

# IBA GLOBAL INSIGHT

Apr/May 2013



## Democracy, Italian-style

The instability of the eurozone's third largest economy has highlighted the impact of austerity, raising serious questions for the rest of Europe

Time to wake up:  
the sea-change on  
corporate abuse of  
tax havens may herald  
lasting change

Exclusive interview  
with Mark Malloch  
Brown on the UN  
and challenges for  
global governance

How China's adoption  
of Cambodia is  
compromising  
regional diplomacy  
and human rights



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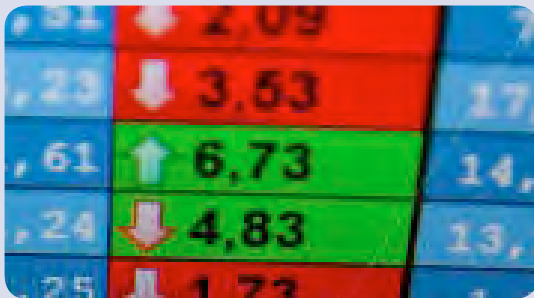
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# From the Editor



**A**s this edition of *Global Insight* went to press, Europe was in turmoil once again. The Italian election on 24–25 February failed to deliver a prime minister, and instead a farcical four-way struggle threatened to further undermine the eurozone, as depicted on our cover (see **Democracy, Italian-style**, page 14). The message from Italy was received loud and clear.

The remarkable number of votes cast for comedian Beppe Grillo's Five Star Movement (25 per cent) constitutes a resounding rejection of what's gone before. It's certainly a rejection of the technocratic rule of Mario Monti, appointed by President Giorgio Napolitano in November 2011 to steer Italy through the austerity measures required by the Troika – the ECB, IMF, and EC – and Germany in order to appease the markets and (so the received wisdom goes) pull the eurozone back from the brink. Upon news of the inconclusive election result Asian stock markets fell and the US stock market had its worst drop in three months.

The support for Grillo was also a rejection of corrupt elites. For some these are epitomised by Silvio Berlusconi. As one authority quoted in our cover feature suggests: 'The people who vote for Berlusconi are the people who don't want to buy a ticket for the bus.' Over the years, he's faced trials for fraud, perjury, bribery, corruption, and having unlawful sex with a minor. He's so far either been acquitted or let off under statutes of limitations. In October, Berlusconi received a jail sentence for tax fraud. He continues to appeal, says he's the victim of politically biased prosecutors, and denies all accusations against him. He also garnered enough votes to stall nominal winner Pier Luigi Bersani's efforts to form a government.

Meanwhile, the Troika set about appropriating funds from Cypriot banks as the condition for a bailout, suggesting they would be accessing the products of tax evasion and money being laundered by rich Russians. Russian assets in Cypriot banks are believed to total more than £20bn. This threw depositors into disarray and knocked confidence in Europe's banking system. But, importantly, it also highlighted a key issue contributing to the financial crisis, as well as distorting democracy and the markets: the abuse of tax havens. When it comes to the pressing need to properly address this issue, it is surely, as our feature on page 25 suggests, **Time to wake up**.

James Lewis



## 19th Global Insolvency and Restructuring Conference: When the sun goes down; insolvency in the energy sector

26–28 May 2013

Czech National Bank, Prague, Czech Republic

A conference presented by the IBA Insolvency Section, supported by the IBA European Regional Forum

### Topics will include:

- Insolvency of renewables: the end of the green dream?
- Past, present and future: European insolvency reform, UNCITRAL and beyond
- Informal v formal restructurings
- Petroplus case study: insolvency in oil refinery

### Who should attend?

Lawyers, judges, regulators, investors, financial advisors, crisis managers and opinion leaders should not miss this important conference.

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# News

## IBA and Nippon Foundation launch Global Appeal 2013

On 24 January the Global Appeal 2013 to end stigma and discrimination against people affected by leprosy was launched by the IBA and The Nippon Foundation in London, at the Law Society of England and Wales.

Yohei Sasakawa, The Nippon Foundation's Chairman, WHO Goodwill Ambassador for Leprosy Elimination and Japanese Government Goodwill Ambassador for the Human Rights of People affected by Leprosy, hosted the event alongside the IBA's immediate Past President, Akira Kawamura. They were joined by Vagavathali Narsappa and Guntreddy Venugopal, representatives of an Indian organisation of recovered leprosy patients.

Sasakawa and The Nippon Foundation have worked for more than 30 years toward the goal of eliminating the scourge of leprosy ('Hansen's disease') from the world. The Nippon Foundation has partnered with the IBA in its capacity as 'the global voice of the legal profession'.

Together, the organisations will work towards increasing awareness about discriminatory laws and lobby governments for their repeal to ensure that the human rights of people affected by leprosy are upheld in accordance with the principles enshrined in the United Nations Universal Declaration of Human Rights.

BBC presenter Reeta Chakrabarti compered proceedings. The President of the Law Society, Lucy Scott-Moncrieff, welcomed the audience and Baroness Helena Kennedy gave the keynote address.

To view images, films and speeches from this event, go to [tinyurl.com/NipponGlobalAppeal2013](http://tinyurl.com/NipponGlobalAppeal2013).

## IBA President meets with Aung San Suu Kyi as part of Southeast Asia tour



IBA President Michael Reynolds recently visited Myanmar (Burma) in February to meet senior legal and political figures including Daw Aung San Suu Kyi, former political prisoner, Nobel Peace Prize-winner and leader of the National League for Democracy, for preliminary discussions on how the IBA can assist in the country. The IBA President's trip also included meetings with the Attorney-General, Chief Legal Adviser to the President, Chief Justice, several justices of the Supreme Court, the President of the Rangoon Bar Association and HM British Ambassador and his staff.

Before travelling to Burma, Reynolds had been in Thailand and Vietnam. In Thailand, he met with the leadership of the Lawyers Council of Thailand and a number of practising lawyers in Bangkok, including the Council's President and Vice-President, Khosangruang and Boonma Tejavanija respectively, and Dej Udom Krairit. They discussed increasing cooperation between the

two organisations, with Khosangruang stating that the Lawyers Council of Thailand would be pleased to see more specialist conferences organised by the IBA in Thailand, a jurisdiction with more than 50,000 qualified lawyers.

