student. So I decided that I should go down another path. Therefore, I chose to study pedagogy and started at the law faculty, aiming to shift to a diplomatic career after two years of study, a requirement at the time. Very quickly, I fell completely in love with this profession – and Brazil lost a polyglot diplomat!

**“ My intention is to work for the IBA to be a better agent of positive change in the world, by encouraging the adoption of laws and regulations that promote the rule of law, democracy, free speech and the fight against poverty and discrimination**

**Career highlights:** I am involved in many of the largest and most sophisticated M&A transactions in Brazil, as well as in many of the major corporate restructuring and reorganisation operations. I have been a member of the IBA since 1982, having served both in the PPID and in the LPD. I am the first Brazilian and native Portuguese-speaking officer of the IBA, and helped create the IBA São Paulo Regional Office, the first office of the IBA incorporated abroad. I have also chaired other national and international organisations

at the Centro de Estudos das Sociedades de Advogados, possibly the largest association of law firms in the world, and the Association Internationale des Jeunes Avocats.

**Career challenges:** Founding a solid partnership with prominence in Brazilian commercial cases.

**Challenges facing the legal profession:** In Brazil, the poor quality of much of the education for recently graduated colleagues, due to the disorientated and uncontrolled creation of new law faculties of very low quality. This results in herds of poorly educated professionals, unable to pass the bar exam, and an enormous number of new lawyers every year.

**Why the IBA:** Besides the IBA providing extraordinary networking opportunities, I also see the importance of the Association globally, promoting discussions of different legal systems, integrating committees and fora by promoting cooperation and supporting the work of the regional fora.

**Key IBA priorities:** It is my intention to promote programmes across Africa, the Middle East, Latin America and Asia, subsidised by the Association and with simultaneous translation – as we presently do in the BIC. My intention is to work for the IBA to be a better agent of positive change in the world, by encouraging the adoption of laws and regulations that promote the rule of law, democracy, free speech and the fight against poverty and discrimination. My work is also directed to defending the integrity, independence and core values of the legal profession, high-level legal education and efficient management of bars and legal professional associations.

## LPD Chair, Almudena Arpón de Mendívil



**Why the law:** I have been very fortunate. I had the best parents one could wish for, an example throughout life, who gave me a great education in the broadest sense. I chose to enter the law without a real vocation to be a lawyer at the time, basically because I didn't know the true scope of the profession. I wanted a tool to forge a professional career that would allow me to achieve real goals in life and in an international environment.

**Career highlights:** Becoming a member of Gómez-Acebo & Pombo's Board of Directors, as well as a member of the Board of Directors of the Spanish satellite company Hispasat, SA, and of its Executive Commission and Appointments and Remuneration Commission. I am also Secretary General of the Spanish luxury association Círculo Fortuny.

**Career challenges:** The amount of time and energy dedicated to my work and the difficulty of ensuring others accept the seriousness of my commitment; the need to convince every new client that you are the best option and meet that standard. Being a woman does not help on those fronts. The greatest challenge now that I have been in practice for so many years

is to maintain the same spirit, motivation and enthusiasm: working with younger colleagues is essential for this.

**Challenges facing the legal profession:**

The need to adapt to a continuously changing environment, with the consequent legal changes; increased and new forms of competition.

**Why the IBA:** Because of my interest in international developments and the benefits of cultivating international contacts. I have learned the benefits of keeping an open mind, allowing me to anticipate moves before they happen at a local level. I have also established relationships with leading practitioners from other countries, many of whom I consider my friends.

**Key IBA priorities:** To further engage in-house counsel with the IBA through the LPD corporate counsel forum, with ad hoc programmes and with our committees and fora activities. To promote the LPD's regional activities, paying special attention to North America. To promote the activities of the committees and fora, maintaining the highest standards of quality. To sustain and improve awareness of the relevance of the legal profession. I hope that the IBA will strengthen its role as 'the Association' of leading legal practitioners worldwide, increase its relevance with international institutions and become an essential tool in terms of sharing knowledge and networking.

**Age:** 53

**Nationality:** Spanish

**Education:** law degree from ICADE (with honours); master's degree in community law from the College of Europe in Bruges (scholarship from the Ministry of Foreign Affairs); PIL Harvard Law School; Dallas Academy of American and International Law

**Family:** single

**Hobbies:** skiing, golf, dance, literature, movies, theatre

**Current position:** partner since 1994; Head of Telecommunications Media and Technology (TMT) within the corporate department

**Specialisms:** corporate and antitrust; TMT

## SPPI Chair, Stephen Macliver

**Nationality:** Australian

**Education:** B Juris and LL.B, University of Western Australia

**Family:** married, no children

**Hobbies:** photography and sharing a bottle of wine from my extensive collection built up over many years

**Current position:** Chief Executive, Sparke Helmore Lawyers, Sydney, Australia

**Specialisms:** my role combines leadership, strategic, management and organisational functions. I'm responsible for managing the firm's shared services teams and assisting the Board and management to implement the firm's strategic plan

**Why law:** Growing up and being educated in Western Australia, very early on I embraced the importance of hard work, perseverance and the need to be a 'self-starter'. I was determined to study law and worked three part-time jobs whilst I studied. Whilst an undergraduate, I had the opportunity to undertake work experience in the Kimberley region of Western Australia, and here I was first exposed to a justice system that was egregiously failing our indigenous Australians. It was that experience that ignited my interest in the rule of law and access to justice. I spent my first six years of practice at the Aboriginal Legal Service, culminating in becoming its principal legal officer for Western Australia.

**Career highlights:** Before joining Sparke Helmore, I was the chief executive at Bell Gully, a leading New Zealand law firm. I also previously held the role of executive managing partner of Minter Ellison (then the 15th largest law firm in the world). I started my management career in the early 1980s when I led an Australian state-wide legal aid service representing indigenous Australians.

