

IBA GLOBAL

Aug/Sept 2015

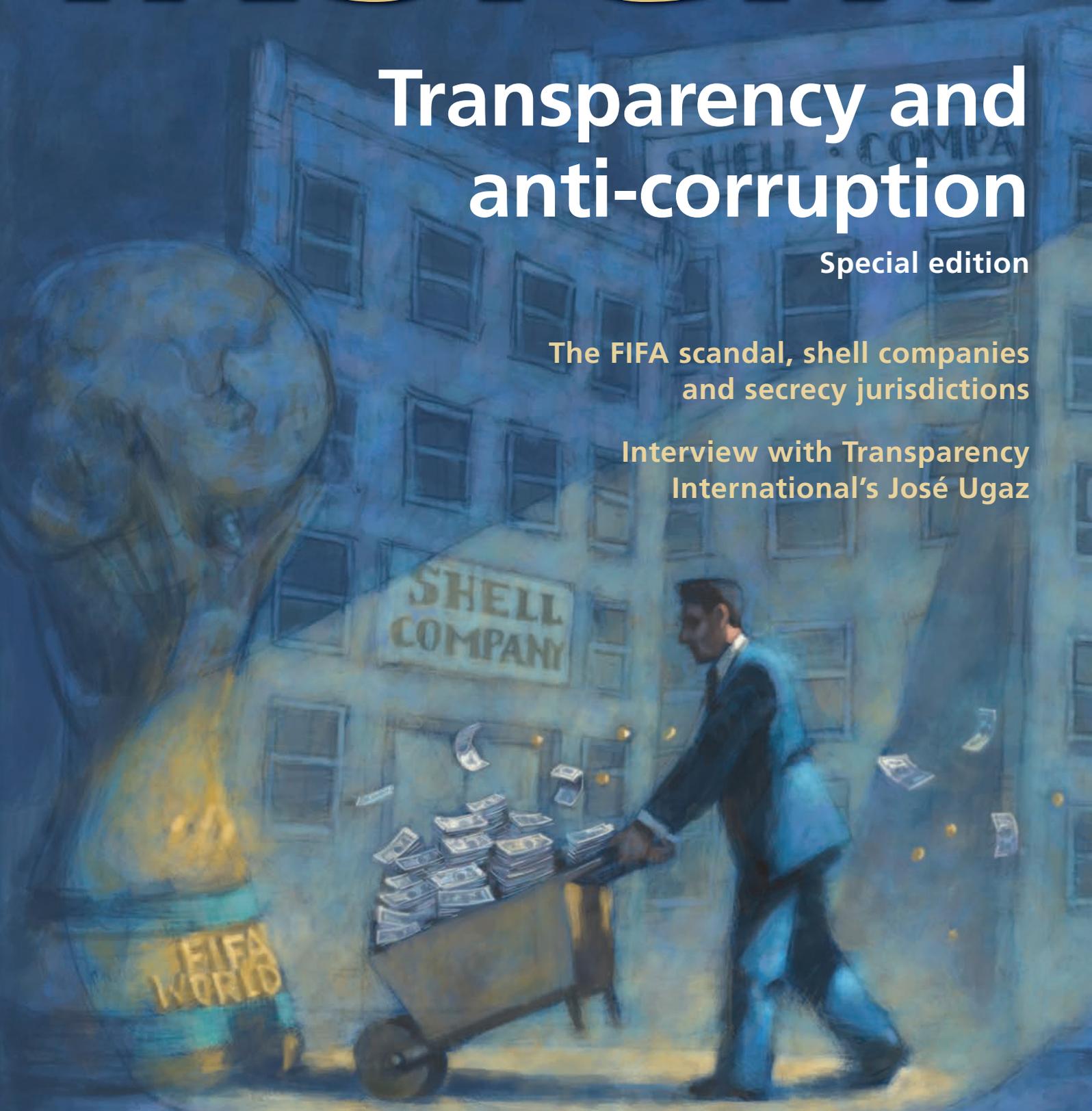
INSIGHT

Transparency and anti-corruption

Special edition

The FIFA scandal, shell companies
and secrecy jurisdictions

Interview with Transparency
International's José Ugaz





Vienna 4–9 October 2015

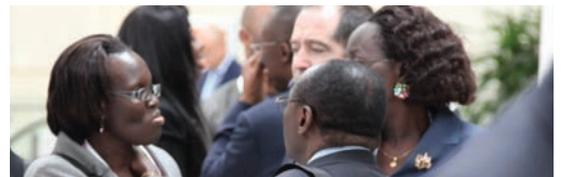
ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION



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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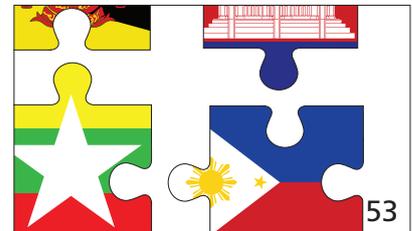
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COMMENT AND ANALYSIS

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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On the cover: Jamel Akib

Editorial

It's impossible to overstate the importance of addressing the all-too-pervasive issue of global corruption. 'Corruption kills,' says our recent webcast interviewee, Chair of Transparency International, José Ugaz. 'Corruption denies education and health and housing, better conditions of life, for millions of people around the world, especially in the poor countries. I've been repeating that corruption is a tax that is paid by the poorest.' And he should know: a formidable anti-corruption lawyer, he acted as the Ad-Hoc State Attorney for Peru in a series of ground-breaking cases, including prosecution of the former president, Alberto Fujimori, and indictment of 1,200 senior government officials.



The IBA's webcast interview with Ugaz took place as news was emerging of the American and Swiss authorities' moves to address the issues dogging football's world governing body, FIFA. This dramatic attempt to stop the rot in the body that oversees arguably the world's most popular sport has ensured the issue of corruption has genuinely captured public attention. Our cover highlights the linked issues of transparency, shell companies and secrecy jurisdictions. Always central to the issue of corruption, these and related areas have been brought to the fore following former FIFA exec Chuck Blazer's whistleblowing – both in the public consciousness and on the international agenda – suggesting long-overdue change may at last be achievable.

Some of the key themes are assessed in-depth across three features in this edition. An abridged version of the interview with José Ugaz runs from page 26 to page 31 – film of the interview can be viewed in full on the IBA website (ibanet.org). The feature 'Corruption uncovered' (page 16) takes themes raised by both the FIFA scandal and Ugaz and develops them with input from leading authorities, such as the IBA's own James Klotz, a former member of FIFA's Independent Governance Committee, and from co-founder of Global Witness, Charmian Gooch. Film of the full interview with Gooch can also be viewed on the IBA's website. The feature 'May I have your attention, please?' (page 33) takes as its point of departure the OECD's proposals for major reform of the international tax regime, which will be put to G20 leaders in November. One way or another, it looks as if significant change could be about to force international businesses to adapt – their advisers need to be ready.

James Lewis

ONLINE

This month's online highlights:

- Data protection: EU proposes new 'one stop shop' rules to safeguard consumers
- Latin America: Bolivia and Chile's ICJ dispute and the implications for international law
- Southeast Asia boat crisis highlights failures of Myanmar rule of law



IN FILM

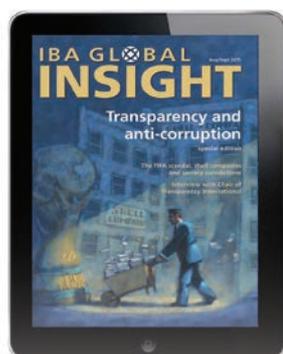
This month's film highlights:

- *Myanmar: the long road to reform* – new documentary investigates Myanmar constitution, business and human rights after decades of military dictatorship



- José Ugaz, Chair of Transparency International, on the FIFA scandal, corruption and accountability
- Charmian Gooch, co-founder of anti-corruption NGO Global Witness, on the fight to end exploitation of natural resources

ON THE MOVE



The *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.



Sanctions: Iran deal offers limited relief with strings attached

JONATHAN WATSON

China, France, Germany, Russia, the United Kingdom and the United States have agreed a deal with Iran that provides for sanctions against the country to be lifted in return for a pledge that it will never 'seek, develop or acquire any nuclear weapons'.

According to US President Barack Obama, the deal – the Joint Comprehensive Plan of Action (JCPOA) – represents 'real and meaningful change' that 'makes our country, and the world, safer and more secure'. Iran's President, Hassan Rouhani, welcomed 'a new chapter' in his country's relations with the wider world.

Simply reaching an agreement after such long and complex negotiations is quite an achievement. However, the JCPOA already has many vocal opponents in the US, Iran and elsewhere. They may be able to delay its implementation or prevent it ever taking effect.

Sanctions against Iran remain in place for the time being. Guidance like that issued by HM Treasury in the UK making clear that 'the UK government does not encourage trade with, or investment in Iran, and has withdrawn all commercial support for trade' is still in force.

This is unlikely to change until 'Implementation Day', when the International Atomic Energy Agency (IAEA) is due to certify that Iran has complied with the key nuclear-related measures described in the JCPOA.

On Implementation Day, if Iran has done what it has agreed to do, then the US and EU will relax sanctions in many areas. But no one can be sure when that day will come. According to Christopher Lock, who works with Lourdes Catrain, Hogan Lovells' European Group Director responsible for trade in the Brussels office and Vice-Chair of the IBA International Trade and Customs Law Committee, it could be in six to nine months' time. Others suggest it could be at least a year away.

'We're waiting for the technical moves on Iran's part, and they may or may not happen,' says Lock. 'There's

still a great deal of uncertainty at the political level.'

The international trade and investment team at Hogan Lovells is still trying to work through what companies interested in doing business in Iran can undertake. 'A lot of clients are asking about this, but as it stands, the sanctions remain in place and they still cover brokering services,' says Lock. 'Strictly speaking, negotiating for a contract and making arrangements for a transaction that would be sanctioned under the existing regime remains a breach of the rules.'

“ The longstanding embargo on trade with Iran by US persons will remain in place, as will the US arms embargo and export controls on dual-use items

Barbara Linney
*International Department,
Miller & Chevalier*

Barbara Linney, a member of the IBA International Trade and Customs Law Committee, says the long-term impact of the JCPOA on US businesses will be minimal. Even after Implementation Day, there will only be limited relief for US businesses in the form of sanctions relief for the commercial passenger aircraft sector, she says.

After Implementation Day, the US has pledged to allow imports of Iranian-origin carpets and foodstuffs, including pistachios and caviar, and to allow non-US entities that are owned or controlled by a US person to engage in activities with Iran that are 'consistent with' the JCPOA. The JCPOA doesn't provide much detail about this, but it might include 'activities of US-owned or controlled foreign entities in industries for which secondary sanctions will be lifted', says Kuang Chiang, a member of the IBA International Trade and Customs Law Committee whose practice at Miller & Chevalier focuses on export and import controls, particularly on economic sanctions as regulated by the US Treasury.

These industries include energy, petrochemicals, shipping, shipbuilding, port services and the automotive, financial, banking and insurance sectors. The US government's Office of Foreign Asset Control is expected to issue guidance in the run-up to Implementation Day.

Any US secondary sanctions that are suspended or waived on Implementation Day will remain 'on the books' until 'Transition Day'. This is supposed to be in approximately eight years' time, or whenever the IAEA issues a report confirming that Iran is only engaging in peaceful nuclear activities. At that point, they should come to an end. 'The longstanding embargo on trade with Iran by US persons will remain in place,' says Linney, 'as will the US arms embargo and export controls on dual-use items.'

Could investigations into past violations of sanctions be suspended? The JCPOA says that once they are lifted, 'ongoing investigations on possible infringements of such sanctions may be reviewed in accordance with applicable national laws'. But it doesn't say anything about pending US enforcement actions over breaches of embargoes or of dual-use export controls. 'Such violations are subject to civil and criminal penalties,' says Linney, 'and we do not expect the JCPOA to have any impact on enforcement proceedings related to such violations.'

Outside the US, the line has been that the sanctions regime is still in place and still being adhered to. 'Regulators won't just be letting people off the hook for breaching what was the law for the last few years,' says Lock.

The lifting of sanctions, if implemented, represents a significant opportunity for European companies. 'Under the terms of the JCPOA, the US primary sanctions will remain in place, so there will be more extensive restrictions on US companies than on European companies,' says Lock. All European sanctions under the nuclear regime are due to be lifted on Implementation Day.

Jonathan Watson is a freelance journalist and can be contacted on jonathan.watson@yahoo.co.uk

IBA Legal Practice Division committee articles online



The IBA has improved the way it delivers content to members and now provides a more regular flow of information to committees that is more user-friendly for both committee members and newsletter editors. Articles and conference reports are available to view online, alongside pre-2015 editions of newsletters in PDF format on committee of forum webpages.

Each month a selection of recent online articles will be published in *IBA E-news*. View the online archive at www.ibanet.org/Online_Articles.aspx.

Newcomers' Welcome Workshop: make the most of the Annual Conference

If you're new to the IBA or this will be the first year you attend the Annual Conference, then make sure to go along to the orientation workshop in Vienna run by Pippa Blakemore. This lively and participative two-hour introduction to the IBA and its Annual Conference is a great way to find out more and will help you to get the most out of Conference week. The workshop takes place at 1630 on the first day of the Annual Conference, Sunday 4 October.

For more details about the workshop, see tinyurl.com/NewcomerWorkshop



Launch of Myanmar film on constitution, business and human rights

Myanmar: *the long road to reform*, a new film from the IBAHRI, was launched at the Charlotte Street Hotel in London on 14 July.

After decades of brutal military dictatorship, many hope that Myanmar is now on the path to reform. However, while there are opportunities for change, significant challenges remain regarding the rule of law, foreign investment and development.

The 25-minute film draws on exclusive interviews with leading lawyers, diplomats, politicians and activists – including Nobel laureate and opposition leader Aung San Suu Kyi – and calls for caution from international investors in the absence of comprehensive legal and constitutional reform

The film is now available to view online at tinyurl.com/IBAMyanmarFilm

LPD Committees call on sporting organisations for reform

The LPD's Anti-Corruption Committee and Sports Law Subcommittee have called on governments and financial supporters of sporting bodies to push for fundamental reform to improve governance, transparency and oversight of international sports organisations, such as FIFA.

The Chair of the IBA Anti-Corruption Committee, Rob Wyld, says: 'Sport is a global industry worth many billions in any currency and that, unfortunately, provides ample opportunity for corruption at all levels and in many settings. Bid manipulation can be problematic in respect of governments and companies alike. The former, manipulating bids to host major sporting events, and the latter, manipulating bids to secure lucrative contracts, for example in the construction of stadia and relevant infrastructure.'

Many of the world's major sporting bodies were established with noble intentions, including FIFA, in 1904, to formulate a set of standard rules and regulations governing the play of football.

The Chair of the IBA Sports Subcommittee, Javier Medin, comments: 'Since their establishment, a number of sporting organisations have grown and changed without independent oversight. This has led to poor governance structures that lack transparency and accountability. Consequently, in many cases the noble and ethical rules once governing the practices of the organisations have been neglected, distorted or blatantly ignored. Integrity in sport needs to be restored. In order for this to happen the IBA Sports Sub-Committee believes that systemic, deep-rooted change must occur throughout a number of international sporting organisations.'

'The financial supporters of these organisations must recognise that fundamental reform is required and press for it. As a first step, sporting organisations should write anti-corruption procedures into their constitutions and codes of conduct,' he says. 'It is critical that sport be free of nepotism, double standards, racketeering, venality and grubby self-interest. It may involve the dismantling of organisations and starting again, but that may just have to be the price to pay.'

Alternative finance: regulating Europe's funding crowds

SCOTT APPLETON

Crowdfunding is fast becoming a force to be reckoned with. Londoner Thom Feeney even attempted to solve the Greek debt crisis by launching a crowdfunding campaign to raise the €1.6bn required by the IMF back in June. In eight days he raised €1.93m, not enough to solve the crisis, but enough to demonstrate the power of crowdfunding.

Globally the sector is estimated to be worth \$12.21bn. The phenomenon may have started in the US, but in less than a decade Europe's leading platforms have grown to become billion-euro businesses.

'There is a strong demand among businesses for access to growth capital and many companies are now exploring new and more flexible ways to raise finance,' says Karen Kerrigan, Legal & Finance Director at UK-based equity crowdfunding platform Seedrs. 'Startups and small and medium-sized businesses [SMEs] increasingly look beyond the banks, and even beyond their home markets for investment, and this is the gap that crowdfunding is filling.'

Rapid expansion and attraction for investors and businesses alike are presenting challenges for lawyers.

'From a legal perspective the US has led the way in crowdfunding legislation, intended to both encourage and regulate the growth of the market. But there is as yet no pan-EU framework,' says José Ramón Morales, Head of Technology at Garrigues in Barcelona. 'The crowdfunding platforms, companies and investors may be taking their influences from many different markets, but we currently have to apply the law on a nation-by-nation basis.'

Indeed, the disparate nature of crowdfunding means that it is impossible to take a one-size-fits-all approach to regulation. 'Donor and reward' platforms such as Kickstarter may be better known, but such a model accounts for a fraction of the total market.

The largest and most rapidly expanding sector is peer-to-peer consumer and business lending, where investors lend to businesses or consumers via an intermediary platform, or through investing in the platform itself, which then lends to clients.

One such platform is German-based Zencap Global Services, which has



Startups and SMEs increasingly look beyond the banks... this is the gap that crowdfunding is filling

Karen Kerrigan
Legal & Finance Director, Seedrs

expanded to the Netherlands and is now exploring options in Spain, says Co-Founder Matthias Knecht.

'Since 2014 we have received €180m loan requests and issued over €20m. What has become very apparent, besides the massive demand for finance from SMEs, is the strong interest among institutional investors to access the types of businesses in the countries in which we operate – we offer a class of asset, such as the German *Mittelstand*, that has previously been out of reach to most.'

But such opportunities are not without problems. Germany's Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – BaFin) has proved slow to adapt the country's debt and equity fundraising regulation to the crowdfunding model.

'As we look across Europe we see certain financial authorities taking a much more facilitative approach, encouraging the growth of the sector through the creation of exceptions within the existing regulatory framework, for example,' says Knecht. 'BaFin has, however, not been one of them... For that, in Germany at least, we still have to partner with a registered bank.'