In Hanoi, Vietnam, the IBA President met with Pham Quoc Anh, the President of the Vietnamese Lawyers Association (VLA), members of its Council and its international liaison officers. He also met Le Thuc Anh, President of the Vietnam Bar Federation (VBF) – which regulates the legal profession in Thailand; VBF Council members; Nguyen Sy Hong, the officer in charge of international relations; and a number of practising lawyers in Hanoi. Both organisations stressed that they would like to participate more fully in IBA activities, particularly with regard to the IBA Annual Conference in Tokyo in 2014, and intend to apply for membership of the IBA.



# US prosecutes Standard & Poor's as tide turns against ratings agencies

TOM WICKER

**T**he tide of opinion has turned against the 'big three' credit rating agencies. Downgraded governments worldwide have been protesting ever more loudly about being held to ransom by organisations they blame for aggravating the financial crisis. But all of this huffing and puffing has been just that.

So, the Department of Justice's (DoJ) decision in February to prosecute Standard & Poor's (S&P) for allegedly defrauding investors out of \$5bn in mortgage-related securities between 2004 and 2007 is a landmark action. So what has emboldened the US government?

The DoJ's civil court suit alleges that S&P deliberately ignored internal warnings about the housing market, issuing inflated ratings to make itself and its parent company, McGraw-Hill, a profit, while falsely claiming commercial objectivity.

Cynics might argue that it's no coincidence that the US government has singled out the agency responsible for its bruising downgrade from AAA two years ago. But whatever the reason, such a claim would have been difficult to bring in previous years due to the First Amendment.

Ratings issued by S&P, Moody's and Fitch Ratings had long been considered constitutionally protected opinions. But in a summary judgement ruling in a fraud case last August – which included Moody's and S&P as defendants – Judge Shira Scheindlin of the Southern District of New York cast doubt over this. She argued: 'When a rating agency issues a rating, it is not merely a statement of that agency's unsupported belief, but rather a statement that the rating agency has analyzed data, conducted an assessment, and reached a fact-based conclusion as to creditworthiness.'

Bill Carmody, a leading trial lawyer responsible for Susman Godfrey's New York office, believes this paved the



way to the DoJ's action. 'Once judges start to carve out pure opinions that are constitutionally protected into something less, it's a way under existing legal precedent to put credit issuers in a potentially precarious position.'

The DoJ's suit against S&P is novel for its use of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) as a stick with which to beat the agency. Other sovereign states lack such a statute 'already on the shelf,' says Jeffrey Manns, Associate Professor of Law at George Washington University.

'The key from the standpoint of the S&P suit is that the government is leveraging the Act's ambiguity. It recognises that there is not much in the way of precedent or for guidance to defendants as to the scope of FIRREA.'

Enacted in response to the 1980s banking crisis, FIRREA was dusted off by the US government in 2009 to 'encourage' banks into settling claims. Advantageously, a civil claim doesn't need evidence beyond all reasonable doubt to be filed. And the Act enables the DoJ to subpoena S&P for documentation.

A win for the DoJ would set a major precedent in other cases in courts all around the country. 'But the hard part will be to find a smoking gun,' Manns explains. 'The government has lots of evidence of underlings running amok. But that's not the same as showing what happened at the corporate policy level.'

Put simply, colourful emails between

employees may be embarrassing but – in and of themselves – don't equal a slam-dunk guilty verdict. The US government's burden is, as Manns says, 'that it has to show both that S&P knowingly committed fraud and that this fraud affects a federally insured financial institution.'

The DoJ is also facing a scenario aptly compared by Manns to 'the pot calling the kettle black.' In part, the central concern of the suit is that the rating agencies failed to anticipate the nature and scope of the financial crisis. But neither did the US government or any number of international monetary funds.

Philip Wood, Special Global Counsel at Allen & Overy and a leading expert in cross-border financial law, argues that scapegoating the rating agencies is, at best, disingenuous. 'Maybe people have short memories, but in April 2007 the IMF released a statement to say that conditions were benign! That was three months before the market froze.'

Overly conservative ratings issued by agencies fearful of being targeted 'could turn out to be almost as bad as being reckless,' Manns suggests. The 'chilling effect' of this on the debt markets currently lubricating the global economy might actually impede future growth.

Manns goes on to suggest that knocking S&P out of the picture entirely, through bankruptcy, could have the ironic consequence of turning an oligarchy of rating agencies into a monopoly – simply tightening a noose that governments claim is already chafing at their necks.

'FIRREA is', Manns has argued, a 'blunt and inadequate tool to deal with systematic conflicts of interest.' Ultimately, comprehensive regulatory reform via statutes such as the Dodd-Frank Act is the way forward. But whether the US government is willing to stop taking pot shots and truly tackle Wall Street is another story.



## Omani British Lawyers Association launched



The IBA has welcomed the launch of the Omani British Lawyers Association (OBLA). The newly-formed association aims to provide a forum for lawyers working in Oman and the United Kingdom to share views on topics of mutual interest, hold conferences and seminars covering current issues and develop other opportunities.

At an event at the Law Society of England and Wales held on 6 March 2013, Paul Sheridan, Chair of OBLA

and Managing Partner of SNR Denton, addressed a large group of attendees, including representatives from the Embassies of the Sultanate of Oman and the Kingdom of Saudi Arabia, private practitioners, law students and other interested parties. IBA Senior Staff Lawyer Mitzi Huang attended on behalf of the IBA.

More information on OBLA can be found at their website at [www.omanbritishla.com](http://www.omanbritishla.com).

## The latest developments in the Anti-Corruption Strategy for the Legal Profession

In the next phase of the Anti-Corruption Strategy for the Legal Profession – a joint initiative of the IBA, Organisation for Economic Co-operation and Development (OECD) and the United Nations Office on Drugs and Crime (UNODC) – the IBA aims to inspire bar associations to take a more active role in leading the legal profession in the global fight against corruption.

With this in mind the IBA is delighted to welcome the launch of the Canadian Bar Association's Anti-Corruption Team (CBA-ACT), a specialist unit created to monitor and respond to all matters pertaining to anti-corruption policy, programmes and compliance, while also providing anti-corruption educational resources for Canadian lawyers.