**Career challenges:** Managing law firms is a delicate balance between constantly encouraging change, adaptation and innovation as quickly and effectively as the firm can do so, while needing to convince and take partners on the journey. The innately cautious and conservative nature of many lawyers, who are

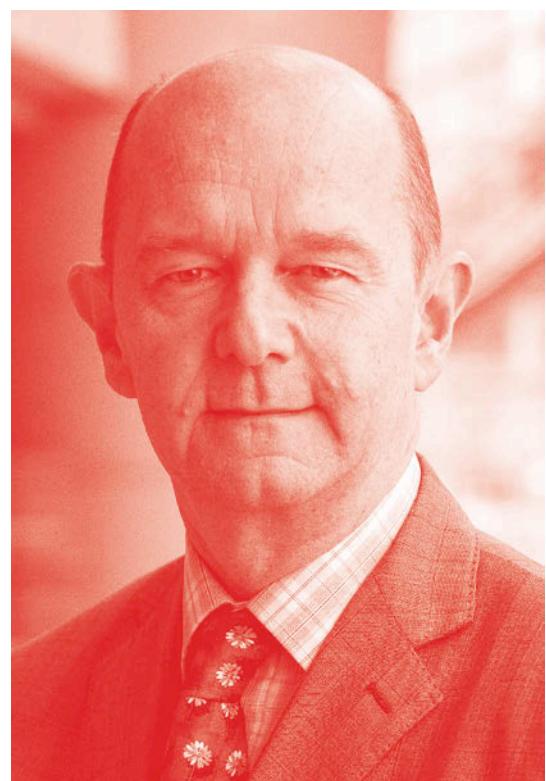
often content with the status quo and prefer to delve into the detail rather than focus on the bigger picture, always provides a challenge.

### Challenges facing the legal profession:

The Australian market has always been a challenging one due to the quality and number of lawyers operating in a highly competitive environment. The shift to an overtly buyers' market, constrained increases in charge rates, increasing pressures on margins, the advent of international entrants and other pressures on the traditional (partnership) business model have only heightened those challenges.

**Why the IBA:** Initially I joined the IBA to network and develop contacts and relationships. However, that initial focus gave way to wanting to become more active in the organisation by making a contribution to its valuable work, in which I passionately believe.

**Key IBA priorities:** My vision for the Section I now chair is to see it become an organisationally strong, engaged and respected Section acknowledged through its 15 committees for the quality of its work, thought leadership and contribution to contemporary issues of global public and professional interest.



## BIC Chair, Margery Nicoll

**Why law:** I was very fortunate to be among the first Australian student travellers who visited Europe and Asia as tourists. In having time to explore exposure to the different views and legal systems, my real interest in law began. The Law Council of Australia – which I joined after selling my own practice on the Gold Coast – is both challenging and rewarding. This is partly because of its legal constitution, which ensures an ongoing dialogue over an appropriate balance between federal and state issues; partly because I have been involved during a unique period in its history, which has seen it evolve from a fledgling body to Australia's peak lawyer representative organisation; and partly because of the range of exceptionally talented people I have met along the way.

**Career highlights:** A highlight of my career has been as an inaugural member of the IBA Bar Issues Commission Policy Committee, as well as chairing the Committee and working as an executive member on the Commission. Through these roles, I have seen first hand the effectiveness of the BIC in assisting bars. For example, it was through a grant from the IBA in conjunction with assistance from the Law Council that it was possible to establish the South Pacific Lawyers' Association. A further highlight was the IBA Human Rights Institute seminar on bar associations' best practices in Myanmar last year, where I had the honour of meeting Daw Aung San Suu Kyi. Another significant initiative I am involved with is the Centre for Asia-Pacific Pro Bono (CAPPB), which has facilitated many worthwhile projects, including the development of a pension fund in Bangladesh and advocacy training in Papua New Guinea.

**Career challenges:** One great change that the Australian national profession began to confront in my early years at the Law Council involved the mobility of lawyers within Australia. The Law Council was integral to the adoption of a mutual recognition scheme that provided Australian lawyers with a cutting-edge solution to interstate mobility. We have since had to deal with issues involving the recognition of foreign legal consultants and overseas qualifications. Inevitably, this was followed by perhaps the most significant change of my time in Australia – the emergence of large national and global law firms – which has sparked an ongoing heated debate about whether law is a 'business' or a 'profession'.



**Nationality:** Australian

**Education:** Bachelor of Arts and Laws from the Australian National University; Master of Arts from Sydney University

**Current position:** Deputy Secretary-General and Director, International, of the Law Council of Australia

### Challenges facing the legal profession:

From the Law Council's perspective, challenges include increased competition from non-lawyers, the effect of technology on legal practice, inadequate legal aid funding and resourcing of the court system. International challenges are twofold. First, there is a need to address the fact of international mobility. Fly in/fly out is happening whether it is authorised or not, and we need to determine the best way to regulate it in the interests of all concerned. The second challenge relates to international human rights. In the Australian region, we are particularly sensitive to human rights and rule of law issues in the Asia-Pacific. There is a need for the international community to identify and react as effectively as possible as these issues arise.

**Why the IBA:** I joined the IBA because it is best-placed as an international organisation to respond to all these challenges, and to exert influence through the development of best practice guidelines, peer support, training and shared information. The IBA shows why a strong and independent legal profession is essential for the proper administration of justice, and what can be done when lawyers throughout the world share the same commitment.

**Key IBA priorities:** There is now a unique opportunity for the PPID to be a cohesive and vibrant division. To do this, I wish to ensure that the BIC is seen as a welcoming, responsive and inclusive body for both mature and developing bars. I am also very pleased to be co-chairing, with Sylvia Khatcherian, a Presidential Task Force established to examine attacks on the profession, which will focus on issues such as client privilege, self-regulation, independence and privacy.

## IBAHRI Co-Chair, Hans Corell

**Why law:** I chose to enter the law because I wanted to become a judge in my own country. So I did: I was appointed Judge of Appeal in 1980. But my career then developed in a slightly different but extremely interesting manner.