'The regulators are always playing catch-up,' says Stefan Weidert, partner

at Gleiss Lutz in Frankfurt and Chair of the IBA Technology Committee. 'A key focus of the European Commission, especially since the financial crisis, has been to strengthen consumer protection, in terms of finance, loans and data. For operators like Zencap, the result is that Germany may be a large and attractive market, but from a regulatory perspective it remains a challenging place in which to grow their business.'

The UK appears to be taking the lead in Europe's crowdfunding market. It is home to many of Europe's largest players and the 'crowd' and regulatory authorities are both open to new ideas.

'Companies like Seedrs pioneered the regulatory approach to what they do,' says Kerrigan. 'The UK Crowdfunding Association, launched in 2012 by ten platforms and now representing around 50, created a common code of practice and has since worked with the Financial Conduct Authority [FCA] to create a proportionate framework that brings credibility to the sector. The result is a clear set of rules that sits within existing legislation, in order to bring the requisite comfort required by retail and institutional investors alike to grow the sector.'

Equity crowdfunding – where businesses seek to sell off small stakes in themselves – is now the fastest growing segment of the UK market, having expanded 400 per cent between 2012 and 2014, according to research by Nesta and the University of Cambridge.

'The UK authorities have recognised the importance of crowdfunding as a means for SMEs to raise finance but also as a financial market in its own right,' says Angus McLean, partner at Simmons & Simmons in London. 'The FCA... has sought to impose a clear framework to regulate what they do. The result, many hope, is that the UK-based platforms become a preferred choice for investors and businesses; that the UK becomes a European crowdfunding capital.'

As Thom Feeney discovered, crowdfunding may not be a panacea for all financial challenges, but for Europe's regulators it may be no bad thing to follow the crowd.

Jordan to host the next IBA Women Business Lawyers Initiative event



After a successful pilot event in Dubai, UAE, in March 2014, the IBA Women Business Lawyers Initiative is returning to the Middle East with an event that will focus on the challenges and opportunities for Jordanian women in the legal profession. On 7 September 2015, around 120 participants will gather in the Kempinski Hotel, Amman, for

a series of sessions covering career management, including deciding on a path and a specialisation, leadership, networking, marketing and business development, anti-corruption awareness and law firm management. High-profile speakers and panellists, including former Minister of Justice HE Sharif Zubi, will share their expertise with participants.

The IBA has teamed up with two important Middle Eastern organisations for the Initiative. The Association's international partner, the Arab International Women's Forum (AIWF), headquartered in London, has been the global voice of Arab women since 2001. AIWF strives to be an agent of change for women in the Arab region and its partnership with the IBA signifies an important new focus on women in the law. The IBA's local partner, the Arab Women's Legal Network (AWLN) was established in 2005 and works at promoting Arab women in legal professions by facilitating meetings of Arab women legal practitioners and encouraging the exchange of experience and expertise.

Registration for this event is now open and delegates can register free of charge at tinyurl.com/IBA-Amman

IBA Judicial Integrity Initiative

The IBA Judicial Integrity Initiative is a project aimed at combating judicial corruption, and is a key priority for IBA President David W Rivkin's two-year term. The aim of the Initiative is to raise awareness of the legal consequences of judicial corruption where it exists, combat it through promoting the highest standards of integrity among judges, prosecutors, court personnel and lawyers, and further best practices of countries that have worked effectively to eliminate it.

Work has begun on the first stage of the Initiative: the production of a report on the types of corruption occurring between lawyers and judges, and other judicial system officials. This will include preparing a questionnaire, to be disseminated to judges, lawyers and others, and conducting in-country consultations in key jurisdictions around the world. Preliminary findings are expected by the end of 2015. As the Initiative progresses, the Typologies Report will guide the design and implementation of further activities to combat judicial corruption.

The latest news on this project can be found at tinyurl.com/JudicialIntegrityInitiative

Ten nominees shortlisted for the IBA Pro Bono Award 2015



Following receipt of a record number of nominations for this year's IBA Pro Bono Award, the judging panel has selected a shortlist of ten from whom this year's winner will be selected. The second stage of deliberation and adjudication is now underway and the winner will be announced at the Annual Conference in Vienna on Monday 5 October, at the Pro Bono Committee session *International pro bono: charity doesn't have to begin at home*.

The shortlisted candidates are: **Daniel Urbas**, partner at Borden Ladner Gervais; **David Gutiérrez**, co-founding partner at BLP, the largest law firm in Costa Rica; **Enrique Felices**, partner and Head of Pro Bono at Miranda & Amando Abogados in Lima; **Gavin Davies**, partner at Herbert Smith Freehills in London; **Kirsty Brimelow QC**, Chair of the Human Rights Committee at Doughty Street Chambers in London; **Marcos Fuchs**, founder and Executive Director of Instituto Pro Bono in Brazil; **Mercedes Pando**, of Estudio Beccar Varela in Buenos Aires; **Pooja Dela**, of Webber Wentzel in Johannesburg; **Richard Dyton**, partner (Head of the Projects Group and voluntary Pro Bono Partner) at Simmons & Simmons; and **Scott Anderson**, managing partner at Sidley Austin in Geneva.

Full details of all ten nominees can be found at tinyurl.com/ProBono2015

Pictured is last year's winner, Nicholas Paul of Doughty Street Chambers, who received the award in recognition of his long career largely dedicated to helping others achieve their rights or increasing capacity by educating others internationally about human rights. This includes projects with Amnesty, Liberty, and Justice.

IBAHRI appeals to Venezuela to investigate Afiuni's renewed torture and rape allegations



Judge María Lourdes Afiuni waves to supporters outside her house in Caracas © REUTERS/Carlos García Rawlins 2013

Speaking publicly for the first time in detail about her allegations of torture and rape, Judge Afiuni recounted the treatment she was subjected to while in detention in 2010, saying: 'These past six years have ruined my life and that of my daughter and my family... in Venezuela judges only exist to serve the whims of the government.'

Baroness Helena Kennedy, IBAHRI Co-Chair, commented: 'We are appalled that without full investigation of the allegations made by Judge Afiuni, Venezuela's Attorney-General would publicly deny the allegations of torture and rape before the UN Human Rights Committee. On several occasions requests have been made by international organisations and actors, including the UN Special Rapporteur on Torture, Juan Mendéz, for the Venezuelan authorities to investigate the allegations by Judge Afiuni and her defence team.'

The IBAHRI has closely followed Judge Afiuni's case since 2011, and last year published a 28-page trial observation report entitled *The Execution of Justice: The Criminal Trial of Judge María Lourdes Afiuni*. It details a number of irregularities in the trial of Judge Afiuni.

To read the report, see tinyurl.com/Afiuni2014

More information on the IBAHRI and Venezuela can be found at tinyurl.com/IBAHRIVenezuela

The IBAHRI is concerned by the continuing failure of the Venezuelan authorities to investigate allegations made by Judge María Lourdes Afiuni that she was tortured and raped while in detention. The IBAHRI urges Venezuela's authorities to investigate the allegations immediately. Of further concern is the recent denial of Judge Afiuni's allegations by the Venezuelan Attorney-General, Luisa Ortega Díaz, before the UN Human Rights Committee hearings in Geneva.

Judge Afiuni was imprisoned in 2009 after granting bail to

political prisoner Eligio Cedeño in accordance with the provisions of the Venezuelan penal code. She repeated the allegations of torture and rape at her trial hearing in Caracas on 30 June 2015 in direct response to the Attorney-General's denial. Under questioning by the UN Human Rights Committee on 29 June, Ms Díaz stated: '...it is not true that Afiuni was tortured and raped. She is inventing it.' At her hearing the following day, Judge Afiuni requested permission to travel to Geneva in order to contest the Attorney-General's claim. The request was not granted.

IBAHRI conducts fact-finding mission to Hungary

In June, a high-profile delegation of human rights experts and tax specialists conducted a fact-finding mission to Hungary under the auspices of the IBAHRI. The delegation met government officials, judges and lawyers, as well as representatives of bar associations, civil society organisations, human rights organisations, diplomatic missions and intergovernmental bodies.

The mission is a follow-up to the 2012 report *Courting Controversy:*

the Impact of the Recent Reforms on the Independence of the Judiciary and the Rule of Law In Hungary, which called on the government of Hungary to respect the decision of the country's Constitutional Court and to repeal new legislative provisions that lowered the mandatory age of retirement for judges to 62 years, forcing the immediate retirement of more than 270 justices.

During their visit, the delegation aimed to carry out assessments of

these recommendations, as well as an examination of the independence of the judiciary and of the legal profession, and related rule of law issues.

The findings of the mission will be published in a report later this year, and launched at the IBA Annual Conference in Vienna during the IBAHRI-led session, *The independence of the legal profession in Europe*.

Yemen conflict 'clearly arose' out of UN-backed amnesty deal

REBECCA LOWE

The Western-backed amnesty pact signed between Yemen's former president, Ali Abdullah Saleh, and the Gulf Cooperation Council (GCC) in November 2011 was a key trigger for a conflict that threatens to tear the country apart despite a fragile ceasefire, say international lawyers and regional experts.

The deal, supported by the US and UN Security Council, allowed the former dictator to transfer power to Vice-President Abd Rabbuh Mansur Hadi without the threat of prosecution.

It was conceived as a diplomatic solution to a growing humanitarian crisis, but critics say it failed to address fundamental grievances. At least 2,000 people were killed by Yemeni security forces after tens of thousands of protesters took to the streets in early 2011 to demand economic development, justice and an end to Saleh's corrupt regime.

'The conflict in Yemen has clearly arisen out of the political transition that took place in 2011,' says Steven Kay QC, head of 9 Bedford Row's international criminal law team and IBA War Crimes Committee Co-Chair, who is advising Hadi. 'Saleh and members of his regime were never held accountable for various corruption charges or the violence used against protesters.'

The GCC agreement was widely rejected among Yemenis and seen by many as an attempt by Saudi Arabia to stop revolution spilling across the border.

The US strongly supported the Saudis, their long-time allies and trade partners. Between 2010 and 2014, Washington and Riyadh agreed \$90bn in weapons deals, according to the Congressional Research Service.

Saleh's continuing behind-the-scenes presence meant he was able to manipulate key markets, including petrol and electricity, to create instability, says Kay. The 'absence of a solid infrastructure' helped to undermine the national dialogue, while the drafting of a Constitution 'was left by the wayside', he adds.

The deal allowed Saleh to remain in control of security and the armed forces,' says Nadwa al-Dawsari, Nonresident Senior Fellow at US-based NGO Project on Middle



Ali Abdullah Saleh
© www.kremlin.ru

“The conflict in Yemen has clearly arisen out of the political transition that took place in 2011... Saleh and members of his regime were never held accountable for various corruption charges or the violence used against protesters

Steven Kay QC
Co-Chair, IBA War Crimes Committee

East Democracy. 'Hadi's government was unable to function effectively and people came to view it as illegitimate and corrupt.'

Houthi rebels, backed by Saleh, seized control of Yemen's capital city Sana'a in September 2014. President Hadi fled to Saudi Arabia in March 2015 after the Houthis – a Shia group – began to advance on his Sunni stronghold in the south of the country.

In April, the UN Security Council imposed an arms embargo on Houthi leaders and allies, including Saleh and his son. Both Hadi and the Houthis are opposed by al-Qaeda in the Arabian Peninsula and a Yemeni affiliate of Islamic State.

US drone strikes against these groups have been ongoing since 2002, exacerbating local tensions and resentment against the Hadi government. In October 2013, the UN Special Rapporteur on Human Rights and Counterterrorism, Ben Emmerson QC, said the attacks could comprise violations of international law.

A Saudi-led, US-backed Sunni coalition has been carrying out airstrikes against the Houthis for the past two months, at Hadi's request. Between 26 March and 2 May, at least 646 civilians died and more than 1,300 were injured, according to the UN. Human rights groups have accused both sides of war crimes.

When the amnesty deal was struck, several leading international lawyers voiced their concerns. Prince Zeid Ra'ad Zeid al Hussein, UN High Commissioner for Human Rights and former President of the Assembly of States Parties at the International Criminal Court (ICC), told *Global Insight* at the time: 'For the Security Council, which contains ICC member states [UK and France], to endorse an amnesty agreement is worrying. Amnesties are a form of blackmail and we don't want that anymore.'

'Amnesties only work provided the correct safeguards are in place,' says Kay. 'For every South Africa success story, we have a dozen situations whereby amnesties have been a cause for further chaos in a state or ultimately dismissed by the international community.'

Holding leaders accountable for their actions was pioneered by the Nuremberg trials after the Second World War, although no clear principles were enshrined in international law. Since then, a series of laws and treaties, including the 1949 Geneva Convention and the 1984 Convention against Torture, oblige states to prosecute gross human rights abuses.

In 1999, the Lomé Peace Accord in Sierra Leone proved a key turning point. Negotiated between the warring parties in the civil war, the UN agreed to sign only on the proviso that no amnesties were granted for acts of genocide, crimes against humanity and war crimes.

In 2002, this agreement was enshrined in the Rome Statute, which the ICC created. Anyone who accepts an amnesty deal nowadays is a 'fool', says Prince Zeid, as this 'could easily be overturned by a court or change of government'.

'A norm has emerged under customary international law that prohibits the use of amnesty for the most serious human rights abuses,' says David Tolbert, President of the International Center for Transitional Justice. 'Amnesties are off the table.'

Dissolution of Equatorial Guinea's judiciary 'clearly disproportionate'



In May 2015, President Obiang Nguema Mbasogo of Equatorial Guinea issued Decree 36/2015, which summarily dissolved the entire judiciary 'in the interest of providing a better service and in accordance with the presidential power under Art 41 (h) of the Fundamental Law'. The IBAHRI expressed deep concern at what appeared to be a politically motivated move by President Obiang and called on the country to meet its international obligations to protect the independence of the judiciary and respect the rule of law.

While the situation received little international attention, IBAHRI Co-Chair, Baroness Helena Kennedy commented: 'While improving the administration of justice in any country may be a legitimate aim, the dissolution of the entire judiciary is

clearly a disproportionate response and represents an existential threat to the independence of the legal profession and the separation of powers, which are cornerstones of every democratic state.'

IBAHRI Co-Chair Hans Corell called on the government of Equatorial Guinea 'to meet its obligations under the international treaties to which it is party and the UN Basic Principles on the Independence of the Judiciary which state that "[i]t is the duty of all governmental and other institutions to respect and observe the independence of the judiciary" and that "[a]ll disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct".'

In July 2003, the IBAHRI undertook a fact-finding mission to Equatorial Guinea amid reports of torture, unfair trials and threats to the rule of law in the country. In October that year it published an in-depth report, entitled *Equatorial Guinea: At the Crossroads*, which included analysis of the legal environment and of the independence of the judiciary and the legal profession. It detailed a lack of respect for the rule of law, with the Executive exercising considerable control over both the legislature and the judiciary, causing a significant negative impact on their ability to exercise sufficient checks and balances on the powers of the Executive.

Venezuela appears before UN Human Rights Committee

On 29 June 2015, Venezuela appeared before the UN Human Rights Committee so that the committee could review its compliance with the International Covenant on Civil and Political Rights. Ahead of this appearance, the IBAHRI and a number of other organisations – including Amnesty International, Human Rights Watch and the International Association of Judges – released a public statement urging the Human Rights Committee to address concerns that grave human rights violations continue to be committed in the country. Despite some progress in reforming the law, the signatories argue, Venezuela has not fulfilled its obligation to protect civil and political rights.

The statement expresses concern about a number of issues including persistent reports of extrajudicial executions; excessive use of force, torture and arbitrary detentions; prison conditions that violate the human rights of those deprived of their liberty; the state's failure to protect the human rights of certain sections of society – such as children and adolescents, women, LGBTI people and indigenous peoples; the lack of independence and impartiality of the justice system; continuing attacks against human rights defenders; Venezuela's denunciation of the American Convention on Human Rights; and its failure to comply with the recommendations of regional and international human rights bodies.

The signatory organisations urge Venezuela to fulfil this commitment to guarantee human rights by engaging in an open and constructive dialogue with international and regional human rights bodies, and welcoming their scrutiny by implementing their recommendations to address the grave human rights issues that the country faces.

The full statement can be read at tinyurl.com/phg7umc

IBAHRI Speaker Session – 'Human rights: Can we go it alone?'

Following the recent UK general election, a national debate has ensued regarding the suitability of the Human Rights Act and the country's relationship with the European Court of Human Rights. In its 20th Anniversary Speaker Session, the IBAHRI will delve deeper into this subject by inviting speakers to take an international perspective on the issue. Keir Starmer is currently scheduled to speak in the debate, which will be moderated by former CNN broadcast journalist Todd Benjamin. The session will take place on the evening of Thursday 10 September at the House of Lords, London.



For more details about the event, see tinyurl.com/HumanRightsActDebate

Assisted suicide: Canada's landmark ruling reframes debate

NEIL HODGE

On 6 February Canada's Supreme Court made a landmark, unanimous 9-0 decision that the country's law on assisted suicide was unconstitutional. It ruled that the country's Criminal Code provision against aiding and abetting someone to commit suicide deprives people suffering from grievous and irremediable medical conditions the right to life, liberty and security of the person, as guaranteed under the Charter.

The Canadian Charter of Rights and Freedoms ruling limits the legal definition of physician-assisted suicides to 'a competent adult person who clearly consents to the termination of life and has a grievous and irremediable medical condition, including an illness, disease or disability, that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition'.

The government now has a year to rewrite the law. If it does not, the current law will be struck down. In the meantime, it remains a crime to aid or abet a suicide.

Assisted suicide has been a crime in Canada since 1892, punishable by up to 14 years in prison, though attempted suicide has been legal since 1972. Right to die campaigners say this means severely infirm individuals physically incapable of legally killing themselves did not – until now – have the same life-ending option as suffering but able-bodied individuals.

February's ruling stems from the appeal of a 2012 lower court ruling launched on behalf of two women from British Columbia with debilitating and terminal illnesses – Gloria Taylor and Kay Carter, both now deceased. In October 2014 their lawyers argued that section 241(b) of the Criminal Code, prohibiting aiding or abetting someone to commit suicide, violates the Charter's section 7 rights to life, liberty and security of the person and condemned them to a life of severe and intolerable suffering. They also argued that, given section 241(b)'s disproportionate impact on physically disabled persons, section 15 of the Charter – which guarantees equal treatment, protection and benefit of the law without discrimination – was also violated regarding the equality rights of the physically disabled.