Having a team of this nature provides a strong focus and organisational structure for the CBA's continued development of their anti-corruption initiatives – as will be demonstrated by their forthcoming International Law Conference entitled 'Emerging Issues in International Corporate Social Responsibility, Corruption and Compliance', due to take place in June 2013.

James Klotz, one of the CBA-ACT's members, and a member of the IBA Management Board, has also been a key figure in a specialist IBA working group, which is currently developing guidance to help all bar associations improve their anti-corruption policies, and become a strong voice on behalf of the legal profession in the global high-level discourse surrounding the issue of corruption.

We hope this initiative will encourage other bar associations to take similar measures. For further details see [tinyurl.com/CBA-Anticorruption](http://tinyurl.com/CBA-Anticorruption).

The IBA is keen to learn of any anti-corruption initiatives implemented by bar associations. Please send any information regarding such programmes to the IBA's Legal Projects Team at [lpt@int-bar.org](mailto:lpt@int-bar.org).

## PRIME Finance Annual Conference

IBA Executive Director Mark Ellis introduced a forthcoming joint IBA/PRIME Finance project for South Korea and Japan at a plenary session of the PRIME Finance Annual Conference from 28–29 January 2013.

PRIME Finance (the Panel of Recognised International Market Experts in Finance) is an independent organisation based in The Hague. It was established in 2012 to assist judicial systems in the settlement of disputes in complex financial transactions. The IBA has supported and been involved with the project from its inception under the leadership of William Calkoen and Jeffrey Golden.

In his address to over 150 participants, the IBA's Executive Director highlighted the importance of an independent and competent judiciary and legal profession to maintain a stable global derivatives market. The IBA expects to engage the judiciary and legal profession in South Korea and Japan in these discussions in order to explore the opportunities and needs of complex financial dispute resolution in those regions.

Ellis emphasised that the IBA/PRIME Finance joint project is symbolic of the IBA's growing interest in and commitment to the region. Since the opening of an IBA office in Seoul in 2011, the organisation has held conferences on international commercial arbitration, international sale of goods and competition law in East Asia.

More information on PRIME Finance is available at their website at [www.primefinancedisputes.org](http://www.primefinancedisputes.org).



# India: multinationals in the spotlight as officials get tough on tax

PIA HEIKKILA

**M**ultinational corporations such as Vodafone, Shell and Nokia are rarely out of the business pages as the Indian tax officials seemingly never-ending chasing of unpaid taxes gives daily fodder to the Indian press.

But, while it's tempting to lump all three companies' cases together under the headline 'unpaid taxes', each is, in fact, very different.

Take Shell, the Anglo-Dutch fuel giant. Indian tax officials are claiming unpaid taxes of over £1bn over an equity infusion undertaken four years ago worth £120m. The tax authorities are claiming that Shell underpriced its shares and as a result paid less tax on the internal shares transaction.

Shell India has described the demands as 'absurd' and says it will challenge the notion that alleged tax evasion is done by underpricing share transfer between member firms. 'We do need the right signal that India is going to be a stable fiscal, legal, tax regime. We are not going to have surprises along the way,' said Yasmine Hilton, the India Head of Royal Dutch Shell in a report by Firstpost.

The Finnish handset maker, Nokia, however, has come under fire for an entirely different reason. Nokia, the Indian tax department alleged, has violated the country's transfer pricing rules. According to unanimous sources in the local media, Nokia's case is related to tax payments the company made for supplying software from its parent company in Finland for devices produced in India.

Nokia India objected to officials entering its factory in Chennai, one of its biggest facilities and described the incident as 'excessive, unacceptable and inconsistent with Indian standards of fair play and governance'.

Vodafone, on the other hand – the world's largest mobile operator – is fighting a case over paying taxes of nearly £2bn on its 2007 majority stake buy in a local telecom company from Hutchinson. The company is also facing a charge from Indian authorities for underpricing an issue of shares of



its Indian unit to a Mauritius-based group company by about INR13bn (£200m). But Vodafone is fighting back and denies the charges.

These cases have one thing in common: the tax is being collected on transactions retrospectively. It seems, the experts say that India has gone on a hunt for unpaid taxes to boost its coffers. 'With the slowdown of the global economy – and, more so, the Indian economy – tax collections in the country have been below estimates. Further, with rising concerns over the fiscal deficit scenario, every attempt is being made by the tax authorities to shore up tax collections to bridge the gap,' said Girish Vanvari, partner and Co-Head of Tax at KPMG in Mumbai.

It could look like a witch hunt for foreign of multinationals operating in India. But, says Devangshu Dutta, CEO of Third Eyesight, a Mumbai-based consultancy, 'there is valid reasoning behind the government's stand that for value gained on assets that are primarily in India, tax should be paid in India, and should not be avoided/evaded purely through offshore corporate structures that have no inherent value of their own.'

The lines between what is tax evasion and what is tax planning appear increasingly blurred today. 'Each country should have their own rules but ultimately the idea is that you should pay appropriate taxes within the framework of law in that country,' said Vanvari. 'There is global trend by each country to increase their tax bases by taxing the superrich, transfer pricing adjustments, off shoring taxes and so on. Transitioning into these new concepts especially for years gone by is leading to debates, chaos and confusion.'

But continuing tax debacles can seriously tarnish India's image and alienate foreign investors and companies alike. 'Retrospective changes such as this affect the image of India as an investment destination not only in the eyes of foreign investors, but domestic investors as well,' said Dutta.

Business leaders say there is much more to be gained from creating a policy environment that allows entrepreneurial and social energy to be unleashed – rather than be subjected to a constant barrage of rules and regulations.

Sadly, however, these cases and other tax-related litigation are not going to disappear any time soon experts warn.

'However good or bad the case is, legal battles in India usually tend to be long. Once a tax demand is raised, a portion of the same needs to be deposited whilst litigation is ongoing,' said Vanvari.

Ultimately India is still trying to get to grips with its own speed of change. But the government should be wary of sending out the message that it can bend the law at will.

'In that environment, business and non-businesses that can contribute to positive changes and growth feel stifled and don't do enough to achieve their own fullest potential, or otherwise they just move to another jurisdiction where they can,' Dutta noted.

More news analysis stories from the IBA can be found at [tinyurl.com/IBANewsAnalysis](http://tinyurl.com/IBANewsAnalysis).