**Career highlights/challenges:** At the UN, I was involved in the establishment of the international war crimes tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the International Criminal Court. During that period, I also had to oversee the establishment of the International Seabed Authority, the International Tribunal for the Law of the Sea and the Commission on the Limits of the Continental Shelf. Other challenges were accompanying Kofi Annan when he went to Baghdad in 1998 to negotiate an agreement with Saddam Hussein on access for weapons inspectors to the presidential palaces, and negotiating and executing the transfer of the Lockerbie suspects from Tripoli to the Netherlands for trial.

**Challenges facing the legal profession:** Working for the establishment of the rule of law, of which human rights are a core element.

**Why the IBA:** Having worked in public service during my whole professional career, I thought

that it would be a natural step to join the IBA. The contacts that I have made and the things that I have learnt in working with fellow members in the IBA and my friends in the IBAHRI secretariat are invaluable.

**Key IBA priorities:** Supporting the IBAHRI, in particular since the objectives of the Institute tally exactly with what I still hope will be achieved: that the rule of law is established in all states and that people understand that the rule of law is not something reserved for lawyers. More generally, I am focused on conflict prevention, and the enormous threats against peace and security generated by world population growth in combination with climate change. The world cannot afford any more conflicts like the one in Iraq in 2003, and now in Syria and Ukraine. In my addresses and writings, I am focusing on the UN Security Council and in particular its five permanent members. They hold the key to international peace and security. But a condition is that they themselves bow to the law and in particular to the UN Charter that they are set to supervise. The root causes of conflicts anywhere in the world are the same: no democracy, no rule of law. The Council, therefore, has to act, and the permanent members have to join hands. Needless to say, the Western democracies must take the lead in this effort. ☈

**Age:** 75

**Nationality:** Swedish

**Education:** law degree at Uppsala University, 1962

**Family:** married with two children and three grandchildren

**Hobbies:** birdwatching and piping [playing the bagpipes]

**Current position:** retired, but engaged in various organisations and activities, focused on strengthening the rule of law. Formerly Under-Secretary-General for Legal Affairs and the Legal Counsel of the UN

**Specialisms:** international law, human rights law, penal law, constitutional law, administrative law, real estate law and the law of the sea





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# Sexual violence in Darfur

The western region of Sudan has seen more than a decade of brutal conflict, in which rape and violence against women have been endemic. Following the IBA Human Rights Institute's innovative in-country legal access programme, *Global Insight* explores the challenges, complexities and outlook for the national – and international – fight against gender-based violence in Darfur.

HANNAH CADDICK

In November, independent Darfuri news channel Radio Dabanga reported that more than 200 women and girls had been raped by Sudanese government forces in the town of Tabit, North Darfur. The government has denied NGOs access to the town to investigate the claims. In a statement to the UN Security Council, International Criminal Court Prosecutor Fatou Bensouda said it was 'disturbing' that 'the Government of the Sudan denied full access to Tabit, thus frustrating full and transparent investigations into serious allegations of sexual and gender-based crimes'.

In an attempt to corroborate Radio Dabanga's report, Human Rights Watch conducted remote interviews with victims, perpetrators and witnesses, and re-asserted the allegations in its own report released in

February. The only organisation to have access to Tabit has been UNAMID, the UN-African Union peacekeeping operation in Darfur, which reported: 'The team neither found any evidence nor received any information regarding the media allegations during the period in question.' Their assessment has been widely criticised. They did, however, report an unusually high number of government military personnel in the town when they visited.

Perhaps most disturbing of all is the fact that Bensouda's comments followed her announcement that, due to a lack of cooperation from the Sudanese, the Court had 'no choice but to hibernate' its 'investigative activities in Darfur', following its 2005 referral to the International Criminal Court (ICC) for the perpetration of mass atrocities – including systematic rape.

## A decade of conflict

In the western Darfur region, conflict between the Sudanese government and rebel groups – the Liberation Movement/Army (SLM/A) and Justice and Equality Movement (JEM) – has raged on since 2003. The last decade has seen numerous failed peace agreements, escalating violence and swathes of reports of gross human rights violations by government forces, including accusations of torture, unlawful detention and ethnic cleansing.

The uprisings and the government's brutal counter-insurgency campaign have claimed the lives of an estimated 300,000 people – either during the hostilities or as a result of conflict-induced disease and starvation. The situation has been too dangerous for many

NGOs to operate in Darfur at all and, in 2009, a further 13 remaining international aid groups were expelled in response to the ICC issuing an arrest warrant for Sudan's sitting head of state, President Omar al-Bashir.

Hundreds of villages have been destroyed during the fighting. More than 2.5 million people have been forcibly displaced and are currently living in internally displaced persons (IDP) camps in Darfur and in neighbouring Chad, where they face malnourishment, poor sanitation and further violence. More than 400,000 of this number were displaced in 2014 alone.

Sexual and gender-based violence has characterised this conflict. The rape of women and girls by the Sudanese forces, government-supported militia (including the Janjaweed) and rebels is endemic – in villages, IDP camps and the surrounding areas. NGOs estimate that thousands may have been raped.

According to Sternford Moyo, former IBA Human Rights Institute (IBAHRI) Co-Chair and current IBA African Regional Forum Chair, in Darfur, as in the Democratic Republic of the Congo, 'sexual and gender-based violence has been so systematic and widespread that the conclusion that those involved view it as part of their war strategies and weapons is inescapable'.

Events in Tabit are tragically emblematic of a conflict in which rape, as in other wars throughout history, has been used tactically. 'Parties to the conflict appear to believe that they should attack their enemies where it hurts the most – that is to say, their wives, daughters and children,' says Moyo.

## IBAHRI programme to address sexual and gender-based violence in IDP camps in Darfur: capacity building and training

Through 2014, the IBAHRI, in partnership with the Darfur Bar Association and the Human Rights and Social Justice Research Institute at London Metropolitan University, implemented a 30-month programme to build the capacity of Sudanese lawyers in order to promote women's rights in the region.