In the US, Brittany Maynard, who had terminal brain cancer, reignited this issue when she was forced to travel from California to Oregon to end her life. Oregon has allowed terminally ill, mentally competent patients with less than six months to live to request a prescription for life-ending medication since 1997. Four other US states – Washington, Vermont, Montana and New Mexico – have since followed suit, and California appears to be moving towards a right to die law.

“There is such growing momentum behind assisted suicide there can be no doubt that more countries and jurisdictions are going to pass legislation on it

John Vernon
Chair, IBA Human Rights Law
Working Group

'There is such growing momentum behind assisted suicide there can be no doubt that more countries and jurisdictions are going to pass legislation on it,' says John Vernon, a US-based human rights lawyer and Chair of the IBA Human Rights Law Working Group.

The Netherlands became the first European country to legalise assisted suicide and euthanasia in April 2002. It imposed a strict set of conditions. In 2014, Belgium allowed euthanasia for young children. Children can ask to die if they are 'in a hopeless medical situation of constant and unbearable suffering that cannot be eased and which will cause death in the short-term' and they must have the 'discernment' necessary to decide to die.

In Germany and Switzerland, 'active assisted suicide' – meaning a doctor prescribing and handing over a lethal drug – is illegal. However, both countries do allow assisted suicide within certain circumstances. In Germany, it is legal as long as the lethal drug is taken without help. In Switzerland, the law is more relaxed: it allows assisted suicide as long as there are no 'self-seeking motives' involved. Switzerland has since become home to organisations such as Dignitas

and Exit, which provide assisted dying services for a fee.

The UK has debated assisted suicide for several years, but attempts to change the law were defeated. In June 2014 campaigners lost their appeal on assisted suicide at the UK Supreme Court by 7-2. An attempt to have the current prosecution guidance clarified was also unsuccessful. However, five justices concluded they had the power to declare that the current law breaches the right to a private life, although they did not make a 'declaration of incompatibility'. A majority of the justices said that the question they were being asked involved moral judgements rather than points of law, and therefore the matter had to be addressed by a democratically elected parliament, thus bouncing the issue back to politicians.

For anti-assisted suicide campaigners, it is important to understand the nuances of the debate. They feel supporters often conflate concepts such as assisted suicide and the right to die, which are in fact separate. Robert Preston, board member of Living and Dying Well, a UK-based campaign group that opposes assisted suicide, says 'assisting someone to wilfully take his or her own life is clearly not the same as stopping treatment or life support for a patient, and so it is wrong to try to talk about the issue in those terms'.

Despite this, Vernon believes 'public sentiment indicates that the right to die should be made easier, but countries that are having this debate seem to be waiting for one country to make the first move, so that they can how easy it is to implement, follow and enforce'.

The problem when trying to draft legislation is determining when assisted suicide can be carried out, by whom, and under what circumstances. 'Lawmakers will insist on any legislation being very prescriptive,' says Vernon, 'otherwise people who believe they are a burden on society may feel or be pressured into ending their lives. However, by being so precise, this presents the obvious problem of some cases not fitting neatly into the rules, and raises concerns that the law is overly prescriptive or not flexible enough.'



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American authorities take a hard line on Muslim immigration

Details of a programme that gives the FBI and immigration officers sweeping powers to hold or deny immigration benefits continue to emerge. *Global Insight* investigates.

EMAD MEKAY

A Nigerian Muslim saw his United States citizenship application put on hold to pressure him to provide information about Boko Haram. An Iranian was asked to snitch on his fellow Los Angeles mosque-goers or face an endless wait before he could become a US citizen. An Egyptian immigrant had his citizenship application delayed by 11 years before the courts said that immigration officers violated the law and swore him in as a US citizen. A lawyer quipped about how he obtained documents showing that a stalled application for his eligible Yemeni client was marked 'Interview and Deny' by a US immigration director because, well, 'he is Yemeni'.

The larger picture behind the stories recounted by immigration lawyers is that Muslims living in the land of the free, who want to become US citizens, are being

systematically discriminated against by the country they want to become citizens of.

'In many instances, Muslims – my clients included – have been discriminated against during their immigration process,' says Ally Bolour, an immigration lawyer in Los Angeles.

Many Muslim immigrants, lawyers and civil rights groups say that thousands of eligible, law-abiding US residents of Arab and Muslim origin have been secretly blacklisted under a covert programme run outside the law by officers of the US Citizenship and Immigration Service (USCIS), with help from the FBI.

The programme, dubbed the 'Controlled Application Review and Resolution Program' or CARRP, gives the FBI and immigration officers unchecked powers to stretch the law to perpetually hold or completely deny immigration benefits to targeted Arabs and Muslims.

Under this little-known programme, benefits are denied or held up, often with little rationale or on flimsy grounds that do not hinder applicants of other backgrounds.

“ CARRP is illegal by the virtue of having no Congressional mandate. It’s a secretive programme with no accountability

Ally Bolour

American Immigration Lawyers Association

CARRP, which the US government does not publicly acknowledge, was first exposed during a lawsuit filed by Egyptian immigrant, Tarek Hamid. Hamid complained that the six months given by law to immigration officers to decide on citizenship cases had turned into 11 years for his application.

Jennie Pasquarella, of the American Civil Liberties Union (ACLU) of Southern California, was one of the first attorneys to help expose the clandestine programme after obtaining confidential documents under the Freedom of Information Act (FOIA). She told *Global Insight* that her group has filed further FOIA requests and federal court lawsuits against the government to force more transparency on the opaque and ‘unconstitutional’ process.

‘We have pending litigation under the FOIA seeking additional documents from USCIS to further discover what the programme really is,’ she says. ACLU is seeking policy memoranda, training manuals and statistics about CARRP, according to Pasquarella.

After the September 11 terrorist attacks, Muslims became the issue of choice for the US Department of Homeland Security and its heavy-handed branches. But critics say CARRP particularly stands out because it does not target suspected terrorists as USCIS would like us to believe. Instead, it primarily goes after legal, documented Muslim residents who have lived in the US for many years and whose only brush with the law is their application to become US citizens, or Muslim visitors legally seeking asylum or visas.

Worse, they say, CARRP penalises behaviour routine to most Muslims as part of their faith: taking their children to the mosque, donating to an Islamic charity, having a special skill such as cyber-security expertise, or transferring money to family overseas can all trigger

alarms. Applicants are then classified under the dreaded label of ‘security concerns’.

Civil rights advocates say the programme also makes use of the notoriously faulty – and already discredited – Terrorist Watch List, devised after 9/11, to which thousands of names have been added in error.

Using security and terrorism as a cover, overzealous USCIS officers create their own rules and use information provided voluntarily by aspiring Americans on their applications to alert the FBI to the presence of Muslim applicants, says Pasquarella.

The FBI in turn digs for data about the person’s history, such as military training, associations or travel, and often uses such information to pressure applicants.

‘The FBI uses that information to essentially blackmail people to become informants,’ Pasquarella says. ‘It is now a policy that they coerce people into becoming informants.’

Muslim immigration applicants who are flagged under CARRP face longer waits than applicants of other backgrounds, threats of deportation and extra surveillance.

‘CARRP is illegal by the virtue of having no congressional mandate. It’s a secretive programme with no accountability. It’s never been debated or commented upon by any elected or appointed government official,’ says Bolour, a member of the American Immigration Lawyers Association.

‘The programme is unconstitutional as it deprives its targeted victims of their due process. It doesn’t even do what its creators probably aimed for – since it’s applied broadly and indiscriminately to any random individual who may be imputed as a Muslim!’ she says.

John Vernon of the Vernon Law Group and Chair of the IBA Human Rights Law Working Group, agrees that ‘there is a total lack of

“ The Australian government recently announced a proposal to strip such people of Australian nationality, so long as they... will not be rendered stateless

Michael Kirby
IBAHRI Vice-Chair

transparency in most cases’. He argues that while the programme ‘has not been on the radar for most practising lawyers because it hasn’t affected their clients’, they must ‘begin taking these cases on and trying them in [the] courts’ so as to force the public to pay attention.

FBI spokesman Paul Bresson did not acknowledge the existence of the programme.

All the FBI does, he says, is innocuous background reviews.

‘Our only role is the name check to see if there is any derogatory information in our records with respect to the applicant,’ Bresson says. ‘We furnish that information to USCIS and they are the agency responsible for processing citizenship applications.’

The USCIS’s media office didn’t return emails and calls asking for details about the programme’s cost to taxpayers, its workforce, who exactly runs it and if it indeed produces any national security benefits.

More broadly, allegations of discrimination against people of Arab and Muslim origin have garnered almost no US public sympathy compared to other immigration issues. Muslims are often the punching bags on US television channels and in newspapers. At the end of July, for example, in the wake of the Chattanooga shootings, renowned American evangelist Reverend Franklin Graham called for the US to ‘close the flood gates’ on the immigration of all Muslims because the country is ‘under attack by Muslims at home and abroad’.

Immigration issues experienced by Muslims are not unique to America, but are being seen globally. Michael Kirby, Vice-Chair of the

IBAHRI, is aware of similar developments in Australia. ‘In response to the participation of young Australians in fighting for Islamic State, the Australian government recently announced a proposal to strip such people of Australian nationality, so long as they have another nation and will not be rendered stateless (which is forbidden by international law),’ he says. ‘This has led some to suggest that the citizenship of that class is thus provisional, in a way that is not true of other citizens.’

Bolour agrees that Muslims are subject to different rules. ‘With our airwaves filled with images of Muslims being the villains in this world, it provides a cover for this type of activity to take root,’ he says. ‘I think that not only is the public more worried about security than civil liberties – but also, they simply don’t care. Muslims have now been so dehumanised that violation of their due process rights does not really register.’

Emad Mekay is a freelance journalist based in California. A former Journalism Fellow at Stanford University, he has worked for *The New York Times*, Middle East Bureau and Bloomberg. He can be contacted at emekay@stanford.edu

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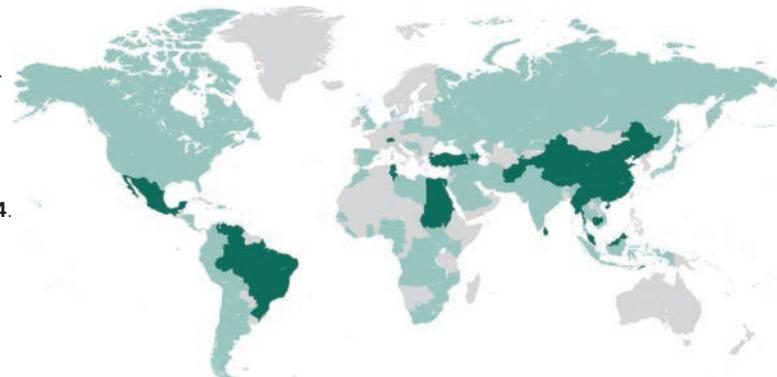


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Corruption



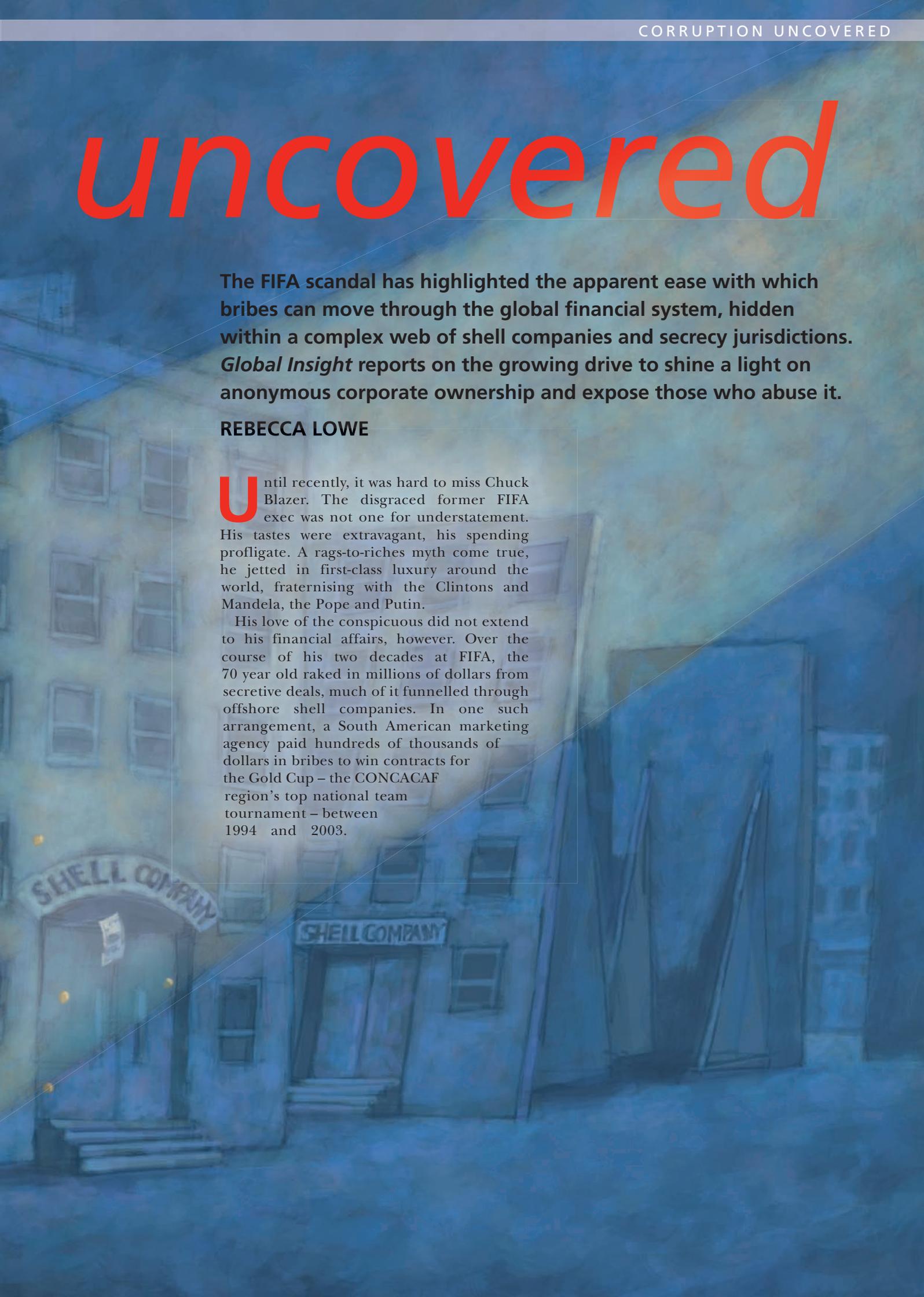
uncovered

The FIFA scandal has highlighted the apparent ease with which bribes can move through the global financial system, hidden within a complex web of shell companies and secrecy jurisdictions. *Global Insight* reports on the growing drive to shine a light on anonymous corporate ownership and expose those who abuse it.

REBECCA LOWE

Until recently, it was hard to miss Chuck Blazer. The disgraced former FIFA exec was not one for understatement. His tastes were extravagant, his spending profligate. A rags-to-riches myth come true, he jetted in first-class luxury around the world, fraternising with the Clintons and Mandela, the Pope and Putin.

His love of the conspicuous did not extend to his financial affairs, however. Over the course of his two decades at FIFA, the 70 year old raked in millions of dollars from secretive deals, much of it funnelled through offshore shell companies. In one such arrangement, a South American marketing agency paid hundreds of thousands of dollars in bribes to win contracts for the Gold Cup – the CONCACAF region's top national team tournament – between 1994 and 2003.



To disguise the payments, they were sent from bank accounts held by third-party companies and deposited to offshore entities controlled by Blazer, such as Cayman Islands-based corporation Sportvertising.

In May, US prosecutors revealed that Blazer had secretly pleaded guilty to this scheme and several others like it 18 months previously, in November 2013. Over the years, he reportedly established at least a dozen shell companies across the world, layering some on top of others to distance himself further from the cash flow. His efforts were not in vain. In 2011, the income of the former Secretary-General of the Confederation of North, Central American and Caribbean Association Football was twice that of all other federation employees and directors combined.

According to the recent US indictment of 14 high-ranking officials, Blazer is far from the only FIFA exec to have engaged in such shell games. The US Department of Justice alleges that anonymous companies and offshore bank accounts were regularly used by these individuals to shield themselves from the law. The individuals have denied the allegations and contested attempts to extradite them from Switzerland.

“When dealing with people like Chuck and Warner, whose reputations stink, then their accounts should be refused or scrutinised very carefully... Alarm bells should have been ringing

Andrew Jennings

Former Sunday Times and BBC investigative journalist

James M Klotz is a partner at Miller Thomson in Canada and a former member of FIFA's Independent Governance Committee, as well a member of the IBA Management Board. 'Corruption flourishes where there is limited transparency, inadequate rules, insufficiently rigorous policing of good rules, and limited or ineffective enforcement of good rules,' he says. 'The FIFA reform process initiated in 2011 was designed to address these weaknesses. However, what makes sustainable organisational change a challenging process is that even when rules are imposed, policing and enforcement initiated, and transparency made more obvious, organisational culture or "the way things are

done around here" is generally resistant to change. Cultural change is a slow process that should begin with senior leadership, and requires vigilance and commitment across every layer of the organisation to become entrenched.' Klotz feels that the ongoing US and Swiss investigations and any additional action that may come out of them could 'be the "kick in the pants" that FIFA needs to effectively change its culture'.

The scandal has, already, highlighted the apparent ease with which bribes can flow unimpeded through global financial markets, assisted by a system that not only permits secrecy, but encourages it. Almost all economic crime involves the 'misuse of corporate vehicles', according to the Organisation for Economic Cooperation and Development – yet historically, very little has been done to prevent such activity. Until recently, not one jurisdiction required publication of the 'beneficial owner': the person behind the frontmen, who ultimately holds the purse strings. In many places, such information is not even collected privately, giving terrorists, despots and drug traffickers the opportunity to open as many companies as they wish with the flimsiest of documentation.

Some significant efforts have recently been made to reform. In a revolutionary move, the UK, Denmark and Norway announced they intend to bring in public registries detailing beneficial ownership information, while the EU has agreed to private registries where data will be made available to people with a 'legitimate public interest'.

However, campaigners stress that far more needs to be done. Anti-corruption NGO Global Witness has been pushing for the introduction of public registries as industry standard for several years – focusing much of its energies on the US, one of the easiest places in the world to set up a fake company. 'What we realised is that corruption isn't about something happening over there, it's happening right here,' says Global Witness founder Charmian Gooch. 'And it's not about a few rotten apples... It's about a globalised financial system that allows people to set up hundreds of shell companies all over the planet to hide their real identity.'