# Human Rights News

## Nominations open for the IBA Human Rights Award 2013

**N**ominations are now open for the annual IBA Human Rights Award. Each year the IBA presents an award to an outstanding lawyer in the world of human rights law. We are seeking high-calibre nominations for 2013 and the deadline for applications is 1 May 2013. The award will be presented to the winner during the Rule of Law Symposium at the IBA Annual Conference, in Boston, October 2013.

Last year's winner was jailed Iranian lawyer, Abdolfattah Soltani. Soltani is co-founder of the Defenders of Human Rights Center (DHRC) with Nobel laureate Shirin Ebadi. He was presented with the title for his outstanding contribution as a legal practitioner to human rights. His daughter, Maede Soltani, accepted the award on her father's behalf at the IBA Annual Conference in Dublin.

For full details of how to nominate a candidate and to read information on former Award winners, see [tinyurl.com/IBAHRAward2013](http://tinyurl.com/IBAHRAward2013).



## IBAHRI delegation denied visas for Sri Lanka mission

The International Bar Association's Human Rights Institute (IBAHRI) has expressed serious concern at the Sri Lankan government's decision to deny entry to Sri Lanka to senior international figures, including a former Chief Justice of the Supreme Court of India, Justice J S Verma.

Mark Ellis, Executive Director of the International Bar Association, stated: 'It is disappointing that the Sri Lankan authorities have missed the opportunity to cooperate on a visit by respected foreign members of the legal system. It will suggest to the international community that the Sri Lankan authorities are fearful of having independent eyes on the issues of interest to the legal profession.'

A visa had been issued to one member of the delegation, facilitated through the relevant national diplomatic channels on 18 January 2013, but was revoked on 29 January. Approval to enter the country was suspended on 29 and 30 January in the cases of the other delegates, who had applied and been approved for entry to Sri Lanka through the online application process on 21 January 2013.

The visit was planned to take place 1–10 February 2013 to meet members of the legal profession, and representatives of government, media and civil society.

Following the suspension and revocation of the visas the IBAHRI was assured that the Sri Lankan High Commission in London would cooperate in the investigation and resolution of the matter. To date, no further information has been forthcoming. However, we remain hopeful that the Sri Lankan government will wish to remain open to international engagement and will reinstate the visits accordingly.

Read further details at [tinyurl.com/IBAHRISriLankamission2013](http://tinyurl.com/IBAHRISriLankamission2013).

## Lebanon: parliamentary strengthening 2013

In February 2013 the IBAHRI undertook a two-day training programme for parliamentary staff in Lebanon. The training took place at the Arab Institute for Parliamentary Training and Legislative Studies (AIPTLS), in the Lebanese Parliament. It aimed to improve the participants' knowledge of the role of parliament in upholding the rule of law and strengthening the implementation of human rights obligations in Arab Inter-Parliamentary Union (AIPU) states.

It also examined how the Lebanese and other AIPU parliaments already incorporate human rights scrutiny into their legislative process and considered how existing procedures and tools may be further strengthened. Examples of best practice and case studies from the region and from the UK Parliament's Joint Committee on Human Rights (JCHR) were discussed.

The training also marked the launch of the Arabic version of the TWC/IBAHRI handbook Human Rights and Parliaments: Handbook for Members and Staff. The Handbook aims to give practical guidance to members of parliament and their staff in ensuring parliaments fulfil their critical role in ensuring the legislature upholds the rule of law. It describes the content of specific rights and their limits, gives case studies and provides checklists to prompt action.



# Russia: historic Magnitsky trial brings corruption and rule of law into focus

RUTH GREEN

Russia is set to make history as the country's first modern-day posthumous trial gets underway in Moscow's Tverskoi District Court. The case, involving deceased defendant Russian lawyer Sergei Magnitsky, who died in pre-trial detention in a Moscow prison cell in 2009, has brought the issue of corruption in Russia and problems with the country's judicial and penitentiary systems all firmly under the international media spotlight.

Another quirk of the trial will see the other defendant, Bill Browder, the founder of investment fund Hermitage Capital and Magnitsky's client at the time of his arrest, examined in absentia, making him one of the few foreigners ever to stand trial in absentia in Russia.

After several months of delayed proceedings, a judge ruled on 4 March that the trial should go ahead despite the tense political backdrop between Russia and the United States. Browder, who has been instrumental in leading an international campaign to investigate Magnitsky's death and bring those guilty to account, succeeded in bringing his campaign to the US last year and in December President Obama signed into law the Sergei Magnitsky Law of Accountability Act. Russia reacted strongly by enforcing a ban on Americans from adopting Russian citizens.

In spite of the huge amount of international attention that the case has attracted, a recent study by the All-Russian Center for the Study of Public Opinion (VTsIOM) suggests that the Russian public are not as aware of the Magnitsky case as might be expected, notes Alexander Nadmitov, managing partner of Nadmitov Ivanov & Partners. 'According to the poll, on 15–16 December 2012, 35 per cent of Russians knew nothing about Sergei Magnitsky,' he says. 'Fifty-three per cent had only heard of his surname and knew nothing else about Sergei Magnitsky, six per cent said that he died in the preliminary detention jail, two per cent said that he was a fighter against corruption who exposed financial fraud, one per cent of respondents had heard about him in



the connection with the Magnitsky List, two per cent said that he was a lawyer and an advocate of a foreign company and one per cent said that he was a public politician.'

Although the ordeal may have caused a relatively small stir among the Russian public, undoubtedly the court case will prove an important milestone in the local legal market. The preliminary hearing for the trial was initially postponed on 28 January after Magnitsky's family and lawyers refused to take part, but on 18 February it was revealed that the state had appointed two lawyers to represent Magnitsky and Browder.

The lawyers in question, Nikolai Gerasimov for Magnitsky and Kirill Goncharov for Browder, practise at Law Office No5, which is located in the same district as the trial is taking place. The appointments have been made despite an urgent plea in January by Magnitsky's mother Natalya Magnitskaya, to the Chairman of the Moscow Bar Association Henri Reznik, to ask its members not to take part in the trial.