The programme trained 19 Sudanese lawyers in the design and implementation of women's rights projects to be delivered in camps for internally displaced persons in Darfur.

Using this training, the lawyers then implemented five innovative community-based projects, which aimed to sensitise displaced communities to the issue of women's rights, address gender-based violations and provide access to justice through provision of paralegal services.

In the final module of the programme, the outcome of the women's rights projects was showcased to a panel of international and regional funders who provided critical feedback on project methodology and made recommendations to support the development of effective and sustainable initiatives for those most vulnerable in Darfur.

*Funded by the Baring Foundation and the John Ellerman Foundation*

**“Without serious and collaborative efforts by government, civil society and the international community... sexual and gender-based violence become an inevitable element of conflict”**

Sternford Moyo  
Chair, IBA African Regional Forum; former Co-Chair, IBAHRI

### 'A cheap and devastating weapon'

At the launch of the Report of the UN Secretary-General on Sexual Violence in Conflict, the office's Special Representative, Zainab Hawa Bangura, described rape in conflict as 'a cheap and devastating weapon'. As with the use of child soldiers, mass rape requires little in the way of military expenditure, coordination or training but tears apart lives, families and communities, and restates power, hierarchy and terror.



## **“ It is largely ‘cost-free’ to rape a woman, child or man in conflict**

Zainab Hawa Bangura  
*Special Representative, Office of the  
UN Secretary-General on Sexual Violence in Conflict*

This ‘cheapness’ also refers to the fact that, as Bangura puts it, it is ‘largely “cost-free” to rape a woman, child or man in conflict’. In conflict and post-conflict regions such as Darfur, lack of infrastructure means that serious sexual crimes go unaddressed.

For victims of rape and sexual violence, accessing medical treatment is particularly difficult. According to Médecins Sans Frontières (MSF), medical care in remote IDP camps is limited or non-existent. Elsewhere, victims of assault may have to wait days for a medical examination to confirm the rape or may not receive any medical care at all (in Tabit, it was reported that perpetrators forcibly prevented such access).

MSF also reported that, due to the rejection and stigma they may face in their communities, survivors of sexual violence are often reluctant to seek any assistance at all. If they do, and if they are able to identify their attacker (problematic in the situation of IDPs, with continually shifting populations and intruders, who are often masked militia), victims may then report the crime to the police, where there is no guarantee the allegations will be taken seriously.

The next step in bringing a case is to secure legal representation – difficult in a country where legal aid and pro bono are not common practice and where, in IDP camps, there is a paucity of lawyers and paralegals, which the IBAHRI’s 2014 project aimed to address

(see boxes). The options available for taking a case to court are also limited. According to a lawyer from West Darfur, most disputes in IDP camps are heard in traditional courts, which operate outside of the Sudanese justice system: ‘The Elders in the camps play a role in hearing disputes between individuals. Where there is no government presence in the camps, the Elders rely on local traditions and norms.’ However, these traditional courts will not hear any crimes of a sexual nature.

The other option is to go to one of the two criminal courts. Sudanese lawyers taking part in the IBAHRI training explained that, before the conflict, each town had a three-court system with a criminal court of three judges. Now there are only two criminal courts in Darfur: one new court based in El Geneina (widely considered to be ineffective); and one mobile court, based in El Fasher, but which travels between different states in the region and has only one judge.

Most significant in bringing cases of sexual violence in conflict, is the fact that rape is often committed by government forces and supported militia. In such cases, many states are unable – or unwilling – to bring perpetrators to justice. Under the 2007 Armed Forces Act, the 2008 Police Act and the 2010 National Security Act, Sudanese law grants immunity to those with government affiliations: a victim cannot take legal action against members of the military, security services, police or border guards (there is some dispute as to whether the Janjaweed is part of the government’s Popular Defense Forces and, therefore, whether this immunity applies to them).

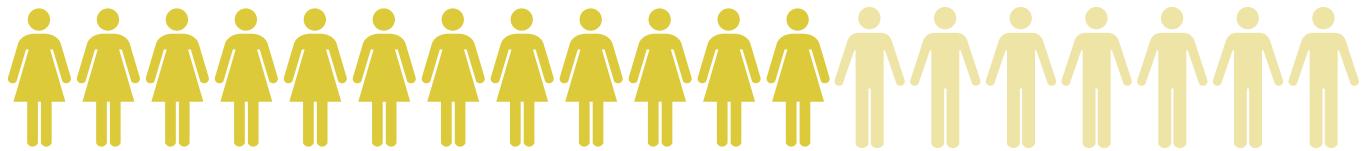
## **“ I had never known before that women had rights**

Male training participant  
IDP camp, El Geneina

### **Women in Darfur**

With such structural instability and insecurity, and the politicisation of rape in conflict, justice for these victims is, as it stands, unattainable. In Darfur, addressing sexual violence – both from a preventative and from a criminal justice point of view – is made all the more difficult by the unequal position of women under law and in society (see also box on economic and social rights).

Although the Bill of Rights – which forms part of the Sudanese Interim Constitution (2005) – states that women have an equal right to life, dignity and integrity of the person, Sudanese lawyers reported that one could never invoke constitutional protections before any court



IBAHRI, with the HRSJ and DBA, trained 19 Darfuri lawyers who in turn trained...



other than the Supreme Court and, even then, such provisions would not be cited in judgment. Indeed, while international jurisprudence provides that rape and sexual assault are tantamount to violations of these rights, there is no established body of jurisprudence of the Sudanese constitutional court that establishes how to interpret the Bill.

Sudanese laws also offer little protection for victims of rape. First, the definitions of rape are limited only to vaginal or anal penetration, and only by a penis (oral rape and penetration with other objects are not covered by this definition). Second, and arguably most problematic, Article 149 of the Penal Code defines rape as the Sharia crime of *zina* – extramarital intercourse between a man and a woman – without consent.