Such people do not act alone, of course. Their activities are facilitated by banks, lawyers and accountants who exploit legal loopholes and weak enforcement. Transparency International Chair José Ugaz, a lawyer himself who acted as Ad-Hoc State Attorney for Peru in a series of ground-breaking anti-corruption cases, stresses that the legal profession must do better. 'We must be part of the solution, not the problem,' he tells *Global Insight* in a live webcast interview. 'Behind every corrupt scheme, you'll find a lawyer creating strategies

of how to circumvent those rules... We have, as professionals of the law, a good deal of responsibility in this.'

Getaway car for the corrupt

For those who aren't lawyers or bankers, there are good reasons to take an interest too. In 2010, six times as much money illicitly left developing countries as was received in aid, according to figures from the World Bank and Global Financial Integrity – a staggering statistic. Much of this was laundered through shell companies by government officials, anti-corruption experts say, with the collusion of multinational companies.

One case in point is the Democratic Republic of Congo. Between 2010 and 2012, billions

of dollars of Congolese mining concessions were snapped up for a pittance by a series of companies registered in the British Virgin Islands (BVI), according to a Global Witness investigation. The companies, alleged by the NGO to be owned by a personal friend of the president – though he denies the allegations against him strenuously – then sold them on to major industry players at the market rate, pocketing the difference.

That difference was reportedly \$1.4bn: the equivalent of twice the country's health and education budgets combined. Bearing this in mind, it is hardly surprising the country is the poorest in the world. 'Corruption kills,' says Ugaz, who led the corruption case against the former President of Peru, Alberto Fujimori, from 2000 to 2002, resulting in the indictment of 1,200 senior government



“It’s not about a few rotten apples... It’s about a globalised financial system that allows people to set up hundreds of shell companies all over the planet to hide their real identity

Charmian Gooch
Co-founder, Global Witness

officials. ‘Corruption denies education, health, housing and better conditions of life for millions of people around the world, especially in poor countries. It is a tax paid by the poorest.’

Shell companies are a godsend for anyone with expensive appetites and an accommodating conscience. Described by Gooch as the ‘getaway car for the corrupt’, they conduct no active business and usually exist only on paper. And even better than shell companies are so-called ‘shelf’ companies, which are aged like vintage wines to create an aura of longevity and legitimacy, increasing their value.

The way it works is simple. A company is set up in a ‘secrecy jurisdiction’ that discloses very little information to third parties; paid nominees list their names as the legal owners, despite having no connection to the company; the company is made the legal owner of another, which becomes the owner of another, forming an almost impenetrable chain crossing several country borders; a



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bank account is opened in the name of the final company in the chain – and the true puppet-master behind the scenes is free to loot with impunity.

‘It’s a massive problem,’ says Jack Blum, one of the US’ top white-collar crime lawyers and former Chair of the United Nations Intergovernmental Working Group on Asset Recovery. ‘It separates people from any responsibility for their actions. They place an entity between themselves and any possibility of a government regulating them, taxing them or punishing them.’

The Financial Action Task Force, the global standards-setting body for anti-money laundering (AML) and anti-terrorist regulation, recommends that beneficial ownership information should be available to authorities in a timely fashion. However, compliance varies widely across the world. Jurisdictions largely fall into three categories: those that have promised to introduce a public registry (the UK, Denmark and Norway); those that have, or intend to introduce, a private registry, where beneficial ownership information can be accessed by law enforcement (several UK overseas territories, Jersey, Italy); and those with no registries, where beneficial ownership information is stored only by banks or corporate service providers (CSPs) – or, in some cases, simply not collected at all (Delaware, the Isle of Man, Gibraltar, Guernsey, Russia, Canada many Asian states).

According to a report by the B-Team, a group of global business leaders dedicated to the ‘wellbeing of people and the planet’, led by Richard Branson, the commercial argument for transparent ownership is clear. It would increase competitiveness, ensuring only legitimate businesses win contracts; help companies assess their risk exposure when dealing with a complex web of financial transactions; and reduce the risk of unwitting complicity in corruption. ‘Ethical and effective businesses do not require anonymous companies,’ the report states. ‘Yet such businesses may suffer the consequences of their use by business partners.’

For Blum, Gooch and a growing cohort of others, the only effective solution is a public registry. As well as helping business, this would allow citizens to hold companies and governments to account, they say. And it would be cheap, significantly reducing policing and investigation costs.

Others, however, believe private registries are more than sufficient. ‘The question is, transparency to whom?’ says Helen Hatton, former Deputy Director General of the Jersey Financial Services Commission, who helped Jersey achieve the International Monetary Fund’s top score for AML compliance in 2009.

‘If you’re talking about the general public, I think that’s too far. If you’re talking about law enforcement, that’s essential. This gives confidentiality at a legitimate level, without tipping into secrecy and non-transparency.’

‘Delaware is a horror story’

But can law enforcement access information from private registries when necessary? Currently, global detection rates for criminal proceeds are shockingly poor, according to estimates by the UN Office on Drugs and Crime: around one per cent, with a seizure rate of just 0.2 per cent. Getting the relevant permissions from governments and courts can be a laborious process, and offenders are often tipped off in the meantime, allowing them, proverbially speaking, to take the money and run.

In several jurisdictions, information is only required to be disclosed for investigations involving high-profile crimes such as drugs trafficking or terrorism, leaving tax cheats and common swindlers home and dry. Obtaining information from foreign countries for the investigation of transnational crimes – as most serious money-laundering cases are – remains especially problematic due to lack of cooperation between jurisdictions.

“Corruption denies education, health, housing and better conditions of life for millions of people around the world. It is a tax paid by the poorest

José Ugaz

Chair, Transparency International

The most difficult places to obtain information are not Jersey or BVI, but the state of Delaware in the US: an onshore tax haven that acts as an irresistible lure for companies across the world. In the Brandywine neighbourhood of Wilmington, a bland, one-storey block on North Orange Street is home to nearly 300,000 businesses. Many are legitimate: Apple, Bank of America, Google, JPMorgan Chase. Many, however, are not. And distinguishing between the two when all that exists is a post-box address is no easy task.

It can take less than 30 minutes to incorporate a company in Delaware, either over the phone or online. One popular CSP is CT Corporation,



which represents more than half of all Fortune 500 companies. Such agencies fill in the paperwork, collect fees and, if necessary, appoint nominee directors – sometimes for as little as \$200. While they are legally obliged to know the name of the beneficial owner, due diligence is often lax, or near non-existent.

‘Delaware is a horror story,’ says Blum. ‘If a foreign government wants to find out about a Delaware corporation, it goes through the office of international affairs, then through a US attorney, the attorney goes to the court in Delaware and gets an order permitting cooperation. And that’s the end of it. Because there is no information there to be found.’

Delaware is not the only publicity shy state in the US, however. Nevada and Wyoming, both home to popular laundry services, are almost equally reticent. In fact, no state currently requires the collection of beneficial ownership information, allowing criminals across the world to open bank accounts with the credible camouflage of an American business address. A recent World Bank investigation into 213 cases of ‘grand corruption’ found that 70 per cent relied on anonymous companies, most set up in the US. Another study, *Global Shell Games*, published in 2012, sampled 60 countries and found the US to be second only to Kenya in the ease with which someone can set up an anonymous company.

Some tentative efforts at reform have been made. A bipartisan group of US senators is co-sponsoring a bill that would require all 50 states to identify beneficial owners. Hopes are not high, however. Such legislation has been proposed four times in Congress, stalling each time due to objections from the American Chamber of Commerce and the American Bar Association.

“ Too many people profit from this system. There is so much money involved in handing kleptocrat investment and there’s an iron lobby that says, sorry, we are not going to allow any of this to be disclosed

Jack Blum

Leading US white-collar crime lawyer; former Chair of the UN Intergovernmental Working Group on Asset Recovery

For Robert Wyld, partner at Australian firm Johnson Winter & Slattery and Chair of the IBA Anti-Corruption Committee, the US cannot drag its feet any longer. ‘The US should be taking the lead in targeting how shell companies can be established and what information must by law be disclosed. If the US is serious on this, we need to see concrete action, not just platitudes, reviews and submissions.’

Britain makes transparency moves

Where concrete measures are concerned, the UK is beginning to take action. Defying critics, the country recently put its money launderers where its mouth is and agreed to introduce public registries for beneficial owners – defined as those with an interest in more than 25 per cent of shares or voting rights in a company, or who otherwise control the way a company is run.

For transparency advocates, it is not before time. The UK is a close competitor with the US for ease of incorporation and weakness

of regulatory oversight. Companies can be set up directly at Companies House for a few pounds, without the need to go through a CSP. Directors can be nominees, no disclosure of real owners is required and no checks are made to ensure the information is accurate. Meanwhile, the policing of fraud and corruption has suffered badly from swingeing budgetary cuts.

Announcing the new policy in November 2013, British Prime Minister David Cameron spoke of its 'wider benefits': 'It's better for businesses here, who will be able to better identify who really owns the companies they're trading with. It's better for developing countries, who will have easy access to all this data without submitting endless requests for each line of enquiry. And it's better for us all to have an open system which everyone has access to.'

Not everyone is convinced, however. Critics point out that trusts and limited liability partnerships are excluded, and few oversight measures seem on the table. 'It strikes me that this is an attempt by the government to look as if they are "doing something",' says Ros Wright, Chair of the UK's Fraud Advisory Panel and former Director of the Serious Fraud Office. 'Knowing how easily criminal enterprises can get around any kind of oversight, I think this will become another regulatory burden for the law-abiding and will not catch the crooks.'

In Wright's view, the UK Department of Business, Innovation and Skills (BIS) is 'extremely resistant to tightening up the controls on incorporation' due to concerns it would 'limit enterprise'. In response to her comments, BIS told *Global Insight*: 'Companies House uses a number of different approaches to ensure the integrity of the UK's company register before and after registration. They work closely with law enforcement agencies to identify suspicious activity and support investigations, and have recently set up a new team to focus on non-compliance and integrity issues.'

For Wright, Blum and others, the UK should be doing far more to pressure its overseas territories and Crown dependencies to tackle corporate secrecy. While most do collect beneficial ownership data privately, not one has agreed to open its books to the prying eyes of the hoi polloi, claiming it would damage their island economies.

Hatton concedes that some offshore jurisdictions offer safe harbour for crooks and thieves, but is adamant Jersey and its fellow Crown dependencies, Guernsey and the Isle of Mann, are not among them. The debate frequently becomes muddled by conflating

ideology with fact, she says. 'If someone doesn't like the concept of incredibly wealthy people managing their affairs to reduce their tax exposure then they will never support offshore jurisdictions. But if they imply much of the activity is unlawful then that is not true. We are subject to extensive scrutiny by international standards setting bodies.'

Accomplices to corruption

Where banks are concerned, such 'extensive scrutiny' seems to have been sorely lacking. In the FIFA case, more than 20 financial institutions were named by US prosecutors as having processed payments relating to corrupt activity. While none have been accused of any wrongdoing, questions clearly need to be asked as to how \$150m of suspicious transactions failed to raise red flags.

'Standards of integrity in the financial sector are really lousy and the banks are playing with the rules and laundering money,' says Ugaz. 'Billions of dollars are going through these institutions to terrorist groups, drug traffickers and weapons trafficking organisations... Financial sector institutions are accomplices to the grand corrupt actors of the world.'

For British journalist Andrew Jennings, whose 2006 report *FOUL! The Secret World of FIFA: Bribes, Vote Rigging and Ticket Scandals* set the current investigation into motion, banks have a great deal to answer for. 'When dealing with people like Chuck and Warner, whose reputations stink, then their accounts should be refused or scrutinised very carefully. In one example, money came from Switzerland to an account in Trinidad, and was then transferred to Warner's personal account. Alarm bells should have been ringing.'

Several leading banks named in the indictment – HSBC, Barclays, JPMorgan Chase, Bank of American, UBS and Standard Chartered – were contacted by *Global Insight* for comment, but all declined. Hatton, however, defends the industry. 'Banks have an incredibly difficult task to comply with AML legislation. These institutions have millions of transactions going through every hour, and these processes are largely dehumanised now.'

Whether banks are complicit in criminality or simply failing to stop it due to incompetence or inadequate regulation, few deny there is a problem. According to the Financial Action Task Force, banks should be legally obliged to identify the real owners behind companies and perform additional due diligence on 'politically exposed persons'. However, few countries fully comply with these rules.

In the US, there is no specific obligation on banks to identify the beneficial owner – though

Cracking the shell of corporate secrecy

Money laundering via anonymous shell companies can do incalculable damage to national security, international stability, vulnerable communities, business, poor and unstable countries and the democratic process as a whole. Here are some of the most serious schemes exposed to date.

National security

Over the past decade, the international drugs trade has ripped apart the fabric of Mexican society, causing thousands of deaths and flooding American streets with drugs and dirty money. Meanwhile, the drug kingpins look for new ways to move and hide their cash.

The biggest of Mexico's drug gangs is the Los Zetas cartel, whose former leader Miguel Ángel Treviño Morales was notorious for dismembering his victims while still alive. From 2008, the Zetas used anonymous companies to launder millions of dollars of drug money into the US, with the true ownership hidden behind frontmen. The money was disguised via the purchase of race horses, some of whom were given names such as Number One Cartel. The horses are reported to have won the cartel several million dollars.

Fourteen people, including Treviño, were indicted on money laundering charges by the US in 2012 in connection with the scheme. Ten people have been convicted, while seven remain at large.

Vulnerable communities

In a \$6m human trafficking scheme, anonymous owners tricked their victims into a life likened to modern-day slavery. Hiding their real identities behind a web of shell companies registered in Kansas, Missouri and Ohio, the Moldovan gang ran employment companies that supplied hundreds of foreign nationals to hotels, resorts and casinos across the US.

According to the indictment, victims from Jamaica, the Dominican Republic, the Philippines and elsewhere were lured to the country with false promises and then forced to live in overcrowded, substandard apartments. The gang withheld much of their earnings, allowed their visas to expire and threatened the workers with deportation and extra fees if they left. They used the anonymous companies to obscure their link to the scam and to launder their illegal money. The ringleader of the scam was jailed for 12 years.

Businesses and investors

The FBI has described Semion Mogilevich as 'the most dangerous mobster in the world', allegedly 'involved in weapons trafficking, contract murders, extortion, drug trafficking, and prostitution on an international scale'. However, that did not stop the Russian from setting up a vast network of anonymous companies, stretching from Eastern Pennsylvania to the UK. This allowed him to cheat the stock market and steal over \$150m from investors in the US and overseas, according to the US authorities. Many lost their pensions and retirement savings.

Using his web of anonymous companies, Mogilevich is said to have created the illusion of a successful international business trading in industrial magnets. By inflating the price of his companies through manipulating securities and false reporting, Mogilevich is alleged to have convinced investors to purchase millions in stocks in a company that did no real business. In spite of several arrest warrants issued against him, he still lives freely in Moscow, according to the FBI.

Poor and unstable countries

Equatorial Guinea is hugely rich in natural resources, but its people are some of the poorest in the world. Much of the money seems to have gone into the pockets of the President's son via a string of anonymous companies.

According to the US Department of Justice (DoJ), Teodorin Obiang spent more than \$300m in stolen money on luxury goods, sports cars and houses. The assets included a mansion in Malibu, California, Michael Jackson memorabilia and luxury cars. Shell companies incorporated in California were used to open US bank accounts and buy the mansion, while a company incorporated in the British Virgin Islands was used to buy the plane.

In October 2014, Obiang was ordered by the US DoJ to forfeit \$80m worth of assets, alleged to be from the proceeds of corruption. Obiang said all the items were purchased using money from legal business deals.

Source: Global Witness, *The Great Rip Off*, September 2014

the Treasury Department is finally taking steps to address this. In the UK, the Financial Conduct Authority last year found ‘significant and widespread weaknesses in most banks’ anti-money laundering systems and controls’. Not much has changed, it seems, since HSBC was fined a record \$1.9bn in December 2012 for allowing ‘drug kingpins and rogue nations’ to channel dirty money through its accounts.

And it won’t, says Blum, while banks’ incentives remain skewed. ‘Too many people profit from this system. There is so much money involved in handing kleptocrat investment and there’s an iron lobby that says, sorry, we are not going to allow any of this to be disclosed.’

Fellow US white-collar crime lawyer John Moscow, a former New York Assistant District Attorney, agrees. Whether via kleptocrats or billionaires seeking to ‘protect’ their assets, the amount of money flooding the system from regions such as the Middle East and Russia is ‘grotesque’, he says. ‘A lot of people with a lot of money want to be able to conceal it from their government. There has to be a way for the people who control that money to take responsibility for it.’

One way to take responsibility is via public registries. Such a resource would significantly assist banks in the identification of clients and raising of red flags. Indeed, leading banking associations have voiced support for increased ownership transparency for this reason. In its contribution for the review of the EU Money Laundering Directive, the European Banking Federation stated that public registries ‘are imperative if credit and financial institutions are expected to discharge their obligations concerning beneficial ownership identification’.

The heart of the matter

Banks are not the only global facilitators under pressure to do more. Responsible for the design and propagation of near-impregnable webs of financial secrecy, the role of lawyers can hardly be overstated.

While such systems may be technically legal at present, for Blum their ethical ramifications are clear-cut. He recalls a recent occasion at a meeting of the Inter-American Bar Association, hosted in a Latin American country, when he told the audience the role of a lawyer was to help clients obey the law rather than evade it. The audience began to laugh at him, he says, ‘and I really got mad. I said, you lawyers think your job is to beat the system... You wonder why wealth is so badly distributed and people have no opportunity. You are at the heart of that problem.’

Wyld supports this view. ‘If lawyers do not act independently with an ethical obligation to

the administration of justice, financial crime will continue to flourish behind complex legal structures. A lawyer may have been misled, did not ask the right questions, did not want to ask such questions, turned a blind eye or was wilfully reckless in the advice given.’

Gooch calls on the legal profession to lead a global conversation that addresses attitudes to secrecy. Lawyers can no longer hide behind ‘the very tiny fig leaf’ that their job is simply to navigate the law, she stresses. ‘Slavery was the law until it stopped being the law. Children were sent up chimneys until this stopped being the law... It is no longer acceptable to say, this is the law and therefore I apply it. It has got much greyer than that.’