However, as Nadmitov explains, under Russian law lawyers can be appointed to a trial at the court's discretion. 'While I don't know the circumstances of a criminal case against Sergei Magnitsky

and Bill Browder, nor am I acquainted with the case materials, as regards procedural matters, under Articles 49–51 of Russia's Criminal Procedure Code, investigators or the court have a right to appoint lawyers for defendants in certain circumstances,' he says. Moreover, according to the rules of the Moscow Bar Association, any lawyers appointed to the case face disbarment if they refuse to take part in the trial.

Meanwhile, Jana Kobzova, a policy fellow and wider Europe programme coordinator at the European Council on Foreign Relations, sees the Magnitsky trial as just the latest indication that rule of law is severely lacking in Russia. 'The posthumous trial is sadly only the more visible example of the current reality of Russia which is that there's no rule of law and the law is twisted, tweaked and mended as needed and required by the ruling elite,' she says. 'Strangely, the more absurd the trial is, the more they'll press ahead with it.'

While Kobzova is hesitant to draw parallels with the Magnitsky trial and Stalin's show trials, the general purpose behind the trial is all too similar, she says. 'It's of course not comparable at all, but as Ivan Krastev argues when one looks back in history, the show trials in the 1930s in Russia took place not to fool people into believing that the defendants admit their mistakes and wrongs, but to show to everyone that the state has capacity to break down each individual and force them into admitting things they never did, despite everyone knowing that what they confessed doing they've never actually done.'

In December 2012, in the only court case related to Magnitsky that has taken place to date, a Russian court cleared prison doctor Dmitry Kratov of negligence while Magnitsky was in his care. As for the verdict for Magnitsky's own trial, it doesn't bode well when you consider that the conviction rate for criminal trials in Russia is over 99 per cent.

Read a further article about Sergei Magnitsky's pre-trial detention at [tinyurl.com/Magnitsky-pre-trial](http://tinyurl.com/Magnitsky-pre-trial).



# IBAHRI publishes its 2012 Annual Report

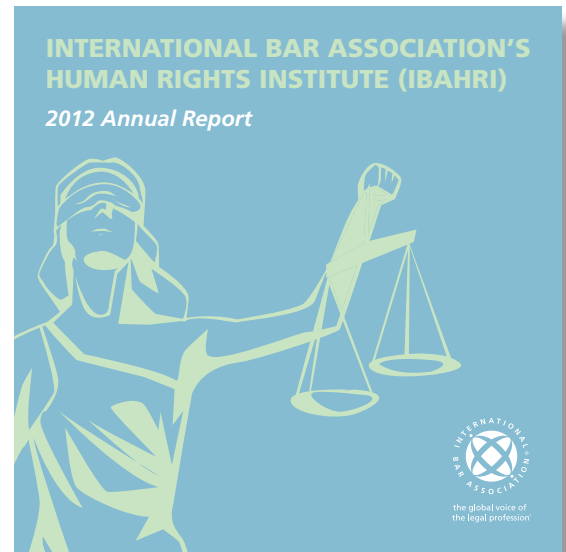
The IBAHRI has released its latest annual report, providing an overview of the Institute's activities and achievements in 2012. The IBAHRI works to promote and protect human rights and the independence of the legal profession worldwide, the 52-page publication includes details of the IBAHRI's capacity building programmes, fact-finding missions, trial observations, advocacy initiatives and training programmes held across the globe.

IBAHRI Co-Chair, Sternford Moyo said, 'Strengthening both national and international institutions interested and involved in the administration of justice, human rights, and freedoms of many people across the world has never

been more important. In recent years there has been a global awakening to the ideals enshrined in the Universal Declaration of Human Rights, which the IBAHRI works to promote and protect.' He added, 'The 2012 IBAHRI Annual Report shows that there were more IBAHRI capacity building initiatives to strengthen the skills and competencies of human rights lawyers in many nascent democracies than in previous times. The Annual Report illustrates how much has been achieved during the last year, but also acts as a

reminder of the vast amount of work to still be done.'

The Report can be downloaded from [tinyurl.com/IBAHRI-Annual-Report-2012](http://tinyurl.com/IBAHRI-Annual-Report-2012).



## IBAHRI confronts unrelenting challenges facing legal profession in China

The IBAHRI has issued a thematic paper on China's diverging legal profession. Author Chen Youxi argues that, while commercial lawyers are afforded high financial gains and relative freedoms, those practising criminal or administrative law face unrelenting challenges and severe restrictions to freedoms.

The paper, entitled 'A tale of two cities – The legal profession in China', provides a succinct background to legal practice in China – from the 1930s to the most recent reforms, including the development of private firms and the 2008 revised Lawyers Law – followed by a detailed analysis of the challenges facing lawyers today, and a view to the future of the legal profession in China.

## Venezuela: IBAHRI continues to monitor Judge Afiuni trial



The IBAHRI continues to monitor the trial of Venezuelan Judge María Lourdes Afiuni, whose case has become emblematic of the lack of independence and politicisation of the judiciary in Venezuela. The IBAHRI's expert trial observers have attended all eight hearings, since the trial began in March 2013. The trial is in the evidentiary stages and is likely to continue throughout 2013. The first three scheduled hearings in 2012, attended by the IBAHRI were postponed at the last minute. It has been speculated in Venezuelan media reports that this was, in part, an attempt to discourage the presence of international observers. The IBAHRI continues to observe scheduled hearings and to hold meetings with key stakeholders.

Judge Afiuni was arrested and imprisoned in 2010 after she released on bail a political prisoner, in compliance with the Venezuelan penal code and applying a decision of the UN Working Group on Arbitrary detention.

Read more at [tinyurl.com/JudgeAfiuniTrial](http://tinyurl.com/JudgeAfiuniTrial).