Evidential requirements for proving non-consensual sex make upholding a claim of rape incredibly difficult. This is, of course, a problem that is not unique to this region; however, in Sudan, if a woman is unable to prove that she did not consent to such intercourse, she then risks being charged with the crime of *zina* because she has confessed to sexual penetration outside of marriage. This carries the punishment of death by stoning for married women and 100 lashes for unmarried women.

It is notable that while Sudan, during al-Bashir's presidency, ratified a constitution that contains a Bill of Rights that is broadly in line with international standards, its Penal Code falls woefully short. Moreover, of the many and various international treaties to which Sudan has become

## IBAHRI programme | Community projects 1–4: the rights of displaced women

Following their training on the IBAHRI-HRSJR programme, four of the five groups of Sudanese (North Darfur, South Darfur, East Darfur, West Darfur) delivered community projects on the rights of displaced women in IDP camps.

The projects aimed to: (1) build the capacity of lawyers and paralegals in the regions; and (2) help women and young people in the IDP camps, by providing both theory- and skills-based learning. The groups employed a variety of teaching methods, from organising guest speakers to delivering rights-based lectures, facilitating discussion and

'brainstorming' sessions to using drama and performance.

They also provided the participants training in interviewing, reporting, writing and local methods for solving problems, and skills.

The topics discussed differed between groups, but broadly covered:

- human rights: concepts and law, including the Interim Constitution of Sudan (2005) and the Convention on the Elimination of All Forms of Discrimination against Women

- the rights of women
- women in Islam, focusing on interpretations of the Qur'an
- female genital mutilation
- psychological impact of rape and sexual violence

### Challenges

Security was the biggest challenge for all project groups. In some projects, the situation was considered too dangerous for participants to travel together or for any women to attend the trainings. In one case, due to financial and

a party (including the ICCPR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is notable by its absence.

Beyond the issue of rape specifically, training delivered by the IBAHRI-trained Sudanese lawyers also focused on educating IDPs and paralegals about social and cultural practices, such as female genital mutilation, that perpetrate the notion of the female body as a site of violence.

### Challenges and complexities

The IBAHRI training revealed that both female and male IDP participants were unaware of their own human rights and specifically the rights of women. Many were particularly relieved and excited to learn about passages in the Qur'an that promoted and stipulated rights for women. One male participant said 'I had never known before that women had rights' and promised that he would endeavour to change his treatment of his female counterparts.

The religious and ethnic make-up of Sudan, and in particular Darfur, with its centuries' long history of war and mass displacement (see timeline overleaf) also makes efforts to address sexual and gender-based violence difficult. IBAHRI training participants explained that building relationships with tribal leaders, camp leaders and religious leaders (imams) is essential to protect the rights of women.

For many, the answer to ending sexual violence in conflict is to end conflict altogether. But if we accept that conflict is occurring across the world without certainty of abating, the project must be to work towards eradicating war while curbing its worst excesses.

Not all conflicts have been characterised by sexual violence, and those that have varied greatly in the extent to which rapes and assaults have taken place, suggesting there are certain conditions under which such attacks become prevalent and that, where conflict cannot be stopped, widespread sexual violence should be considered preventable.

**“The training helped me to obtain alternative means of earning a living, instead of making wire or selling tea on the street. It has changed my life. I will never be the same again”**

Female prisoner, Khartoum, and participant in the community project on economic rights



Sudanese lawyers participating the IBAHRI training © IBA 2014

logistical limitations, the group had to use transport provided by the Janjaweed, which prevented any women travelling. The remote location of some IDP camps also meant that they were hard and expensive to get to, and lack of funding in general hindered the projects.

#### Successes

- With increased understanding of their rights and the law, there has been an increase in reporting of gender-based violence, including cases of domestic violence and divorce. Many of those cases that have gone to trial have found in favour of the women.

- Increased understanding amongst women in the camps about psychological problems and trauma sustained from experiencing sexual violence.
- Positive relationships formed between the women in the camps and the project lawyers. Several women who had been raped sought help from the project groups and as a result received treatment, rehabilitation and, in some cases, psychological care.
- Women have become more involved in IDP camp activities and leadership roles, including camp leaders and imams. Many symposia are also conducted in the camps by the women. The training

empowered women and many activists, for example, started wearing clothes bearing slogans.

- Although the traditional courts systems are still dominated by men, groups observed an increase in the role of the women. In conventional courts the groups also noted that more women were willing to come forward as witnesses in support of other women.
- Imams engaged in discussions about women's rights during Jumu'ah (Friday prayers) and preached against violations of women's rights and dignity.

For Moyo, sexual violence in conflict is a result of failure on the part of states and the international community to provide protection to vulnerable groups. ‘In Darfur, as in the Congo,’ he says, ‘we have seen that, without serious and collaborative efforts by government, civic society and the international community aimed at putting in place strategies to protect vulnerable groups such as women and children, gender-based violence become an inevitable element of conflict.’

**“From the perspective of prosecutions, there is a rapidly developing awareness... of the need to move beyond “myths” such as the idea that sexual violence is merely a regrettable consequence of war**

Nina Jorgensen  
Visiting fellow, Harvard University;  
Professor, Chinese University of Hong Kong Faculty of Law

### International humanitarian law

With the UN’s Global Summit to End Sexual Violence in Conflict, held in London last year and co-chaired by actor and Special Envoy for the UN High Commissioner for Refugees Angelina Jolie, gender-based violence and rape in conflict is gaining global media attention. The Summit itself was the largest ever gathering on the topic of violence in conflict, with 1,700 delegates and 123 country delegations including 79 ministers. Yet the outcomes have been the subject of criticism. The Summit, according to the gov.uk summary of the event, ‘agreed practical steps to tackle impunity for the use of rape as a weapon of war,’ and to ‘begin to change global attitudes to these crimes’, but what are these ‘practical steps’? And how do they propose to change attitudes?

International criminal law and international human rights law no longer struggle in recognising wartime rape and gender-based violence as a crime. Discussions have moved on so far that academics are addressing the semantics of the charges (‘war crime’ or ‘crime against humanity’), which it is hoped will change attitudes.