Momentum is clearly growing for governments to crack the shell of corporate secrecy. In November 2014, the G20 leaders agreed to a set of high-level principles to implement ownership transparency – though stopped short of pressing for public registries. From 2016, the Extractives Industry Transparency Initiative will require oil and gas companies bidding for licences to declare their beneficial owners, while in the US, the Financial Account Tax Compliance Act now requires foreign banks to disclose accounts held by US taxpayers.

Former Siemens General Counsel Peter Solmssen, who joined the company in 2007 following a high-profile bribery scandal, is confident the world is going in the right direction where tackling corruption is concerned – ‘there is hardly a country where it is not a top priority’ – but believes that ‘better international enforcement cooperation’ is key to ensuring such change continues.

However, achieving such cooperation in a world suffused with shadows is an arduous and often impossible task, leaving vast troves of wealth buried deep in fiscal black holes. Whether used for overt criminality or to ‘shield’ assets from inconveniently intrusive governments, anonymous shell companies exist in a netherworld of governance, outside the confines of accountability and oversight.

Publicly accessible information on all corporate entities – including trusts and limited liability partnerships – would change this, benefiting businesses, banks, investigators and society alike. And everyone can play their part to achieve this, stresses Gooch. ‘Andy Warhol has a fantastic quote, where he says that people think time changes things, but actually you have to get out there and change it yourself. So I think anybody can make change happen.’ ☒

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GLOBAL LEADERS

José Ugaz

José Ugaz is Chair of the world's leading anti-corruption organisation, Transparency International. A formidable anti-corruption lawyer, he acted as Ad-Hoc State Attorney of Peru in a series of ground-breaking cases, including prosecution of the former president, Alberto Fujimori, and indictment of 1,200 senior government officials. In an interview at the OECD in Paris, he spoke to IBA Senior Reporter Rebecca Lowe about the FIFA scandal, progress in fighting corruption and the challenges that remain.

Rebecca Lowe: You are one of the world's top anti-corruption lawyers, you've dedicated your life to fighting for transparency, for accountability; you must have quite strong feelings about the last couple of weeks. Are we seeing a watershed moment in the history of corruption in sport? Is this an end to impunity?

José Ugaz: Transparency International knew, some years ago, that terrible things were happening in FIFA regarding corruption, so that's the reason why Transparency International released a report on corruption in sport in 2010.

Then, we had some conversations with Mr Blatter and he committed himself to appoint a committee to review the situation of corruption in FIFA and make some suggestions for the future.

In the end, they didn't review the past and Blatter refused to make the report public, so we were not really happy with that. And what we are seeing now, I think, is just a consequence of decades of passivity

in the way that FIFA has been run by the top officials of the organisation, and how they have enriched themselves with illicit practices all around the world.

RL: A lot of people might say that this has been a long time coming – as you say, maybe two decades. Why is this only happening now? Why have we not seen this sort of investigation before?

JU: I think it has to do with political will. You know, FIFA had the particular issue that, since it was a private institution, it was surrounded by impunity. Many countries have huge problems with their national federations that are linked to FIFA, but they were not able to open investigations because they would be immediately debarred from the championships of soccer. So I think that when the American and Swiss authorities found that these corrupt practices were not only private, involving payments among these officials, but also crossed some lines and went into tax evasion and money laundering

and racketeering, then that's why I think it went through the criminal system.

RL: The United States was the one that were able to capitalise on this because of the dollar payments, but should it be the US, really, who has come forward with this prosecution? Where was everyone else? Where were the Europeans, where's the United Kingdom? Why are we depending on the US to do this?

JU: To some extent I think it has to do with a lot of wilful blindness, people not willing to take action on things that everybody knows are happening – maybe the US because soccer is not so popular there and they were not too much concerned about the consequences of that. But I think it has to do more with the ruling in the US and this possibility of pursuing cases when money goes through the American market. So, anyway, I think the US or Switzerland or whoever gets involved, FIFA was requiring these type of measures many years ago [*sic*].

RL: And why should anyone outside of the sporting world care about this? Isn't it just a load of greedy men putting some bungs into their back pockets? What real consequences does it have for the rest of us?

JU: Well, corruption is bad in any case, private or public. Of course, when it goes public, things are worse because it has an impact on the livelihood of millions of people around the world. Now, when we talk about grand corruption, we are talking about the impact of this type of practice on the basic rights of the people.

When corruption is private, it has to do with another set of rules and this is about fairness and getting into the markets correctly. In the case of soccer in particular, it has, I think, a big share of public interest.

This is a sport that moves millions of people around the world and, of course, when you distort the rules by implementing all these practices under the table, in order to fix matches or to select the countries that are going to be hosting the championships, or when you overpay or overcharge for the payments of the TV and media rights, then you distort the entire business.

RL: It's not all about FIFA, a lot of sporting federations are in trouble – cycling, cricket,

volleyball, wrestling, a whole host of them. Why does sport and corruption go hand in hand like this, and what are you hoping to achieve with your initiative, the Corruption in Sports campaign?



On the FIFA scandal

“To some extent I think it has to do with a lot of wilful blindness, people not willing to take action on things that everybody knows are happening...”

JU: There are basically two factors here. One is money. Sport generates huge amounts of money, especially if they are popular sports. Depending on the country, and which sport is more popular, you will find big issues of corruption there because the amounts of money involved are quite big. The other thing is that if a sport is popular, it gives you a significant quota of power.

In the case of soccer, you've seen this. The impunity that was implemented by the FIFA leaders was because they had the power. They were, all the time, threatening the countries that wanted to make investigations, saying 'if you dare to investigate me, I will debar you and you will be out of the official championship'.

So power and money, and not only the power that comes from money, but also political power, are two of the big

components that have led sports to this situation.

RL: Switzerland looks set to pass a bill that would allow federal corruption investigations against FIFA and the other 60-odd sporting federations that are currently based in the country. Do you think that's going to have an impact?

JU: Yes. I think that what is happening with the Swiss authorities regarding corruption has been very interesting in the past few years. I have witnessed it, as a special state attorney for approving the case. We had to go to the Swiss authorities in order to ask for cooperation to recover money that was being stolen by Montesinos and Fujimori, and we found full support from the Swiss authorities. So things have changed considerably in Switzerland, and FIFA is proof of that.

RL: We were talking a lot about impunity, and that is one of the big campaigns of Transparency International, the no impunity campaign. I was looking at your 2014 report, *Exporting Corruption*, and it doesn't make for very hopeful reading. It says that with 30 of 41 signatories, the OECD anti-bribery convention has no or limited enforcement at the moment. So it seems that there still is a lot of impunity, it doesn't seem that many countries are really actively prosecuting these sorts of crimes. What needs to change?

JU: Well, in the type of anti-corruption work we do, it is not easy to make a final assessment and say, look, we already won, or achieved, a definite victory against corruption, but if we look back, I can assure you that we have achieved. And when I say 'we', I'm referring to civil society authorities, anti-corruption authorities and the international community in general who have been committed to this work.

We have achieved very significant goals. Now you have a United Nations Anti-Corruption Convention and American, African and Asian Conventions against corruption. The OECD has a set of rules in the convention against international bribery and corruption is at the top of the agenda. You wouldn't believe that 15 years before, the word 'corruption' was officially avoided from reports in some worldwide institutions, because they said it referred to politics.

RL: And it was a tax-deductible expense, wasn't it, for a lot of countries?

JU: Just a few years ago, many first world countries were entitled to deduct bribe payments abroad in order to obtain some additional gain. So things have considerably changed. Of course, there's a lot to do. And regarding the OECD report, I think it's a very valuable instrument. I was here in December when it was presented, and the OECD found that only 17 out of 42 countries are really complying with the enforcement of the convention.

The good side of it is that at least 17 countries have done it and we had 446 cases that have been finished regarding corruption investigations. The bad side of the picture is that more than 50 per cent of the countries are not complying, and that group is composed of countries that have the biggest economies.



On progress in the global fight against corruption

“ Things have changed considerably in Switzerland, and FIFA is proof of that

So Transparency International volunteered to work with the OECD in order to monitor and observe and put some pressure on these countries, in order to obtain a better performance and then force another convention.

RL: How's the UK doing in that? It has the UK Bribery Act, which was a little bit delayed and then finally came into force, but we haven't exactly seen a spate of prosecutions yet. Does it need to do better? Are there the resources there to do better – the political will?

JU: Absolutely. On one side you have the UK accepting the possibility of having a registry in order to know who the ultimate beneficiaries of offshore companies are, for example. It's a huge issue and the OECD reports points it out, because in more than 40 per cent of the cases that were part of this report, that were investigated for international bribery, the money went through corporate vehicles, that's offshore companies and most of them were linked to the so-called safe havens. A report that has recently been released in the UK says that a huge amount of property is in the name of offshore companies, and we know because we've seen in many cases that money is coming from illicit sources and coming from the third world, where corrupt top officials have been stealing money and buying property in the UK, in France, in the US, in Spain and other first world countries.

So there's a lot to be done yet, and I think, of course, the UK can have a much better performance because it is well-known that millions, if not billions, of dollars are running through the London market.

RL: Yes, exactly. And I wanted to come on to that because, according to the OECD, almost all financial crime involves anonymous shell companies. There was a study by the World Bank not so long ago, that looked at more than 200 cases of grand corruption over the past 20 years and found that 70 per cent involved these shell companies.

Is this really at the heart of the problem when we're looking at grand corruption, when we're looking at FIFA? Is it better to go after the facilitators who allow for the shell companies to be set up? Is that more effective than going for the people who are actually accepting the bribes?

JU: Intermediaries are always an interesting part of the chain to look at, and following the money through these people sometimes is much easier than going through the people that accepted the money. Now, in this modern world, with a lot of technology and global issues and speedy communications, it's not easy to trace money.

People, when they use straw men and offshore companies, can generate very complex fraud schemes that are very difficult to trace, so all the possibilities, all the means that are available should be used, but it's the responsibility of the state and of the ruling authorities to set the rules in order to make it possible.



On tax havens and secrecy jurisdictions

“ If they are used as a means to avoid control, to avoid paying taxes, to bring opacity and to avoid knowing who the ultimate beneficiaries are, then we'd better not have them

Banking secrecy, offshore companies, political asylum, immunity for high-level authorities – all of these institutions were created many years ago for other purposes, to protect privacy, yes, but to protect privacy in a specific context, not to build a shield for impunity and not make it possible to trace illicit funds. Political asylum – yes, but not to establish safe havens for the crooks that are looting their states and then run to another state. Immunity for the congressmen – yes, in order to avoid political persecution, but not to permit bad congressmen to do whatever they want without any consequences.

So we should rethink these institutions and order them in relation to what we expect,

now, in combating corruption and impeding impunity to be the general rule in our world.

RL: Where tax havens and secrecy jurisdictions are concerned, should we see an end to those, or do you just want greater transparency, greater oversight and accountability? The British Virgin Islands, the Cayman Islands – whenever there is a corruption scandal, these names keep cropping up, so would it be best just to end them altogether?

JU: Well, I think that would be impossible.

RL: Should that be the ideal?

JU: They are there because there were, historically, some commercial reasons to put these vehicles in the market. And I think if they are run with transparency and according to legal standards, there shouldn't be a problem. But if they are used as a means to avoid control, to avoid paying taxes, to bring opacity and to avoid knowing who the ultimate beneficiaries are, then we'd better not have them.

I think that with all the efforts we are making now, to bring light into safe havens, into offshore companies, to bring rationale to banking secrecy and other aspects of the right to privacy, we should guarantee that fundamental rights are there and are protected, but we cannot be so naïve about the so-called protection of fundamental rights, to open all these avenues for the corrupt in order to further their private gain, affecting millions of people.

Because in the end, when we talk about public corruption, corruption kills, corruption denies education and health and housing, better conditions of life, for millions of people around the world, especially in the poor countries. I've been repeating that corruption is a tax that is paid by the poorest, so it is not only a matter of the right to privacy or my right to private financing movements, but it's also, here, an element of public interest.

RL: And do you think the UK should be doing more to ensure there is the oversight and transparency that you're talking about, over its overseas territories, over its crown dependencies, these tax havens that do keep cropping up?

JU: Absolutely. I think the UK has still a very long road to travel. The amazing thing is that I don't think the UK needs dirty money to be the UK and to sustain its market, so what is the reason for having all this opacity and all these tricky things around, and all these islands making strange movements of money?

The UK doesn't need that. I mean, this is only to benefit some individuals that are taking advantage of a flexibility that, in my opinion, should be revised and strongly reduced. Only for necessary elements in a case of protection of fundamental rights.

RL: And it may surprise some people to learn that the US is one of the easiest places to set up an anonymous shell company. Should the US be doing more to take the lead here, and try and stamp out that sort of activity?

JU: Delaware and Miami are, of course, good examples of how you can launder money very easily, and many dirty funds go through the markets of New York. Of course, the US is doing very visible things, the State Department and the Department of Justice, in particular, regarding the Foreign Corrupt Practices Act and bringing cases all the time into the light, but there are still a lot of corrupt practices.

Recently, as happened in the UK, there was a report of the owners of the richest properties in New York and most of them were, again, in the name of offshore companies. Many of those offshore companies were linked to corrupt top officials in other parts of the world – Russian oligarchs and those from many other parts of the world – so, of course, there's a lot to do, a lot of improvements to be made.

Sometimes we find double speech or double standards, showing some results in some ways, but at the same time all this money continues to go through the territories, or rules are fixed in order to not make possible a real control and monitoring of these funds. ☒



This is an abridged version of a filmed interview, which can be viewed in full on the IBA website at: tinyurl.com/JoseUgazInterview



May I have your attention, please?

The OECD's final proposals for major reform of the international tax regime will be put to G20 leaders in November. Businesses and their advisers need to be ready.

JONATHAN WATSON

Pay attention! That's the message to lawyers from Pascal Saint-Amans, Director of the OECD's Centre for Tax Policy and Administration. 'Lawyers need to pay attention because our work is going to change tax planning across the world,' Saint-Amans told *Global Insight*. 'In the future, compliance will be more important than ever. Conservative tax planning will be the best advice for clients.'

Saint-Amans is leading the OECD's base erosion and profit shifting (BEPS) project, a 15-step plan designed to transform the international tax system (see box on p 37). BEPS refers to tax planning strategies that enable companies to exploit gaps and mismatches in tax rules so they can artificially shift profits to low or no-tax locations where, in reality, they do very little business. This enables them to pay little or no corporate tax.

The phenomenon is creating a big problem for national governments, who are losing out on revenue that could be used for public investment to promote growth. And, as many economies are still struggling in the wake of the financial crisis, this has become a major issue for governments of all political shades.

The key aims of the BEPS project include making sure tax administrations are equipped with tools like country-by-country reporting, which forces multinationals to provide a detailed account of their results in every

jurisdiction where they operate. Another is establishing minimum standards to prevent treaty shopping – the practice whereby companies structure themselves to take advantage of more favourable tax treaties available in certain jurisdictions. Yet another is to neutralise hybrid mismatches, which is when corporations set up entities or transfers in two or more countries, in some cases for no productive purpose, but rather to create deductions or to generate foreign tax credits.

'We need to make sure that tax planning as it was implemented in the 1990s or early 2000s has come to an end,' Saint-Amans says. 'Tax planning should be on the margins of company activity – not at the core of the business model.'

Tech firms singled out

Many of those highlighted for avoiding tax are successful US-based technology multinationals such as Facebook, Apple, Amazon and Google. In Britain, Margaret Hodge, Chair of the UK Parliament's House of Commons Public Accounts Committee, has been particularly critical of specific companies. Saint-Amans is keen to emphasise that the BEPS project, which was commissioned by the finance ministers of the G20 countries, is not interested in naming and shaming the most aggressive tax



“ Compliance will be more important than ever. Conservative tax planning will be the best advice for clients

Pascal Saint-Amans
Director, OECD Centre for Tax Policy and Administration

avoiders. ‘We’re not trying to blame anyone,’ he says. ‘We are not saying specific companies are bad guys. We are saying that the rules we have to eliminate double taxation are actually facilitating double non-taxation. We need to update them so they do their work.’

There are specific reasons why tech firms have turned into targets for tax campaigners. ‘These companies are new and they do not have a history of interacting with governments,’ says Saint-Amans. ‘They have emerged at a time when aggressive tax planning became the norm, so they became quite aggressive themselves.’

“ People like me, tax practitioners, are beginning to say maybe I need to pay more attention to this, because it could really happen

David Hardy
Osler, New York;
IBA Taxes Committee

Another issue is that they rely more heavily on intangibles such as intellectual property, which can be located almost anywhere. Companies like Amazon and Google have less of a physical presence than is the case for those with roots in the bricks and mortar era.

‘Once upon a time, we dealt with factories and commercial installations and in that case it was quite easy to decide where a business was run,’ says Fabio Cagnola, a Milan-based

partner at Studio Legale Bana and Co-Chair of the IBA Business Crime Committee. ‘When you deal with the IT world, it’s a little bit more difficult to establish where business is carried out and therefore where a company should be subject to taxation.’

Google’s response to complaints about its tax planning was an interesting one, says Steve Edge, a partner in the London office of Slaughter and May and a member of the IBA Taxes Committee. ‘They said they don’t need any employees in the UK. You suspect that people would say they should pay tax anyway, because they are active in the UK market. But that’s not the way the international tax system currently works. If you’re selling from abroad, you pay tax abroad, not in the country you’re selling to. Otherwise you are basically charging an entrance fee to access a market.’

This is an issue that has been around for many years. ‘Many countries clearly feel that when an Amazon or a Google accesses and exploits their local market, even from a remote location, they ought not to be able to extract profits from the jurisdiction without paying tax to the jurisdiction,’ says David Hardy, a tax partner with Osler in New York and another member of the IBA Taxes Committee.

Could the US undermine the project?

Lawyers in the US are paying particularly close attention to the OECD’s work. ‘When BEPS first rolled out, the US was a little sceptical of the intrusiveness of the proposed exchanges,’ Hardy says. ‘It seemed there was potential to displace or reduce some of the US’s revenue expectations. We expect our multinationals to expend money on things like R&D, to develop new innovations, and then to exploit that capital abroad. We also expect the lion’s share

of the tax on those innovations to be generated here in the US, where the innovations were created.'