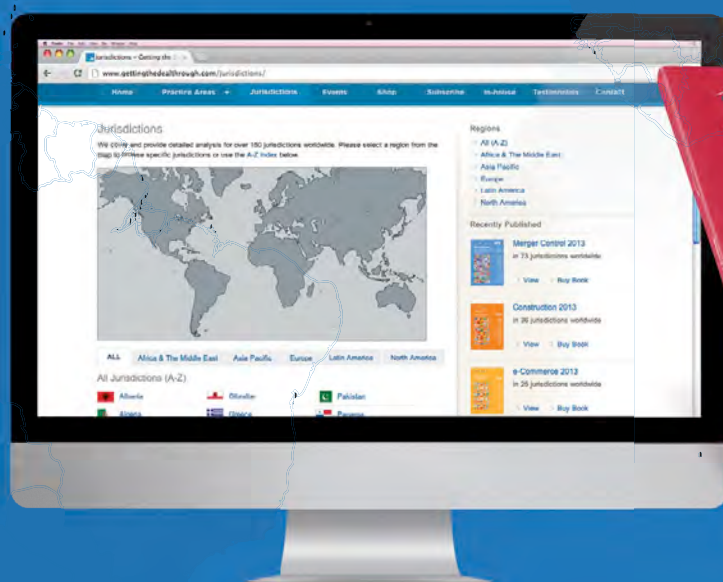


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# Mali: successful and legal intervention, but questions remain

REBECCA LOWE

France's intervention in Mali to assist the government in its fight against Islamist terrorist groups has garnered widespread global support while raising serious questions, notably regarding continued inaction on Syria.

African nations neighbouring Mali have provided troops and resources, while the United Kingdom recently bolstered efforts by supplying two aircraft and 240 troops to help train soldiers.

But why was France's intervention so straightforward, while Syria remains unassisted and in turmoil? Was France acting wholly within international law – and if so, what lessons can be learnt concerning global inaction in Syria and elsewhere?

Hans Corell, former Legal Counsel of the United Nations, suggests that the situation in Mali is an example of what can be done when the international system works effectively. He has long called for an overhaul of the structure and procedures of the UN Security Council (UNSC), including the use of the veto by permanent members.

'Looking at Syria and Mali, the lesson is that the Security Council must act when international peace and security is threatened and then make use of the same yardstick,' he says. 'Determined and consistent action by the Council would send a resounding signal around the globe, in particular to oppressive regimes and presumptive warlords – in other words, those who cause the conflicts – that the Council will be faced with unless they are prevented.'

International law experts seem to agree that the intervention of 4,000 French troops in Mali on 11 January was legal, though they differ in their reasoning.

France gave three justifications: Article 51 of the United Nations Charter, which allows for 'collective self-defence'; the fact that Mali itself appealed for help; and the backing of the UNSC.



While each argument is convincing, say experts, the overall case is not quite as straightforward. Article 51 allows for 'individual or collective self-defence if an armed attack occurs against a member of the UN'. While this justification seems sound, the Article has traditionally been interpreted to mean an attack of one state against another. In two International Court of Justice decisions, in 2004 and 2005, the Court ruled that the Article does not extend to self-defence against private groups such as terrorists.

France's second justification, the invitation from Mali, is similarly ambiguous. Throughout France's colonial history in the region, such appeals were often made by undemocratic regimes as a way to suppress their people. States therefore do not have an unlimited right to respond to intervention requests. While there is no question that Mali's terrorist threat is real, it is unclear whether the government's consent alone is sufficient legal basis to give France the all-clear.

The final justification, UNSC Resolution 2085, seems the most convincing. Yet the Resolution only authorised the use of force by an African-led support mission, while urging other member states to provide 'necessary assistance'. While the call to arms was later ramped up in a press release, a further Resolution clarifying the terms was not forthcoming.

Yves Doutriaux, Member of the

French Council of State and former Deputy Permanent Representative of France to the UN, believes all three reasons are sound. He admits that former 'Françafrique' interventions were unjust, but points out that 'this is clearly not the case in Mali', where a large portion of the population are in support of the action.

Richard Goldstone, former Chief Prosecutor for the International Criminal Tribunal for the former Yugoslavia and Rwanda, agrees. 'In my view the intervention is consistent with international law. I believe the strongest basis for justification for the intervention is the UNSC Resolution, but I also believe that foreign military intervention at the request of the lawful government to repel an internal threat does not contravene international law.'

However, a leading international barrister and judge, who declined to be named, confesses he 'doesn't see the immediate relevance of Resolution 2085' as it is too restricted in scope. 'UNSC authorisation of use of force must be explicit, it cannot be presumed,' he explains. 'The UNSC seems to have changed its mind later, but a press release is no way of expanding the terms of a Resolution.'

Yet the lawyer finds Mali's entreaty for help a 'sufficient legal basis in the circumstances'. While such assistance is not an unlimited right, he stresses that assessments depend on individual circumstances. 'In this case I think it works,' he says.

As the differing responses to France's operation show, international law is far from unequivocal. Still in its infancy, it remains malleable and subjective – as well as highly political, according to David Michael Crane, former Chief Prosecutor of the Special Court for Sierra Leone, who was responsible for indicting former Liberian President Charles Taylor. The decision to do something is not a legal one, or even a moral one, but a political one.'



# Democracy,



Illustration: John Holder



# Italian-style

The Italian national elections have highlighted the instability of the eurozone's third largest economy, raising serious questions for the rest of Europe.

POLLY BOTSFORD



On the eve of the Italian national elections, Mount Etna erupted sending lava fountains eight hundred metres into the air. For days afterwards, great jets of gas and grit continued to spurt out of the crater followed by a dense ash cloud, which loomed over Sicily's eastern regions.

The election itself was no less explosive both for Italy and for the eurozone: the unpredicted success of the anti-austerity, anti-establishment Five Star Movement taking 25 per cent of the total votes cast, coupled with the return of Silvio Berlusconi, turned Italy's political arena into turmoil; for the eurozone, the election was a dangerous reminder of the strength and depth of feeling against EU austerity measures and how that turmoil is, to an extent, self-inflicted.

Three out of every four Italians went to vote on Sunday 24 and Monday 25 February. Flights were fully booked as the diaspora flew back to have their say. As the counts came in, it became clear, however, that nothing was clear, and that no coalition had won outright.

In the lower house, the Chamber of Deputies, the centre-left coalition led by Pier Luigi Bersani did manage to win a majority (securing 340 seats out of a total of 630 as a result of a mechanism known as the majority bonus whereby the coalition with the most votes automatically gets 55 per cent of the seats). Berlusconi and the centre-right coalition won 124 seats and the Five Star Movement a staggering 108. Mario Monti, the outgoing prime minister who had instigated Brussels-driven austerity measures during his so-called technocratic rule, only garnered 45 through his coalition, Civic Choice.