There is also a growing body of jurisprudence addressing rape in an international setting – for example, *Prosecutor v Akayesu* (International Criminal Tribunal for Rwanda 1998); *Prosecutor v Sesay, Kallon and Gbao* (Special Court of Sierra Leone 2009); and, in particular, the landmark decision from the International Criminal Tribunal for the former Yugoslavia in 2001, which ruled that the systematic and widespread gang rape, torture and sexual enslavement of Muslim women in south eastern Bosnia and Herzegovina by Bosnian Serb soldiers, policemen, and members of paramilitaries constituted ‘torture’ and ‘crimes against humanity’.

Nina Jorgensen is a visiting fellow at Harvard University and Professor in the Faculty of Law at the Chinese University of Hong Kong, having also previously been employed at a number of international criminal courts and tribunals. ‘From the perspective of prosecutions, there is a rapidly developing awareness, reflected in the jurisprudence and in the charges being brought currently before the ICC, of the need to move beyond “myths” such as the idea that sexual violence is merely a regrettable consequence of war.’

### TIMELINE OF KEY DATES

**1875**

Darfur (‘land of the Fur’, a tribe in the region) first annexed to Egyptian Sudan

**1899**

Darfur becomes part of Anglo-Egyptian condominium in Sudan

**1946**

British and Egyptian governments merge north and south Sudan into a single administrative region as part of British strategy in the Middle East

**1956**

Sudanese independence from Anglo-Egyptian condominium

**1955–1972**

1st Sudanese Civil War between southern separatists and Sudan government (GoS)

**1972**

Signing of the Addis Ababa Agreement between Anyanya and GoS

**1983–2005**

Collapse of the Addis Ababa Agreement and beginning of the Second Sudanese Civil War

**2003**

Darfur rebel groups (Liberation Movement/Army (SLM/A) and Justice and Equality Movement (JEM)) attack government military installations, saying GoS in Khartoum neglects arid region and arms Arab militia against civilians

**2007**

Violence between government forces and rebels increases. Government militia attack refugee camps; rebels target oil fields. International peacekeeping operations in and around Sudan stepped up. The ICC issues its first arrest warrants for crimes in Darfur

**2006**

Sudan and an SLA faction sign peace deal. SLA rival faction and JEM reject deal. Two major attacks targeted at aid agency compounds force hundreds of relief workers to relocate

**2005**

GoS and the SPLM/A sign Comprehensive Peace Agreement to end the decades-long Second Sudanese Civil War. UN Security Council refers the case of Darfur to the International Criminal Court. ICC launches formal investigations

**2004**

US characterises the conflict as genocide. UN human rights report says Sudanese troops and militia may be guilty of war crimes and crimes against humanity. UN Security Council passes a number of resolutions. The first of a series of failed peace agreements is signed

**2008**

26,000 troops and police for 'hybrid' UN-African Union (UNAMID) operation deployed to Darfur, but attacks continue. UN estimate death toll at 300,000 in five years.

ICC chief prosecutor charges Sudan's president Omar al-Bashir with masterminding genocide, killing 35,000 people and persecuting 2.5 million. Khartoum dismisses charges

**2009**

ICC issues an arrest warrant for Bashir on charges of war crimes and crimes against humanity in Darfur, the first time such a charge has been brought against a sitting head of state. 13 international aid groups are expelled from the region

**2010**

Bashir wins national elections. Fighting escalates between army and rebels, forcing thousands of Darfuris and Chadians to flee

A weak peace accord is signed between the GoS and JEM in March; a larger peace process begins in Doha in late-2010.

**2011**

More than 70,000 people have fled fighting since December 2010, says UN. Southern Sudan votes overwhelmingly to support secession from Sudan. In July the Republic of South Sudan is formed. The GoS and a newly-formed rebel coalition sign the Doha Document for Peace in Darfur (DDPD)

**2015**

ICC Prosecutor Fatou Bensouda announces that the Court is 'hibernating its investigative activities in Darfur' due to a lack of cooperation from the Sudanese

**2014**

**February** – Khartoum deploys the Rapid Support Force militia in Darfur. The militia attack villages displacing at least 30,000 people

**November** – Radio Dabanga reports that more than 200 women and girls have been raped by Sudanese government forces in the town of Tabit in North Darfur

**2013**

**January** – Fighting between two tribes over control of a Darfur goldmine displaces around 100,000 people

**May** – UN estimates 300,000 people newly displaced in 2013 alone

**November** – Khartoum announces a new offensive against the Sudanese Revolutionary Front in Darfur and other parts of Sudan

**2012**

As the DDPD is implemented with very limited success, violence in Darfur continues. The proliferation of militias, inter-communal violence, and the army itself remain threats to the civilian population. Conditions in, and security of, refugee and IDP camps deteriorate

## IBAHRI programme | Community project 5: economic rights of female prisoners

It was reported that many women from Darfur were being taken to Khartoum state prisons and that others were also living on the outskirts of the city as refugees. With no way to support themselves, these women often turned to illegal trading in tea and alcohol, the punishment for which may be a fine, a flogging or both, at the discretion of the court. As the majority of these women are poor and disadvantaged, many of them cannot afford to pay the court fine and end up remaining in the Khartoum prisons.

The Khartoum Group Project targeted long-term female prisoners and aimed to help them develop new skills and to educate them on their social and economic rights, in order to allow them to be independent and self-sufficient. It is hoped that the training will also help these women provide for their children.

The group delivered two workshops, which each included two training sessions. The first training session focused on vocational training (knitting and handicraft, making perfumes, baked goods, baskets and key chains, for example). The second training was rights-based. The group also delivered training and education on FGM. The women who participated were awarded certificates to evidence their newly learnt skills.

The group was presented with a certificate of appreciation by the Prison Warden for their efforts.