There were doubts in the US about whether all the proposed BEPS changes could be implemented in a way that was fair to all countries. 'The notion that the US and all the other OECD member countries were going to simultaneously adopt a multilateral treaty to implement all the BEPS action plans seemed impossible, especially with the US Congress being the way it is,' Hardy says. 'We already have five or six totally unobjectionable tax treaties that have been pending before the Senate for several years.'

“ Some countries have already anticipated what might happen and we could end up with a very uneven playing field internationally. Some jurisdictions may choose to change their rules more onerously than others

Steve Edge
Slaughter and May;
IBA Taxes Committee

However, Hardy believes he is beginning to see a change in this attitude. The US Treasury negotiators have become more present and involved in the OECD process, and they've been seeking to help guide the process towards resolutions that may be acceptable to the US.

Recently, the US announced changes to its new model tax treaty, soon to be released, which are designed to draw the BEPS process towards what the US thinks it can adopt. 'Robert Stack, Deputy Assistant Secretary (International Tax Affairs) at the US Treasury, has been quite specific that all of these new BEPS initiatives – including country-by-country reporting – need to be consistent with the internationally established arm's length principle,' says Hardy. 'That's essential.'

According to Saint-Amans, the US government has always been supportive of the BEPS project, even though some individual officials may have highlighted concerns from time to time. 'The US business community for

a long time did not believe that real change would occur,' he says. 'They now realise that changes are occurring, and have become more active in commenting on our work – although it's true that a number of comments are not positive!'

The US Treasury is starting to believe that much of BEPS will ultimately emerge into real law that countries agree to adopt and that the US will be a participant in that. 'People like me, tax practitioners, are beginning to say maybe I need to pay more attention to this, because it could really happen,' says Hardy. 'How it rolls out may not yet be totally clear, but it appears to be rolling out and it appears to be something that is not only making more sense, but also looking more politically feasible.'

Australia and the UK strike out on their own

As well as the US Treasury accepting that BEPS could work in the US, we now also have the new step of countries unilaterally adopting certain aspects of the project. The UK's diverted profits tax – nicknamed the 'Google tax' – is a perfect example of that. The measure, which came into force in April, levies a 25 per cent charge on 'diverted profits' earned by companies that avoid having a taxable presence in the UK or transact with overseas affiliates that 'lack economic substance'.

This 'experiment' will be interesting to follow, says Jan Lawrence Handzlik, Managing Principal at Handzlik & Associates in Los Angeles and Co-Chair of the IBA Business Crime Committee. 'What impact will that have on the operations of multinationals in the UK? Will they remain in that domicile at the same level they are now, or will they move somewhere else? Measures like this may sound good to voters, but you have to ask what the long-term consequences will be.'

Soon after the tax came into force, US online retailing multinational Amazon started to pay taxes on sales to its UK customers in the UK, rather than Luxembourg as it had done previously. It did this by setting up a London branch of its main Luxembourg retail company, which has been responsible for booking sales from UK customers since 1 May. This enables UK authorities to tax the profits associated with those sales, which previously were mostly out of reach.

Saint-Amans notes that unilateral moves are 'a bit complicated' when you are trying to lead a big multilateral project. But for Hardy, they illustrate that BEPS initiatives 'do not all have



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- Action 14:** Make dispute resolution mechanisms more effective
- Action 15:** Develop a multilateral instrument

to be adopted by all OECD member countries simultaneously in order to work’.

In the US, for example, the last two Treasury budgets have included proposals to adopt a structure that is very similar to the anti-hybrid provisions of BEPS. And Australia is amending its general anti-avoidance rule by inserting a Tax Integrity Multinational Anti-avoidance Law that targets the tax arrangements of 30 specific multinationals.

All this raises fears of a confused world for tax lawyers. ‘My fear is that we’ll end up changing the rules, there won’t be universal acceptance about what we should do, and some countries, possibly the US, will say no,’ says Edge. ‘Some countries have already anticipated what might happen and we could end up with a very uneven playing field internationally. Some jurisdictions may choose to change their rules more onerously than others.’

Edge is particularly worried about the work being undertaken as part of Action 4 of the BEPS plan (see box above). This deals with interest deductions and other financial payments that can cause double non-taxation on both inbound and outbound investments.

‘There’s been a big push to say that for every interest deduction, there will be some income, and it will have to be taxed somewhere,’ he says. ‘If it isn’t taxed, you will have to go back to the jurisdiction where the company is carrying out its activity and say that even though they were quite happy to give a deduction for that interest because it was within their rules, they’ve now got to take the deduction away. That strikes me as going too far, and potentially creating an uneven playing field between some businesses and others.’

National governments will retain some room for manoeuvre. Saint-Amans is keen to emphasise

“Once upon a time, we dealt with factories and commercial installations and in that case it was quite easy to decide where a business was run

Studio Legale Bana; Co-Chair, IBA Business Crime Committee

Fabio Cagnola

that the BEPS project is not about preventing them using tax advantages to attract profitable multinationals to their countries. ‘Countries will still be able to offer good regimes, including attractive corporate income tax, as long as companies don’t de-link the location of their profits and the location of their activities,’ he says.

Informed public opinion?

Some lawyers view the BEPS project as a potentially misguided response to public outcry. ‘BEPS got going during a public furore against multinationals,’ says Edge. ‘I’m not sure how far it was based on informed public opinion and how far on a sense that everyone should pay tax, especially someone other than you. Tax is always good when someone else is paying it.’

It’s fine for companies to seek tax savings as long as tax laws are respected, says Cagnola. ‘On the one hand, companies must abide by tax laws, but on the other hand, tax authorities should not work on the assumption that all companies are seeking to avoid tax. This can lead them to make mistakes, as we have seen on several occasions in Italy.’

In the US, paradoxically, it is government paralysis that is driving a lot of the pressure on multinationals to change their ways, says Handzlik. ‘There is a lack of will on the part of our Congress to change the laws and regulations, which is why many people here have engaged in the process of trying to shame companies into paying more taxes. And that has actually worked in a couple of cases.’

A similar process was seen in the UK, where a sustained campaign against coffee chain Starbucks led the company to announce it would hand over up to £20m (\$31.48m) to the government over a two-year period.

Handzlik is not comfortable with this. ‘If individuals or companies are obeying the law, then they should be permitted to do that in good faith and not have to answer for their

conduct simply because someone doesn’t like it,’ he says. ‘The law is very clear, and if you want a mandate for companies not to move their domiciles, then it should be made a matter of law.’

Saint-Amans makes no apology for the fact that the BEPS project is an attempt to respond to public concerns. ‘When you have people in the street talking about international taxation and you have NGOs campaigning on it, it’s clear that there is a big issue,’ he says. ‘There are situations that you cannot really explain, such as the fact that 29 per cent of direct investment in India came from Mauritius in the last fiscal year. Is that right? No it is not, and it is urgent for us to respond to that.’

While the OECD may be glad to respond to civil society campaigns, the recent ‘joint verdict’ issued by the BEPS Monitoring Group and the Global Alliance for Tax Justice claimed that BEPS was confirming the stereotype of the OECD as the ‘rich countries’ club’. The consultations on the draft BEPS proposals ‘have generally been dominated by representatives of big business and lobbyists from the tax avoidance industry’, the groups said. They are worried that concerns raised by civil society organisations and developing countries are ‘largely being ignored’ and want a more ‘inclusive’ approach, where all governments can participate on an equal footing.

The final BEPS package is due to be presented to the G20 finance ministers in Peru on 8 October this year before it goes to the G20 leaders at their meeting in Turkey in mid-November. The implementation phase should then mean the new rules are in place well before 2020. If Saint-Amans doesn’t have your attention now, he will certainly have it then. ☒

Jonathan Watson is a journalist specialising in European business, legal and regulatory developments. He can be contacted at jwatson1@gmail.com



UN climate talks: game on

Events leading up to climate change negotiations in Paris offer hope that a binding and universal deal can be struck. The next step is helping developing nations move away from fossil fuels.

KATIE KOUCHAKJI

In the fight against climate change, the stakes are high – and it's not a game the world can afford to lose. With parts of the world already experiencing extreme weather, from severe droughts in India, Brazil and California, to name a few, to the heatwave sweeping across Europe at the start of July, we are glimpsing what the future holds if we fail to act.

The international climate change agreement expected at the United Nations climate talks in Paris in December is just one part of the solution. The Paris conference serves as a focal point for efforts, but by no means will the work stop there.

Governments are in the process of putting forward their proposals for the Paris agreement, called Intended Nationally Determined Contributions (INDCs). These set out the actions they will take, or would like to take with the necessary help, and the policies they will implement in the future to curb emissions. By the first official 'deadline',

31 March, the UN Framework Convention on Climate Change (UNFCCC) secretariat had received just six submissions (although the European Union represents 28 countries), representing more than 65 per cent of industrialised country emissions, and that was before Russia's INDC submission late in the day.

Since then, and in the spirit of universal action, more countries have submitted their INDCs to the UNFCCC, including Gabon, Ethiopia and Morocco. These proposals not only show how climate change is affecting these countries, but also how intertwined climate change mitigation and adaptation are with their overall development needs and ambitions.

Ethiopia, for example, is ranked 216th in terms of per capita gross domestic product, but has the 25th highest industrial production growth rate, according to the CIA World Factbook. It proposes cutting its emissions to 64 per cent below business-as-usual levels by 2030; that is, 64 per cent below

where it would be if it were to develop on a 'traditional', fossil fuel-fired pathway.

Renewable energy sources, chiefly hydropower, already account for 90 per cent of Ethiopia's energy mix. Its INDC, therefore, focuses more on agriculture and forestry, both in terms of protection and reforestation, as well as access to modern and efficient technologies. Improving food security, access to energy, public health and job creation are all cited in the plan, which ostensibly is 'just' about curbing emissions and adapting to climate change. Ethiopia's INDC is clear: this sustainable development pathway will only be achieved with international support, finance and technology transfer.

Some of the required support for developing countries will come via the Green Climate Fund (GCF), established as part of the UNFCCC process, but operating as its own entity. While it's important to note that the GCF is not the only path to delivering the promised \$100bn a year by 2020 in climate finance, it is expected to play a major role in achieving this total and its success is crucial to the international climate process. For too long, developing countries have shouted 'show us the money': the GCF is a chance for that money to be shown.

In its initial capitalisation late last year, more than \$10bn was pledged to the GCF, of which more than 60 per cent has been confirmed. The GCF is set to deploy \$2.5m to nine countries (including \$300,000 to Ethiopia) for readiness programmes, to develop the necessary skills and infrastructure in the countries to enable them work with the GCF to develop projects and strategies for the fund to support. It may sound skewed, but this kind of assistance is needed to help close the skills gap and to enable those countries in need of the GCF's financial support to be in a position to put it to good use.

Away from the GCF, other important steps towards achieving a Paris deal and a longer-term effective climate change response have been taken. China has submitted its eagerly awaited INDC – significant because it demonstrates China continuing to engage with the UNFCCC process. There was real concern that this would not be the case after the fallout from the last attempt to forge a global deal in Copenhagen in 2009. As the world's largest emitter, any climate change response needs to include China; it is also crucial in ensuring the involvement of the United States, which rejected the 1997 Kyoto Protocol owing to the absence of any cap on China's emissions.

However, initial analysis of China's INDC is less encouraging. Climate Action Tracker is an independent analysis project run by four research organisations, which assesses progress towards achieving the goal of keeping the average global temperature increase to 2°C above pre-industrial levels, as determined by scientists. Its analysis found that China's energy goals – to reduce coal use and increase the share of non-fossil fuels in its

energy mix to 20 per cent – would make a major step to achieving the 2°C goal, but that if other nations mirror the country's emissions intensity reduction goals in isolation, the world would be on track for 3–4°C of warming.

Governments should take heed of the *Urgenda v Netherlands* case when drafting their INDCs. A court ruled in June that the Dutch government

“ A transformation of the world's energy system must become a unifying vision if the 2°C climate goal is to be achieved

International Energy Agency

needs to do more to fight climate change, and must cut the country's emissions to 25 per cent below 1990 levels by 2020. David Estrin is Senior Research Fellow at the Centre for International Governance Innovation, and sits on the Council of the IBA Section on Energy, Environment, Natural Resources and Infrastructure Law. He warns that the court found this reduction obligation applies to all developed countries that are party to the UNFCCC. Major emitters, both past and present, 'need to recognise that litigation is potentially coming at them', he says. 'Certainly since the 1990s, they knew they couldn't keep putting it up there at the same levels.'

Tackling energy is at the heart of most INDCs and decarbonisation plans, understandably since energy production and use accounts for two-thirds of global greenhouse gas emissions. In its climate change and energy special report in June, the International Energy Agency (IEA) states: 'A transformation of the world's energy system must become a unifying vision if the 2°C climate goal is to be achieved.' This includes laying the foundations for a peak in global emissions and implementing methods for tracking the energy transformation.

Phasing out fossil fuel subsidies will be an important part of effecting this change: the International Monetary Fund estimates these subsidies will reach \$5.3tn this year (yet we're battling to find \$100bn a year to fight climate change). G7 leaders picked up the baton, pledging to eliminate fossil fuel subsidies, but only by 2100. Meanwhile, the IEA's report, analysing INDCs submitted by 14 May 2015 and planned energy policies for other nations, found that, as a result of these policies, the remaining time left before we exceed our 'carbon budget' (the level of emissions necessary to keep global warming to 2°C) has been extended by eight months, until 2040.

It's clear that we're a long way off. It seems likely that an agreement will be reached in Paris before the end of the year, but we need more than Paris if we are going to win this fight. ☒

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The future of green energy in Latin America

A combination of the right policies, limited fossil fuels and friendly business environment is allowing several Latin American countries to lead the way on renewable energy.

ÁNGELA CASTILLO

Five countries – Brazil, Chile, Costa Rica, Mexico and Uruguay – are showing the way ahead in Latin America's non-conventional renewable energy (NCRE) sector. Supportive clean energy policies, limited fossil fuels and friendly business environments, together with a significant decline in technology costs, have all contributed to the growth of the sector. According to reports from both Bloomberg and Ernst & Young, these countries epitomise a shift in the energy paradigm that has, until recently, dominated in Latin America.

Currently, only six per cent of energy in the region comes from NCRE sources. The reports forecast that this will grow to 20 per cent by 2050. In 2013 alone, investment in renewable energy in the region accounted for \$16bn, which represents seven per cent of global clean energy investments. These nations are clearly doing something right to attract such investment and could become role models for countries in the region and further afield.



Hydropower accounts for 80 per cent of Brazil's total electricity generation

Brazil: the hydro powerhouse

Latin America's giant depends on hydropower to cater for much of its power needs, currently 80 per cent of the country's total electricity generation. The situation is set to continue in line with the country's ten-year plan for energy expansion, designed by the Brazilian Ministry of Mines and Energy. It states that by 2022, capacity from hydropower will increase from 84.8 to 119 GW.

However, the market has seen record growth in NCRE sources in recent years, too, specifically in wind-sourced energy generation. In 2013, Brazil was the largest

wind energy producer in Latin America, with 2,200 MW of installed capacity. By 2016 it will have an additional 7,000 MW of wind power feeding into the national grid.

Key factors for the rapid expansion of the wind energy sector in the country are the development of a robust local manufacturing base and the certainty provided by sensible energy policies over the long term. However, a turning point in the meteoric rise of the wind power industry could come as a result of the government's announcement of its plan to increase oil production to five million barrels per day by 2023.

“ We are also exploring the continental platform in search of oil and gas. Although it will not affect the development of NCRE resources, the discovery of oil would radically change our energy matrix

Juan Manuel Mercant

Guyer & Regules, Montevideo; IBA Latin American Regional Forum Officer



87 per cent of Costa Rica's electricity generation comes from renewable energy sources

Costa Rica: setting ambitious targets

Most of Costa Rica's electricity generation comes from renewable energy sources (around 87 per cent) and specifically hydropower. However, the country has achieved remarkable progress in developing NCRE sources in just a few years. According to Bloomberg's Climate Scope Score 2014, around 20 per cent of the total renewable energy capacity was generated from NCRE sources. Out of this, geothermal has the biggest potential, with 155 MW of capacity in the pipeline.

The country has stipulated a target of 100 per cent of renewables by 2021. To achieve this, policy makers have designed an innovative approach that includes two mechanisms to encourage the adoption of NCRE sources. The first is an auction system

that has allowed 38 MW of small hydro and 100 MW of wind power to be contracted out. The second is a programme to promote local energy generation, which made available 5 MW of capacity to small producers of solar, wind, biomass, and small hydropower.

'Based on a build, operate and transfer model, private companies played a key role in the birth of a NCRE industry back in the 90s, by way of building a number of small hydropower plants,' says Luis Castro, partner at BLP Abogados in San José, Costa Rica. 'Over the last decade wind and geothermal have seen impressive growth rates. However, looking further ahead, the development of geothermal in the country might be limited because most geothermal reserves are located within National Parks premises.'



In 2013, Chile invested \$958m in solar projects

Chile: a sun mine

Chile offers a compelling case for investors in the NCRE sector. As it lacks fossil fuels, the country imports large amounts of oil and gas for electricity generation, resulting in the region's highest electricity prices. In addition, Chile has seen record economic growth in recent years, mainly driven by a voracious appetite for commodities, which has translated into a deficit between the energy produced and the power demanded. This has further increased the need for renewable energy projects.

A key juncture for Chile's energy sector came in 2008. The gas supply crisis, originating in Argentina, prompted a reassessment of the country's power infrastructure investment scheme, as well as important regulatory changes to foster the diversification of the energy mix. A key piece of legislation was enacted in April 2008 – Law N° 20,257 – aimed at promoting NCRE sources, such as geothermal, wind, solar, tidal, biomass and small hydroelectric plants. Through an amendment in 2013, it established an ambitious target of 20 per cent renewables by 2025.

Patricia Nuñez, founding partner at Santiago-based law firm Nuñez Muñoz

Verdugo & Cia and Chair of the IBA Section on Energy, Environment, Natural Resources and Infrastructure Law (SEERIL), highlights that Law 20/25 'was a political decision'. She believes that the amendment, which also stated that power generators should meet pre-established annual targets for NCRE or pay a fine if they fail to comply, 'explains to a large extent the quick development of the industry in recent years'.

A similar belief is held by Juan Francisco Mackenna, partner at Carey in Santiago and Council Member of SEERIL. 'Our policy-makers ignored global trends that pointed towards the implementation of a feed-in tariff scheme and other kinds of subsidies and, in doing so, they genuinely fostered competition. Any investor could come to Chile, be it a local or an international player, and develop their renewable energy project.'