In the upper house, the Senate, no party secured the overall majority (and the Senate in Italy matters; it has equal status with the Chamber of Deputies). There the centre-right won 117 seats out of 315, the centre-left struggled their way up to 119, the Five Star Movement stole the

show with 54 and Monti managed 18. In other words, the centre-left did not have an outright majority (they needed 158 seats to achieve that). There was no real winner, there was only an impasse or, as the left-leaning Italian newspaper, *La Repubblica*'s headline put it, Italy had become: 'ingovernabile'.

The national and world press branded the result a deadlock and a disaster, a disaster for Italy, for the eurozone. Only one op-ed piece in the *New York Times* took a more measured approach, referring to the election as a 'geostrategic minnow'.

The stock markets reacted badly too because they had anticipated (or should one say 'hoped'?) that the election would end the uncertainty which Monti's unelected rule had created and establish a mandate for further reform; this the result most certainly did not do. By 26 February the markets had dropped by 4.9 per cent in Milan, 2.3 per cent in Germany and 1.3 per cent in the UK. But it is also true that markets do not like uncertainty, of whatever sort; they reacted similarly after Barak Obama was re-elected last November, the Dow Jones falling by 313 points. And in case of the Italian election, a day later, on 27 February, the markets recovered.

As this edition of *IBA Global Insight* went to press, coalitions were attempting to form a government, at the President's request, and secure the crucial vote of confidence, a constitutional mandate where the legislature must declare whether it accepts the government that has been formed. It is also predicted that any government that is formed may be brought down, which makes another election a possibility.

But already this election has demonstrated

worrying traits in current Italian politics and in the wider dynamics of the eurozone. For one, it has shown that Berlusconi still has huge clout (to the tune of around 25 per cent of the vote) despite his failure to implement crucial reforms, despite the sex scandals, and despite October's jail sentence for tax fraud, which he continues to appeal, denying all accusations against him. He says he's the victim of politically biased

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*'The Italian elections are an indication that we should listen to what the peoples of Europe are telling us'*

Unidentified French diplomat

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prosecutors.

It is also a rejection loud and clear of Monti's unelected government and heralds the arrival of the Five Star Movement. Both of these elements represent a vote against the EU's austerity measures. 'The Italian elections are an indication that we should listen to what the peoples of Europe are telling us,' one unidentified French diplomat told a member of the European press corps recently. The problem for the EU is that whereas Monti talked the language of the euro and delighted Brussels, Grillo talks the language of the lire and enrages Brussels. And whoever runs Italy going forward has to factor in the existence of the Five Star Movement.

## ITALY'S TIMELINE

1946	1992	1994	2007
Following the end of the Second World War, a new Constituent Assembly is established, made up of Christian Democrats, the Italian Socialist Party and the Italian Communist Party. These parties dominate Italy through the country's economic miracle of the 1950s and 1960s, and the 'Years of Lead' in the 1970s and 1980s.	Mani Pulite investigations begin into allegations of widespread corruption of the Italian parliament, the so-called 'Tangentopoli'. This signifies the end of the Christian Democrats. With the collapse of communism, the Italian Communist Party falls away with many members switching over to the Democratic Party of the Left. This eventually transmogrified into what is now the Democratic Party (DP) launched in 2007.	Silvio Berlusconi, once a singer on cruise ships, wins his first election. He repeats this in 2001 and again in 2008. Romano Prodi's centre-left coalition struggles to defeat Berlusconi but does so in 1996. Prodi, nicknamed Mortadella (an uninspiring Italian sausage), is no match for Berlusconi's TV channels and football clubs.	The global financial crisis strikes. Italy's economy shrinks by six per cent.



### Grillo the clown

In the initial aftermath of the election result, Bersani and the centre-left coalition tried to form a government by approaching the Five Star Movement and asking Beppe Grillo, its leader, to enter into a coalition. Grillo turned them down. But he did not leave it there. He followed up his refusal by posting on his website an image depicting the face of Bersani superimposed onto the figure of a man dressed like the grim reaper in a parody of a poster of an Italian film, *47 Morto che parla*. Over the image was the headline: 'Bersani, dead man talking'.

Grillo combines a comedian's wit, a Julian Assange-like evangelism for the power of the internet, and oratorical skills worthy of Ancient Rome. He refuses to speak to the Italian press because he claims they are part of the same corrupted system as the main political parties; so it was in an interview with the BBC that Beppe Grillo gave us a taste of his philosophy.

When asked by the interviewer if his success was based on him tapping into the anger and frustration of the Italian people, Grillo replied: 'We did not create this anger. Yet from all this rage we have created hope. Before us, there was no hope, and anger without hope is dangerous and violent. But anger with hope is a different thing. You'll see'.

The Five Star Movement is only three years old and in that time has garnered one in four of the Italian votes, an extraordinary achievement. The five stars of its moniker represent its main themes: water, transportation, development, internet availability, and the environment. The manifesto is wide-ranging (critics would call it chaotic) including repealing unpopular copyright laws, preventing those who have committed crimes

from holding public office, but also abolishing the provinces and doing away with stock options.

The movement is against the party system, what Italians call the '*partitocrazia*', which it sees as responsible for the mess Italy is in, and emphasises that it is not a party but 'a free association of citizens'. It has already turned down an offer of a coalition with Bersani,

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*'Let's not forget that Italy is a major world economy, ranked eighth globally by the World Bank. Yes we have problems but we are not alone in that'*

Leonardo Simonelli Santi,  
President of the Italian Chamber  
of Commerce in the UK

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refusing to play a political game of forming alliances with hitherto sworn enemies. It is a public rejection of a Machiavellian approach to governing, and claims to breathe new life into politics with the netizens and the government working without parties to revolutionise Italy.

Not surprisingly, grave doubts remain as to how a movement so critical of the system could ever run a country from within it, particularly at a time of economic crisis. *The Economist* featured him on the front cover of its edition immediately after the election as one of Italy's two clowns (the other, of course, being Silvio Berlusconi)

## 12 November 2011

Despite using his Facebook page to deny rumours that he was going to do so, Berlusconi resigns in the face of criticism over his failure to deal with Italy's growing debt crisis (among other matters). There is dancing in the streets of Italy.

Mario Monti, an economist and eurocrat, is appointed by President Napolitano to lead a unity government in an unprecedented move. The government is rebranded the 'technocrats' and is assigned with delivering a package of austerity measures.