### Outcomes

- 120 women attended the training programme, of which 80 per cent were Darfuri. This workshop was implemented in partnership with another Darfuri-established NGO Ma'an on Serving Humanity (MSH).
- Products made by the beneficiaries were then sold, raising money which was used to help pay some of the women's fines.
- MSH was able to free more than 20 women with the assistance of local business people who donated money to help pay the fines.
- The training gave women skills to enable them to earn enough money so as to supplement the single daily meal provided by the prison. It also introduced a savings culture, which helped the women save money to pay the fines associated with their incarceration and so secure their release from prison.
- The women's prison authority and MSH signed a memorandum of understanding for cooperation in future training of female prisoners and allocated an area for those women who had already received training to work and sell their products.



Handmade perfumes, biscuits, cakes and jewellery made by female prisoners taking part in the IBAHRI Khartoum Group's community project © IBA 2014

But, in the town of Tabit, and villages and IDP camps across Darfur, the reality of mass rape and gender-based violence against women looms large in everyday life. The development of international humanitarian legal theory has little impact. With NGOs unable to operate in country the importance of hybrid 'ground-up' training (such as the IBAHRI's) is clear: by educating women and men about their human rights, they can be mobilised to claim those rights; by educating lawyers in proper handling of cases alleging rape, there may be more successful prosecutions.

All of this, however, is after-the-fact. 'Addressing gender-based violence,' says Moyo, 'requires decisiveness and a commitment by the international community to holding perpetrators of crimes against humanity to account.' While the ICC is forced to shelve its investigations, a tragic status quo continues. To stop these atrocities occurring and to protect the rights of women and girls, the international community must find a way to bring perpetrators to justice. ☈

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# Japanese corporate governance: a matter of principle

**Japan is taking significant steps towards accountability by introducing a new corporate governance code. However, not all listed companies are open to guidance, while some foreigners think the principles-based approach is too weak.**

**STEPHEN MULRENAN**

In November, Japan slipped into recession after its economy shrank for the second quarter in a row. Although somewhat unexpected, the sobering news delayed plans to increase the nation's sales tax and led to December's snap election, in which Prime Minister Shinzō Abe won a two-thirds majority. Despite the fact that Japan came

out of recession at the end of the year, the Bank of Japan's stated goal of permanently ending two decades of deflation seems as elusive as ever.

The government is acutely aware that only smart structural reforms have the potential to increase productivity and bring about much needed consolidation and investment.

Since the heyday of Japan's economic miracle, its approach to corporate governance has been very different from other leading economies. Japanese corporate law was finally modernised with the enactment of the Companies Act in 2006, which rewrote and consolidated multiple laws into a single piece of legislation. In May this year, the Act will be amended for the first time since its inception.

One of the main goals of the reform is to encourage more foreign investment by strengthening the corporate governance regime, which has needed considerable work for some time. The law in this area is fragmented, and there is a lack of independent oversight of companies: independent board directors are rare. It is usually the chief executive who nominates them, and candidates are often known to him from within the company.

The legacy of the 2011 Olympus scandal should not be underestimated either. Approximately US\$1.7bn worth of accounting irregularities were discovered by British chief executive Michael Woodford, before his subsequent dismissal and hasty departure from the country. Nick Wall, an Allen & Overy partner based in Tokyo, says: 'What the Olympus scandal showed us was that there are serious issues to be addressed in connection with the role of boards and management accountability in some Japanese corporations, although there is a point of view in Japan that Olympus is such a unique example that it would be wrong to draw too many conclusions from it.'

### **Comply or explain**

Reforming the Companies Act will address legislative gaps, as will calls for greater disclosure through the Tokyo Stock Exchange (TSE). Since mid-2014, the government has also been discussing the prospect of a corporate governance code, which would require the appointment of independent directors, and encourage greater shareholder engagement. A draft of the new code was finalised on 5 March, following consultation overseen by Japan's Council of Experts Concerning the Corporate Governance Code, headed by the country's Financial Services Agency (FSA) and the TSE.

Prior to these proposals being made, Japan was one of the few countries in the developed world without a corporate governance code. The new draft code is based on the Organisation for Economic Co-operation and Development's principles of corporate governance. It focuses on general principles and adopts a 'comply-or-explain' approach to enforcement. It will be reflected in the TSE's new listing standards, due to come into effect in June, and will apply to all TSE-1 and TSE-2 listed firms, and all other exchange-traded companies in Japan.

The 'comply-or-explain' obligation will have a major impact on listed companies in Japan, especially where they do not have at least two independent directors. Approximately four-fifths of the 1,800 companies listed in the first section of the TSE fall into this category. This means they will need to appoint independent directors, or explain why they have not done so in their corporate governance

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**“ Government and stock exchange policy with respect to governance has finally been clarified, with much more specificity than before ”**

Nicholas Benes

Representative Director

Board Director Training Institute of Japan

report, which most will file around December this year. Corporate governance reports are required within six months of annual general meetings, which for most companies fall in June, following a March fiscal year-end.

One senior corporate counsel at a leading Japanese trading company says that, although the draft code may not be perfect, it is a good start. 'With more outside director involvement, I believe that issues previously not discussed (because, for example, that was the norm) will be questioned by outside directors, and this will bring about more scrutiny of decisions made by the board,' she says.

Mori Hamada & Matsumoto corporate governance partner Shuhei Uchida worked for Japan's Ministry of Justice and has been involved in civil code revisions. He says the proposed code provides a good opportunity for the management of Japanese companies to reaffirm the importance of explaining their policies on corporate governance. 'This may be the first step to enhancing the effectiveness and transparency of the governance systems of Japanese listed companies and to achieving growth-orientated corporate governance.'

Uchida adds: 'The fact that Olympus had three outside directors confirmed that it's the substance that matters, rather than formalities. This recognition facilitated the principles-based approach that aims to achieve effective corporate governance under the particular circumstances of each company, instead of the traditional rules-based approach that tends to be more formal.'

### Mixed reception

The proposed corporate governance code requests the disclosure of numerous items, such as cross-shareholding, conflicts of interest, company goals and principles on corporate governance. Despite this, the adoption of a principles-based approach to compliance with the new code has not satisfied everyone.