Judging by the results, the success of the policy is evident. In 2013, \$1.6bn was invested in the NCRE sector. Out of this, \$958m were invested in solar projects and \$583m in wind farms. Current figures for solar investment are not surprising considering the country is home to the Atacama Desert, the place with the best solar resource in the world.



Hydropower provides 80 per cent of Mexico's total clean electricity supply

Mexico: generating competition

Like most countries in the region, Mexico's most important renewable energy source is hydropower, which provides 80 per cent of its total clean electricity supply, followed by geothermal generation with a share of 14 per cent. However, the NCRE sector has been growing at a fast pace in recent years, especially the wind industry. In 2001, there was 3 MW capacity of wind power; a decade later, the country had over 1,500 MW of wind capacity.

On the regulatory front, there have been important developments. Two years ago, the Energy Sector Reform was put in motion, with the aim of increasing competition among generators. As a result, landmark measures, such as the end of the state-owned utility monopoly in the generation segment and the creation of a spot market,

were approved. Although the reform's main focus was to increase the country's natural gas-fired generating capacity, clean energy is part of the agenda.

Claudio Rodríguez-Galán, partner at Ramírez, Gutiérrez-Azpe, Rodríguez-Rivero y Hurtado in Mexico City, indicates that there have been certain delays in this regard. 'We are waiting for the Energy Transition Law to be passed in the Congress', he says. The law's importance lies in the fact that it confirms the regulatory framework to achieve a 30 per cent emission reduction target by 2020, as well as ambitious renewable energy targets of 25 per cent in 2018; 35 per cent in 2024; and 60 per cent by 2050.

Rodríguez-Galán believes the enactment of the law and the entry into force of the

Wholesale Market Rulings will have two consequences. ‘Geothermal will be greatly endorsed because of its “dispatchability” and despite the large capital investment it requires.’

On the other hand, developers will have to integrate different technologies at one site, be it wind, solar photovoltaic (PV), hydro, geothermal or concentrated solar power, ‘so that their projects can feed power

into the grid 24/7 and match the base-load power capabilities of fossil-fuelled plants’, Rodríguez-Galán says.

‘It is a matter of patience. Most clients expected that the 2014 energy reform would bring a quicker development in the renewable energy realm, but such regulatory reforms take time to yield positive results in terms of readiness for investments. However, we are confident it will happen very soon.’

“ Our policy-makers... genuinely fostered competition. Any investor could come to Chile, be it a local or an international player, and develop their renewable energy project

Juan Francisco Mackenna

Carey, Santiago; IBA SEERIL Council Member



By 2016, 1,100 MW will come from wind generation

Uruguay: a leading renewable energy force

Over a decade ago, the country set up the 2005–2030 Energy Policy strategy, which aimed to achieve between 15 and 20 per cent of power generation from NCRE sources by 2015. ‘The policy has been a great success as both private and public entities, including the UTE – the public-utility company – have invested a sizeable amount of resources,’ says Juan Manuel Mercant.

‘By early next year, Uruguay will have achieved 1,300 MW of NCRE, which is very close to the target,’ he says. Out of this capacity, almost 1,100 MW will come from wind generation, making it the largest source of NCRE in the country. In practical terms, investments in NCRE sources were close to \$1.3bn in 2013.

As for other NCRE sources, although the government enacted the Solar Thermal

Energy Law in 2009, it is only now that PV projects and solar water heating systems are beginning to gain traction.

Despite the advancements in the development of a robust green energy sector, the country is looking at increasing its fossil-fuelled generation capacity. For instance, construction works at the regasification plant site of Puntas de Sayago, near Montevideo, are expected to be completed by the end of 2016.

‘We are also exploring the continental platform in search of oil and gas,’ says Mercant. ‘Although it will not affect the development of NCRE resources, the discovery of oil would radically change our energy matrix.’



281 MW generated from small hydro in 2013

Peru: following in its neighbours’ footsteps

Peru is another country in the region making strides towards a greener future. The Andean state’s economy has been growing quickly over the last decade,

following a global surge in demand for commodities, creating increased power requirements. Nevertheless, it is one of the Latin American countries with the

lowest electricity prices, which means that any plans to develop NCRE resources have to be backed up by government-led initiatives. In 2008, the Law for the Promotion of Investment in Renewable Energy Generation was enacted. It set a five per cent renewable energy generation target over the 2008–2013 period, laying out the foundation for the three renewable energy auctions that followed.

‘The regulatory reform has two important features. First, it prioritises energy coming from Renewable Energy Resources power plants (better known as RER) to feed into the system. Secondly, successful bidders have a guaranteed annual income, which is subsidised by end-consumers,’ says Verónica Sattler, a partner specialising in renewable

energy at Rodrigo, Elías & Medrano Abogados in Lima.

Eduardo López Sandoval, a partner at the same firm, adds that although most developments are in the small-hydro sphere, with 281 MW contracted from this source in 2013, there are reasons to be optimistic about the development of the wind and PV industries. ‘The first two rounds saw very competitive prices from wind projects, followed by solar PV,’ he says.

Around the same time, the country announced the National Plan of Rural Electrification, Peru’s first off-grid renewable energy auction. It aimed to expand PV systems electricity coverage to 500,000 users in rural and isolated areas of the country.



39 per cent of Nicaragua’s national capacity comes from non-conventional renewable energy sources

Nicaragua: still a long way to go

Although the country has experienced a decline in renewable energy investment (from \$290m in 2012 to \$129m the following year), the local government has ambitious plans to double the country’s renewable energy capacity by 2030.

The picture, however, is less clear judging by two different indicators. On the one hand, Nicaragua has one of the highest clean

energy rates in the region, with 39 per cent of its national capacity coming from NCRE sources. On the other hand, however, the country still relies on oil and diesel to cater for almost half of its electricity needs. Undoubtedly, there remains considerable potential for growth in the renewable energy sector.

Stability is the key

Though the figures outlined above are an encouraging sign, Latin America still has a long way to go to become a global leader in green energy, as the region has traditionally relied on heavily subsidised conventional power sources. Indeed, according to the Frankfurt School – United Nations Environment Project, \$40bn was used to subsidise fossil fuels in the region in 2013 alone, twice the amount invested in NCRE sources across Latin America.

Although other countries such as Panama, Argentina and Colombia are making progress, mainly in the small-hydro sphere, there is considerable room for improvement. In fact, it is now all the more important,

considering the effects climate-change has had in most countries in the form of severe droughts.

However, most experts agree that laying solid ground for the development of the industry is important. ‘A stable regulatory framework and a business-friendly environment that secures long-term tax benefits are of critical importance’, says Mercant, adding that “stability” is the key word’. Castro agrees: political will and long-term vision are the cornerstones for the adoption of a green agenda in any country. ☒

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Ukraine's war on two fronts

As Ukraine contends with a precarious security situation and dire economic outlook, *Global Insight* assesses the local and transnational energy wars shaping the legal and business landscape.

RUTH GREEN

Over the past 18 months, Ukraine hit the international headlines time and again as it battled months of widespread demonstrations, bloodshed, the annexation of Crimea, snap elections, the downing of Flight MH17 and a tumbling currency, the beleaguered hryvnia. The country's long-running spat with Russian state-owned gas giant Gazprom, which has a monopoly over the European gas market, has also been well documented since the feud first began ten years ago.

Ukraine is still largely reliant on gas from Russia and disputes over payments have crippled supply numerous times over the past decade as the two countries continue to come to contractual blows. The pipeline that transits the country also carries around half of Gazprom's exports to the rest of Europe, meaning that the problems have also been felt much further afield.

Over the years, contracts between Russia and Ukraine have been signed, amended and restructured in an unregulated and often arbitrary way. This finally came to a head last year when Gazprom launched a case against Ukraine's state-owned gas utility, Naftogaz, in the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), claiming the Ukrainian company owed it billions of dollars in unpaid debts on gas delivered since 2009.

Although the hearing isn't expected to take place until early 2016, with the ruling scheduled for next June at the earliest, Jonathan Stern, Chairman of the Natural Gas Research Programme and a Senior Research Fellow at the Oxford Institute for Energy Studies, says the case's potential ramifications could be extraordinary. 'This is not the first arbitral case between Russia and Ukraine – there's just been endless argy-bargy – so this is well-trodden arbitral ground,' he says. 'The thing about an arbitral tribunal, particularly in this type of case, is it's a "nuclear option". You've no idea what the result will be and the consequences may be devastating. The real big thing about this case is it concerns huge amounts of debt and, of course, huge amounts of money.'

There is also a chance that, if successful, JKK Oil & Gas may set a precedent for others to take similar action. 'A positive award in favour of JKK may indeed inspire others to bring similar claims against the government,' says Joseph Tirado, a partner at Winston & Strawn and Co-Chair of the IBA Mediation Committee.

Sure enough, Naftogaz hasn't taken the claims lying down and, in May this year, filed its own claim at the SCC, alleging it is owed as much as \$16bn by Gazprom for losses stemming from amendments to its gas purchase and gas transport contracts.

abusing its dominant market position in Central and Eastern European gas markets – another claim Gazprom strongly denies.

And, while these very public contractual disputes continue to play out elsewhere in Europe, a number of controversial changes imposed by the Ukrainian government are causing their own legal rifts back on home turf. Last August, the government announced it was increasing royalty payments on private natural gas producers in the country from 28 per cent to 55 per cent for gas produced from depths of more than 5,000 metres, and from 14 per cent to 28 per cent for gas produced at depths of less than 5,000 metres.

The move was purportedly to aid the country's fledgling economy. But, Vladimir Sayenko, a partner at Sayenko Kharenko in Kiev, says the plan clearly backfired and has succeeded in discrediting the government. 'The increase in royalty payments for private natural gas producers was presented to the public as an element of justice, an attempt to finance budget deficit from the local oligarchs' pocket,' says Sayenko. 'Yet, this populist move was not justified economically and has had a negative impact on the investment climate in Ukraine.'

Consequently, a number of private companies have resorted to taking the government to court over the move. 'As the fiscal pressure is being raised by the government, more and more oil and gas companies are ending up in courts trying to challenge claims from the tax authorities,' says Vitaliy Radchenko, a partner in CMS Cameron McKenna's energy and projects practice in Kiev.

After lengthy out-of-court discussions, the government finally conceded to decrease royalty payments for natural gas and also passed a bill reinstating the two-year royalty relief period for new gas wells. While the announced changes have come as good news to some, Sayenko says natural gas produced by joint venture companies would still, for now at least, be subject to extremely high royalty rates. 'Royalty payments in relation to natural gas produced by joint ventures will stay at 70 per cent,' he says. 'They may be decreased later this year when the new methodology of taxation applicable to oil and gas producers is developed to stimulate domestic production pursuant to the "action plan on gas sector reform", approved by the Resolution of the Cabinet of Ministers in March.'

Besides royalty hikes, another change has drawn the ire of foreign gas companies operating in the country. In November, the government passed a resolution stating that all industrial gas buyers in the country must purchase gas exclusively from Naftogaz until March 2015.

The Kiev District Administrative Court has since declared the government's resolution illegal

“ The thing about an arbitral tribunal... is that it's a "nuclear option" ... the consequences may be devastating... it concerns huge amounts of debt and huge amounts of money

Jonathan Stern

Chairman, Natural Gas Research Programme

Stern says the complexity of the case will make it very difficult to arbitrate. 'It is a massive can of worms in contractual terms, which is why we've had these dragged out arbitration proceedings on all these issues in Stockholm,' he says. 'There are disputes all over the place, there are disputes on prices, on "take or pay", disputes on who did or did not supply when they were requested or not requested to supply. What the tribunal has to do is sift through the evidence and look at the contracts and decide out of all the things that are alleged to have happened by the parties, which are the ones that are contractually sound.'

Separate to this legal challenge, the European Commission (EC) has charged Gazprom with

and invalid. Nevertheless, several companies are turning to the courts for compensation. One example is London-listed JKK, which was forced to postpone its 2015 capital investment programme due to the government's actions. The company is currently seeking repayment of more than \$180m in rental fees that it says its Ukrainian subsidiary paid on the production of oil and gas in the country since 2011.

In January, emergency arbitrator Professor Rudolf Dolzer, who was appointed under the Arbitration Rules of the Stockholm Chamber of Commerce, issued an interim award to JKK. It ordered the Ukrainian government to refrain from imposing royalties on gas produced by JKK's Ukrainian subsidiary that were in excess of 28 per cent – substantially less than the 55 per cent rate currently applicable under Ukrainian law – while the claim is pending.

In February, JKK announced it was suing the government under the Energy Charter Treaty for breaching its bilateral agreement with the UK government and is seeking orders from the Charter's Tribunal to force Ukraine to comply with the award. While the interim award is binding under international law, if Ukraine refuses to comply then JKK will have the option to pursue the claim in the Ukrainian courts. CMS' Kiev office is advising JKK on Ukrainian law issues, while a team from Allen & Overy's London office, led by Mark Levy, is acting for JKK in arbitration proceedings.

'If JKK is successful in this case, this would have paramount impact, as all other companies are equally suffering from the 55 per cent royalty tax these days,' says Radchenko. 'Ukraine will then have to re-consider whether the increased tax pressure is a wise policy.'

For Stern, the case could have significant implications both for the country's foreign investment climate and its oil and gas market. 'It would be foolish if the state allowed this case to progress very far,' he says. 'It's kind of a bellwether – whether it wins the legal case or not is another matter – but, for JKK, which everybody knows has been through really difficult times through a range of different governments, if this company can't make it, given how well-established it is, there is no chance that anyone coming in can make it. It would be very wise for the state to actually settle and improve the situation. If the state chooses not to or is unable to, there is no chance for any investment in this country.'

Although Sayenko agrees the government is likely to settle, he believes much still needs

to be done to recoup the country's business image in the eyes of international investors. 'The Ukrainian government will probably try to settle such disputes,' he says. 'In general, we believe that the Ukrainian government will

“As the fiscal pressure is being raised by the government, more and more oil and gas companies are ending up in courts trying to challenge claims from the tax authorities

Vitaliy Radchenko
Partner, CMS Cameron McKenna, Kiev

learn from these mistakes and will be careful to avoid similar precedents in the future. The government is trying to implement various reforms that are supposed to improve the investment climate, but actions speak louder than words and short term gains, such as increases in tax revenue, do not justify the damage that is being done to the business image of the country.'

JKK is not the only company that has been affected by the government's actions. Canada's Serinus Energy initially suspended drilling and development at its operations in eastern Ukraine last year over security concerns. However, the company recently revealed its overall production continued to be significantly below par due to 'the lingering effects of Ukrainian government legislation'.

Elsewhere, Australia-listed Hawkey Oil and Gas, which saw production halted at its Sorochynska Well-201 in November 2014 due to a suspected water influx, said the government's decision to increase royalties has been a 'significant factor in assessing the economic prospects of potential well workovers'.

Both Hawkey and JKK have reportedly been in talks to sell off their Ukrainian assets. Although neither deal has come to fruition, the potential sales are indicative of the difficulties facing even established names in Ukraine's gas market right now.

Domestic production

Although spats between the government and foreign producers like JKK have made the headlines in recent months, Simon Pirani, a Senior Research Fellow at the Oxford Institute,



says their operations are relatively small in the context of the wider Ukrainian gas market. 'There are a small number of British and other foreign companies operating in Ukraine,' he says. 'You tend to hear a lot about their legal problems, whereas some of the issues relating to transit and import are actually far more important.'

'To put a figure on it, last year Ukraine consumed only 42 billion cubic metres [bcm] when the industry was in a state of collapse and they were trying to save gas and money. Of this, Ukraine produced 20bcm and about 3.5bcm of that was produced by all of these private companies put together, so they're a small part of the overall picture.'

However, Pirani recognises that the right investment climate would guarantee these producers a larger share of the market. 'Of course, if the legal framework for investing in oil and gas projects in Ukraine was better, more people would do it.'

As Pirani notes, production sharing agreements (PSA) in Ukraine's oil and gas sector have a chequered history. US firm Vanco International learned the hard way in 2008 when its 30-year PSA to explore near Kerch on the Crimean peninsula was suddenly withdrawn by Yulia Tymoshenko's government, allegedly to protect state interests. Vanco was

However, the ongoing security situation in the east of Ukraine has brought promising projects like this to a standstill. 'This project is now on hold in large part because the asset is where the military conflict is taking place – it's a tragedy for all concerned,' says Pirani.

'There were other PSAs that were about to be signed when the change of government took place last year, namely one with Chevron, and there was one in the Black Sea by a group of companies headed by Exxon Mobil. They were very close to being signed, but then war broke out.'

'These offshore Black Sea projects need to be operated out of Crimea, but nobody is going to do business there at the moment. However, it's not practical to do those offshore projects from somewhere else unless you're really desperate and want to reorganise everything. These big companies aren't really desperate, so they can go somewhere else to do their business.'

Radchenko agrees that the government has much more to lose from the situation. 'I do not see significant legal ramifications for the companies – *force majeure* and various termination provisions were always there in the PSAs,' he says. 'For the state, however, this means that the planned projects, investments and taxes in millions of US dollars will not flow into Ukraine, which is much more dreadful for the country.' Markian Malsky, Head of Arbitration at Ukrainian law firm Arzinger, points out that 'the Ukrainian government, in fact, provided Chevron with formal grounds for avoiding implementation of its contractual obligations' by raising rates for the use of subsoil. 'The PSA concluded with Chevron prescribing that the foreign investor has the right to universally pull out of the contract in the event that the Ukrainian government does not fulfil the preliminary conditions,' he says. 'Those conditions, inter alia, stipulated amending Ukrainian legislation, in the part of taxes [or] duties.'

Radchenko agrees that the government's actions are proving inimical to progress. 'The government has declared the idea of Ukraine's energy independence, but its actions

“ Political risk is high because the boundary lines in Ukraine are potentially being redrawn, and there are issues for businesses based in the region around energy supplies, banking services, transport...

Simon Bushell

London Chair, Latham & Watkins Litigation Department

eventually forced to appeal to the SCC. It was only after a change in government in 2010 that things were smoothed over and the dispute was eventually settled out of court.

Despite these setbacks, other major companies have continued to chase gas assets in Ukraine. In January 2013, Royal Dutch Shell signed a landmark \$10bn 50-year PSA with the Ukrainian government to develop untapped shale gas resources in the Yuzivska gas blocks in the eastern Kharkiv and Donetsk regions.