Japan's powerful industrial lobby – the Keidanren – is strongly opposed to the idea of its members being told who they may or

may not appoint as directors, independent or otherwise. It argues that in past experience, the mere appointment of so-called independent directors has not in itself guaranteed effective corporate governance. It cites the Olympus scandal as an example, stating that the existence of independent directors on the company's board prior to Woodford's revelations demonstrates that they were not a deciding factor in delivering effective corporate governance at the company.

The corporate counsel of a Japanese trading company, who wishes to remain anonymous, agrees: 'Outside directors did not function in uncovering the Olympus episode, so it is questionable whether there really could be stronger governance just by introducing outside directors.'

Comparisons with Olympus, of course, do not take into account the fact that the new code aims to address the previous failings of the non-executive director position, by ensuring the holder is truly independent. The code emphasises the need for objectivity, stating that the board should 'welcome proposals from the management based on healthy entrepreneurship, fully examine such proposals from an independent and objective standpoint with the aim of securing accountability'.

A principles-based approach can help to bring about effective corporate governance. Companies can derive maximum benefit from the code, by being allowed the flexibility to apply it in the way that is most appropriate to their specific circumstances. Wall says:

'Given some of the hierarchical complexities within large Japanese corporates, imposing strict guidelines that corporates are forced to comply with would potentially present significant difficulties for large Japanese corporations.'

The absence of specific rules could even spur companies to exert greater effort, just to be on the safe side. Uchida says: 'While

### Key features of Japan's draft Corporate Governance Code

- Multiple independent non-executive (outside) directors (INEDs) (there must be at least two INEDs appointed to the board)
- De facto encouragement that one third of the board of global companies be composed of INEDs
- Directors' fiduciary obligations to shareholders as well as other stakeholders
- Principle of separation of management functions from oversight functions
- Encouragement of prudent risk-taking, efficient capital allocation, and sustainability
- Suggestion of a committee mainly composed of INEDs to advise on nominations, compensation, and other matters, as best practice
- Explanation/disclosure of company policy and procedures regarding the nomination and compensation of board members, and the reasons for nominating each board member
- Explanation/disclosure of company policy with respect to the code's rules
- Executive sessions where only outside board members are present
- Provision of information to all directors. Statutory auditors will be expected to help with information provision
- Internal systems for whistleblowing and reporting
- Director training and ongoing education/updates is required. Company policy regarding director training must be disclosed
- Financial knowledge required for at least one statutory auditor
- Board self-evaluation process, and evaluation of executives
- Succession planning and oversight of succession planning
- Board members may hire independent outside advisers at company expense
- Discouragement of over-boarding [where a board member holds too many board positions to the extent that they cannot fulfil their duties adequately]; disclosure of all concurrent director positions, and corporate policy regarding concurrent positions
- Encouragement of board diversity and the appointment of female directors
- Disclosure required as to the 'reason' and logic for cross-shareholdings
- Disclosure of arrangements for constructive engagement with/by shareholders

Source: The Board Director Training Institute of Japan (BDTI)

it will take some time for [companies] to get used to the principles-based approach, I expect that a common understanding on the appropriate level of efforts to be made will be formed through practice, which will work as a guidance for the companies.'

Another area of concern with the new code, highlighted notably by those from outside Japan, is the lack of emphasis on the chair of the board's leadership role and constructive challenge by non-executive directors. This contrasts sharply, they say, with the UK Corporate Governance Code.

While this may be true of the role of the chair, challenge by non-executive directors is addressed in the draft code, albeit not in precisely the same language as the UK Code. Principle 4.6 emphasises the role of non-executive directors in oversight by the board. Principle 4.7 focuses on the expected roles and responsibilities of independent directors in relation to: (i) the provision of advice on business policies and business improvement based on their knowledge and experience; and (ii) the monitoring of management through important decision-making at the board. It's not quite as strong as the view of the UK regulator, the Financial Reporting Council, which argues that 'an effective board should not necessarily be a comfortable place', but it's a step in the right direction.

Wall says: 'One of the factors that was perceived as contributing to the [Olympus] scandal was a culture of not questioning your line manager or superior. In combination with the Stewardship Code that was published last year, the new Corporate Governance Code should be a useful stepping stone to tackling this type of issue at board level, together with addressing the wider points of director accountability and transparency.'

### A good start

It's hoped that Japan's new governance code, combined with upcoming amendments to the Companies Act, will improve the attitudes of listed companies toward corporate governance.

In the context of Japan, a country whose corporate culture had previously prospered out of blind obedience and deference, a draft code with this degree of substance is – in the words of the Board Director Training Institute of Japan's Representative Director Nicholas Benes – 'nothing short of revolutionary'. Benes says: 'Government and stock exchange policy with respect to governance has finally been clarified, with much more specificity than before.'

'Effective corporate governance is a matter of culture as much as of law', says Dr Martin Brodey, a partner at Dorda Brugger Jordis Rechtsanwälte and Chair of the IBA corporate governance subcommittee. 'Given longstanding practices, the legal development needs time to influence management and corporate culture. Imposing a new, more stringent corporate governance system for listed companies in Japan is an important first step to ensure an up-to-date management of key companies on the market. Even if critics argue that the rules do not go far enough, they will help to eventually bring Japanese standards in line with generally accepted corporate governance rules and models, and will therefore sooner or later influence Japanese management culture.'

The new code also enables Japan to begin addressing criticism it has faced from foreign investors. The code's 'comply-or-explain' approach is not the mandatory requirement that many foreigners were hoping for. However, an important provision has been included in the supplementary law, regarding amendment of the Companies Act, allowing the government to re-evaluate it after two years. This will enable amendments to the principles-based approach to regulatory compliance to be made, should the required adoption rate of outside independent directors not be met. Whether the new code helps to revitalise the Japanese economy by encouraging investment, however, remains to be seen. ☀

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