Impact on the legal market

There are clear signs that the ongoing security situation and the country's economic travails are affecting industries other than oil and gas.

'Political risk is high because the boundary lines in Ukraine are potentially being redrawn, and there are issues for businesses based in the region around energy supplies, banking services, transport, and other basic utilities and infrastructure,' says Simon Bushell, London Chair of Latham & Watkins' litigation department.

'The local currency is extremely weak, which means servicing foreign denominated debt is an uphill struggle,' he adds. 'Debt restructuring and insolvencies are therefore more likely than they have been for some time in the region.'

Vladimir Sayenko agrees the conflict is continuing to hamper foreign investment. 'Due to the protests last year and, more importantly, the ongoing military conflict in eastern Ukraine, international investors have not re-established their trust and confidence in Ukraine yet,' he says.

'Some of them pulled out of the market, others have taken a "watch and see" approach. Consequently, a number of international law firms, whose clientele was predominantly foreign companies with business interests in Ukraine, were forced to shut down their Ukrainian offices, such as Chadbourne & Parke, Beiten Burkhardt, Noerr, or downsize significantly.'

'Many Ukrainian law firms also felt the pinch, and for many this remains an ongoing challenge. Some law firms are switching to a shorter working week and reducing costs. Others are re-shaping their practices in order to respond better to the market demands.'

Sayenko says his firm has seen a rise in the demand for several new types of work, such as government relations, corporate security and private wealth management, and the firm has also strengthened its anti-corruption and compliance practices.

Although he says Western sanctions have not resulted in much work for Ukrainian law firms, there has been a noticeable rise in Russian businesses seeking legal advice on investing in Ukraine.

'While many clients need to be aware of the sanctions regime, most of the legal work related to sanctions goes to law firms from the Western jurisdictions where the sanctions were imposed. The impact of this demand on the Ukrainian legal market is insignificant. Ukrainian law firms may be approached to assist with investigative services or to conduct the so-called sanctions due diligence requested by clients that are cautious about potential reputational hazards resulting from dealing with sanctioned counterparties.

'A more noticeable demand for legal services relates to advice on the risks that Russian businesses may face in Ukraine, including trade measures, licensing terms and other practical restrictions that may affect Russian companies in Ukraine.'

are in no way motivating oil and gas companies to invest money into Ukraine – which just shows that the government is not trying hard, or it is just being hypocritical. We will see whether the government will change its views and actions, or there won't be any investors left and gas production will not rise.'

For Stern, if the Ukrainian government is to maintain the interest of foreign investors, then its prerogative has to be to get these companies' operations up and running again. 'If it is true that Ukraine really wants to encourage investment, then the first step is to get companies like JKC and Shell back in business drilling and producing,' he says. 'If that doesn't happen, nothing else will.'

'The country also has massive potential for reducing its gas consumption even lower than it is now. And there's no reason why in ten years this country couldn't be self-sufficient in gas, but [if things stay as they are] that's not going to happen.'

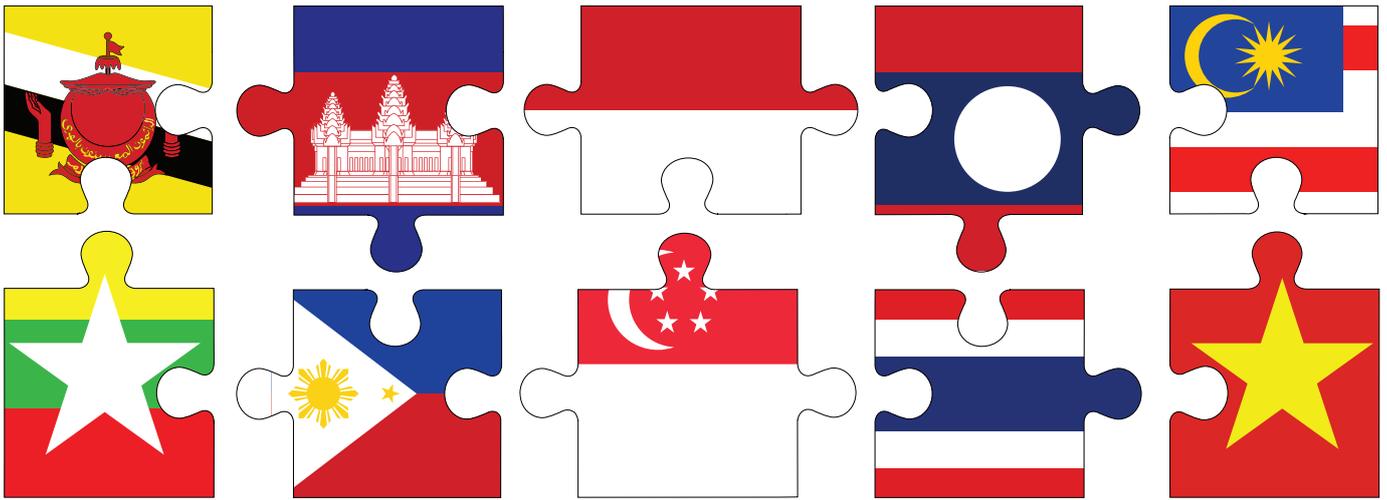
Although Pirani says the government's recent decision to pass a gas market reform,

bringing it into line with the EU's Third Energy Package, certainly showed willing, he thinks practically there is still much more that can and should be done.

'Passing a law is one thing, but implementing it in a country with a military conflict ripping its industrial area in the east to bits is a whole other matter,' he says. 'It will take time and it will not alter the physical reality that they import gas from Russia and as long as that is the case – and it will be the case long beyond 2020, and Russia is going to transit gas long beyond 2020 – they're going to have to somehow agree about how those things are going to happen.'

There is some hope for Pirani, however. 'Remarkably, in October, the European Commission, Russia and Ukraine agreed on how the gas imports and transit would be done over the winter and that's been reviewed to take us over the summer,' he says. 'This is a glimmer of hope in gas terms in what is politically an absolutely dark situation.'

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Region's integration encourages alternative business structures

The ASEAN Economic Community will be launched in December and is expected to boost the region's economy to more than \$3tn by 2020. The liberalisation of its legal markets has left service providers jostling for position.

STEPHEN MULRENAN

The ASEAN Economic Community (AEC) is expected to accelerate domestic growth, trade and foreign investment in the region by allowing for the free movement of goods, services, investment and skilled labour, as well as a freer flow of capital.

The potential for the region is huge. It encompasses Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. Even by today's financials, as a single entity, ASEAN would be the world's seventh largest economy; 25 per cent larger than India. With the AEC in place, the region's economy, built on manufacturing and trade, is expected to increase from approximately \$2.4tn to more than \$3tn by 2020. Servicing a population of around 600 million people, it will house one of the fastest-growing consumer markets in the world.

However, the road to integration has not been entirely smooth. In 2012, for example, it was estimated that member nations had only achieved 67.5 per cent of their integration targets. While there has been progress since then, there is still work to do on issues such as free trade in food products and other key sectors.

The region's incredible constitutional and economic diversity could also prove a barrier to further integration. As its wealthiest member, for example, Singapore's gross domestic product per capita is more than 20 times that of the poorest member, Myanmar. Its legal services market is also much more committed to allowing the entry and participation of foreign law firms.

Opportunity knocks for integrated networks

Law firms are already looking to adapt to what is set to become the new economic climate. In a strategic move to prepare for the launch of the AEC, for example, Singapore law firm Rajah & Tann will provide integrated cross-border transactional and dispute resolution services across the region by combining its eight regional and associated law firms in Southeast Asia. In doing so, it has sought to benefit from the forthcoming removal of import taxes, foreign ownership curbs and restrictions on skilled labour mobility.

Rajah & Tann is not the only firm to favour an integrated network approach. Chew Seng Kok is

Managing Director of ZICO Holdings, ASEAN's first integrated provider of multidisciplinary services. He is also Chair of Malaysia's largest law firm, Zaid Ibrahim & Co. 'We always believed in the potential of the market to become integrated, as the momentum for [it] has certainly been there,' he says. 'It might take another five years, or even ten years, but it will happen.'

The ZICO Holdings network of firms offers legal and other professional services, including advisory and transactional services, management and support services and licensing services. ZICO Holdings is the parent company of Malaysian law firm network ZICOLaw, of which Zaid Ibrahim & Co is the Malaysian member. Individuals at Zaid Ibrahim & Co continue to be the driving force behind ZICO Holdings, leveraging on the goodwill of the former, which has been in the marketplace since 1987.

ZICOLaw is structured as a network rather than a single firm because of regulatory restrictions on non-lawyer ownership of firms in certain jurisdictions. It has own-branded offices in Myanmar, Singapore, Thailand and Vietnam, operates in Australia as a branch of Zaid Ibrahim & Co (at the invitation of the Australian government, which is keen to promote Islamic finance services), and has associated firms in Laos, Cambodia and Indonesia. In addition, it has 'disaggregated the market to service different segments with different product lines', says Singapore-based Chew.

In November 2014, ZICO Holdings listed on the Singapore Stock Exchange with the aim of funding further expansion across the ASEAN region. Chew had noted with interest similar developments abroad. In Australia, consumer law firm Slater & Gordon became the first in the world to be publicly traded in 2007. In the UK, such listings were made possible following implementation of the Legal Services Act in October 2011. On 12 May, UK firm Gately formally announced its intention to float on the Alternative Investment Market, part of the London Stock Exchange.

Chew was particularly intrigued by the idea of companies that were not law firms offering legal services, while law firms themselves could start accepting investment from third parties. These new entities are known as alternative business structures (ABS), and other jurisdictions such as Singapore, Hong Kong and Canada are also considering their introduction.

“The bottom line is one of capital. Every time we wanted to do things that were a bit ambitious, law firm partners were traditionally reluctant

Chew Seng Kok
*Managing Director, ZICO Holdings;
 Chair, Zaid Ibrahim & Co, Malaysia*

'The bottom line is one of capital. Every time we wanted to do things that were a bit ambitious, law firm partners were traditionally reluctant,' says Chew. 'We are aggressively expanding because we can see the opportunities, but younger lawyers today are saying, "why should I put in my own money to fund this expansion?">'

Chew retains a combined 45.9 per cent of the business post-flotation, together with executive directors Robert Liew and Kelvin Ng. He says that without the injection of capital gained from this type of business structure, it would have been considerably harder to compete with the huge international law firms.

Although ZICOLaw's corporate strategy earned it an award at the *Financial Times* inaugural Asia-Pacific Innovative Lawyers Awards in June last year, the idea of lawyers reporting to shareholders remains controversial. One major concern is the potential for compromising a lawyer's professional independence and undermining the client relationship.

Qualified privilege

Can accountants* own and control law firms?

Yes in: Australia, Britain, Mexico

No, but can collaborate and share costs in: China, France, Germany, Italy, Japan, Ontario, Canada, Spain

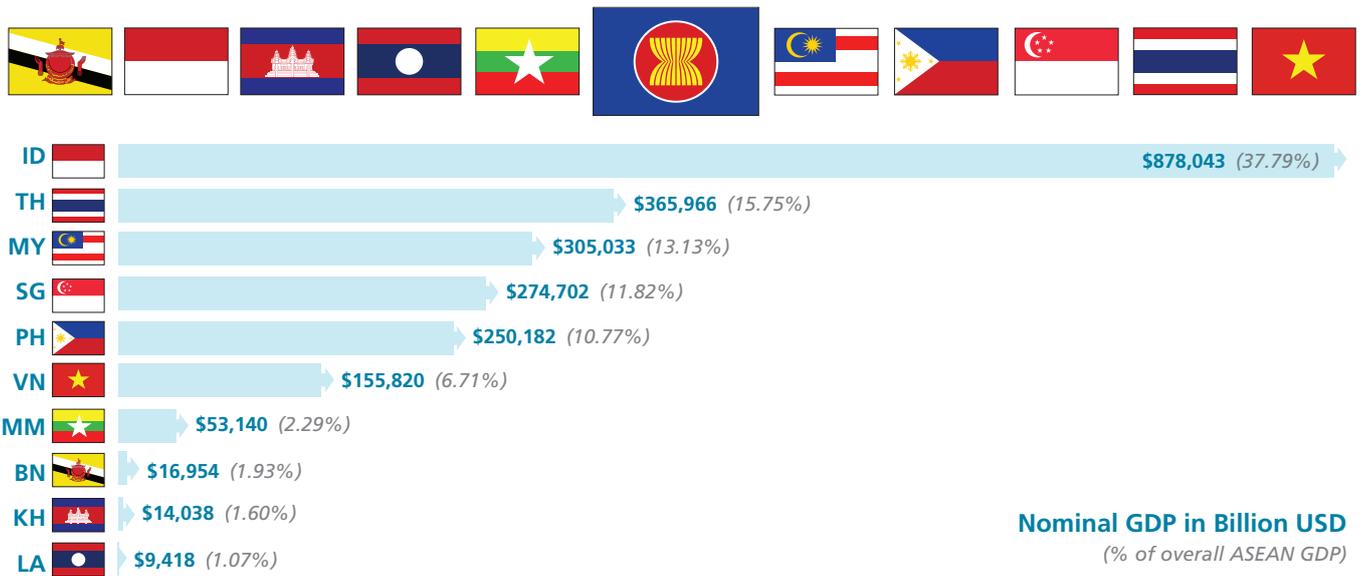
No in: Brazil, India, Other Canadian provinces, United States

Source: The Economist *Global accounting networks

The return of the MDP

In its marketing materials for prospective investors, ZICO Holdings claims to support the member law firms of ZICOLaw by offering greater efficiencies from improved economies of scale and scope. It says the firms have access to a more advanced support infrastructure, meaning that the lawyers can focus on doing what they do best. 'Law firms should not have to focus on the things that they don't want to focus on, such as HR and IT,' says Chew.

The ASEAN economies



Source: World Bank data 2012, aseanup.com

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These sorts of multidisciplinary practices (MDPs) were last in vogue around the year 2000, when the then 'Big Five' accounting firms sought to diversify their auditing and tax offerings by expanding into consulting and law. That experiment came to a sudden halt in 2002, when the Enron corporate governance scandal and resulting Sarbanes-Oxley legislation in the US killed off Arthur Andersen, one of the Big Five, and humbled its rivals.

“ We will see a number of disasters like Enron in the future if this trend continues

Christoph Vaagt
*Managing Partner, Law Firm Change Consultants;
Conference Coordinator, IBA Law Firm
Management Committee*

Given the fate of Andersen's affiliated legal practice in the UK, Garretts (whose dissolution led to partners facing personal bankruptcy), and the fact that Zaid Ibrahim & Co was Andersen's affiliated firm in Malaysia for the final four years of its existence, Chew's views on MDPs are perhaps surprising.

'Our previous experience gave me clear thinking,' he says. 'I learned from the Big Four about financial discipline and adopting

a more professional management structure. As a result, we now have central management and support functions.'

There are strong business arguments for choosing a MDP over a law firm structure. Munich-based Christoph Vaagt is Managing Partner of Law Firm Change Consultants and Conference Coordinator of IBA Law Firm Management Committee. 'MDPs have long-lasting client relationships,' he says, 'while law firms are engaged on a project/transactional basis.'

The Big Four certainly appear eager to re-enter the world of MDPs (reportedly due to limited growth prospects in other business lines) and are lobbying hard for many jurisdictions to loosen the regulations restricting them. Australia, Mexico and the UK are recent examples of countries that have authorised MDPs. However, concern over potential conflicts of interest between the consulting and auditing arms of the Big Four remain, in particular for publicly listed companies.

Vaagt argues that many MDPs also have serious issues around profitability and therefore desperately need to offer higher-value services, such as consulting and legal. 'The basic concerns [about MDPs] are still valid and are in no way without merit,' he says. 'But society, and economic interests, tends to ignore them. We will see a number of disasters like Enron in the future if this trend continues.'

For their part, the Big Four are certainly approaching MDPs in a much smarter manner

Law firm innovation in Asia



Source: Financial Times's Asia-Pacific Innovative Lawyers 2014: Corporate strategy – Asia-Pacific headquartered firms

*In May this year it became two separate firms: Cyril Amarchand Mangaldas and Shardul Amarchand Mangaldas

these days. Whereas previously they might have simply acquired a huge litigation practice, today they're targeting smaller firms and are focused on managing their conflicts more effectively.

New Jersey-based Duane Morris partner, Steven Richman, is Chair of the IBA Multidisciplinary Practices Committee and Co-Chair of the American Bar Association's International Law Section's Professional Ethics Committee. 'Various law firms have subsidiaries or affiliated companies that do other things, such as forensic accounting or lobbying, so I am not sure that MDPs are "re-emerging", as they have never really gone away,' he says.

“ Various law firms have subsidiaries or affiliated companies that do other things, such as forensic accounting or lobbying

Steven Richman

Chair, IBA Multidisciplinary Practices Committee

Businesses don't see issues in silos anymore. 'Clients are saying, "as long as the conflicts are managed properly we don't care about the model",' Chew says. 'Anyone who can provide multiple services will find it easier.' Deepa Vallabh, partner at Webber Wenzel and Vice-Chair of the IBA Multidisciplinary Practices Committee agrees. 'A law firm that develops flexibility in terms of its approach with clients will have the greatest opportunity of being top of mind in terms of attracting work,' she says.

Law firms have responded to these trends in a variety of ways. For example, Clifford Chance recently focused more on project management techniques borrowed from business and manufacturing, while Morgan, Lewis & Bockius successfully embraced technology.

'What we see is not necessarily greater efficiency [...] but certainly a more diverse offering for legal counsels to make use of,' says Vaagt. 'Other than big law, we see technology and consultants entering the field, so the way legal departments work in the future will be different.'

The success of these new ventures is in part because they recognise frustration with the current perceived value disconnect between the service provided and the charge made for that service. 'The cry from clients is more for less,' says Chew.

The new MDP approach, which ZICO Holdings is trying to replicate, seeks to combine the best of the law firms (ie, legal expertise) with the best of the Big Four (ie, real process disciplines and smart technology and tools). 'The dilemma with the existing business model is that many innovations are merely sales arguments, not real changes,' says Vaagt. 'Real innovation will come from those regions or countries that allow it to flourish, and whose markets are ready to adopt it.'

With the AEC expected to be in place to a meaningful extent by 31 December 2015, there are many in Southeast Asia and the ASEAN who believe that the region's commitment to non-interference in the internal affairs of member states gives it a distinct advantage, creating the perfect environment for innovation. ☒

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