## December 2012

Berlusconi threatens to and then does withdraw support of Monti's technocrats and announces he will lead his party again in the next general election. Monti resigns his premiership. He is expected to become the next president of the republic. Instead, however, just before Christmas, he announces he will run for parliament.

referencing a comment made by the German opposition politician, Peer Steinbrueck, recently. And it is with disdain that the movement is also known as 'the Cappuccino Party'.

Now that the movement has legitimacy and representation inside the legislature, how it interplays with the established parties there will be interesting to watch. Leonardo Simonelli Santi, President of the Italian Chamber of Commerce in the UK, believes that Italian MPs can be pragmatic if there is a real need: 'the new parliament is not made up of wild people. They want normality, they want to make it work. Even Mr Grillo was dressed appropriately when he visited the president recently.'

Certainly, one of the more intriguing aspects of the Five Star Movement phenomenon is that its MPs are an unknown: unknown to each other, unknown to parliament, unknown to their own leader. These are not longstanding members of a cohesive cohort. Many were local independent candidates who did not want to or could not join the main political parties and who saw the Grillo stamp as a last-minute passport to parliament.

Also, within the legislature, the 162 'grillini' (as they are known) across both houses have no leader because Grillo has no seat of his own. He is not an elected leader. How long will they stay loyal to his principles and to each other? As one Italian comments: 'it would only take ten or so of these MPs to express their own ideas and the political situation could be very different indeed' There has already been one example of this when there was a vote on who should be speaker in the Senate. Twelve Five Star Movement MPs voted against the movement's dictat on this appointment.

And yet for all the talk of a free association, the Five Star Movement in reality is not that free. Before the election there were plenty of examples of the autocratic nature of Grillo (and of his ultimate boss and funder, Roberto Cassaleggio, a net entrepreneur who has bankrolled the movement's development) where members had been expelled for disobeying rules. Those MPs who voted against the movement over the speaker in the house have been threatened with expulsion. With a blustering three-line whip like this, Grillo may be able to keep his 'grillini' in check.

Grillo is a new force in Italian politics and any government going forward will have to find a *modus vivendi* with him and his MPs. Although comparisons are made with the Occupy movement in the UK and the US, or the Indignacios in Spain, Grillo has managed to do what they have not: he has given the movement political clout.

Even if it is not the end game, the movement could be a force for change argues Dr Jonathan Hopkin, a reader in comparative politics at the

London School of Economics: 'Grillo's success sends a clear signal to the rest of the political elite that a large number of Italians have had enough of the corruption and incompetence that is holding the country back, and may embolden new political actors to enter the fray.'

### Opportunity missed

Yet Italy has been here before and it didn't turn out that well the last time. A generation ago, Italian politics was turned upside down following the collapse of communism and a wave of corruption scandals known as the 'tangentopoli', government-by-kickbacks. Up until then, the First Republic was dominated by the conservative

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Dr Jonathan Hopkin  
Reader in comparative politics, LSE

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and catholic Christian Democrats, kept in power in part by people's fear of the Italian Communist Party, the PCI (then the strongest and most credible communist party of Western Europe).

But then the Berlin Wall came down and, overnight, the PCI were no longer a threat, as Professor Donald Sassoon, a professor of contemporary modern history at Queen Mary, University of London, explains: 'Italians were no longer afraid to look at the parties with a fresh eye. They no longer had a need to vote for them.' Indeed, not only did Italians turn away from the Christian Democrats but deep-seated corruption was uncovered and the old guard was swept away. It was an opportunity to change Italy's future, to change the laws and reform from the core.

What happened instead, however, was that the power vacuum was filled by Silvio Berlusconi and has led to what some refer to as '*il ventennio perduto*', the lost 20 years, when the country had an opportunity to reform and that opportunity was missed. As one Italian puts it: 'the people who vote for Berlusconi are the people who don't want to buy a ticket for the bus, who, when they see someone double-parked blocking the street they think: "Great. That means I can double-park too".' As Sassoon concludes: 'they could have changed all that but they didn't. And now the next generation of Italians has had to go abroad.'





There is a fear that the Five Star Movement could create the same sort of fissures. But Hopkin sees it in a more positive light, as a first step in a crucial displacement of the status quo: 'the replacement of a political class that has presided over Italy's two decades of stagnation is a pre-requisite for recovery.'

### Could Italy sink the Euro?

Recovery is certainly needed: the country is currently in recession and the Bank of Italy predicts a one per cent contraction for 2013 (its GDP contracted by as much as 5.5 per cent in 2009). Public debt is very high at around 120 per cent of GDP. The impact of this is made worse by the fact that tax evasion is endemic so the burden of tax falls disproportionately on law-abiding citizens.

And, of course, Italy's woes are the eurozone's woes (Italy is often included in the derogatory acronym, the 'PIIGS': those countries which threaten to destabilise the eurozone, alongside Portugal, Ireland, Greece and Spain) And so there is a broader question of how Italy's new government and the Italian economy over which it will preside, will impact on the eurozone.

The answer isn't simple. First, there is some good news: Monti's reforms over the past eighteen months have done much to clear a

path for growth rather than greater austerity.

Indeed, at the recent EU Summit, Italy was given reprieve from intense austerity towards a more growth-friendly interpretation of the EU budget rules. This includes the new government being able to inject significant cash into the economy by paying various private suppliers which have, up until now, not been paid. Vincenzo Scarpetta, a researcher at the think tank, Open Europe, and a well-known tweeter on Italian political affairs (@londonervince), says: 'thanks to the legacy of Monti, Italy is in a good position in terms of its deficit.'

Nor did Italy have a subprime mortgage crisis out of which it must dig its way, and is not riddled with failing banks (apart, that is, from the recent bail-out of the private bank, Banca Monte dei Paschi di Siena following a derivatives scandal).

The bad news, however, is that it isn't the deficit which is of longer term concern. Italy's problems are structural: many of its traditional industries have stagnated and lost out to competition from the emerging markets. Fragmented sectors have failed to attract external investment, and foreign direct investment into Italy has been notoriously low.

There has been a lack of political will to do anything about the need for reform (and the legislative process hampers any efforts which are made because it is very slow; Franco Toffoletto, Senior Partner at Italian law firm, Toffoletto De Luca Tamajo e Soci, estimates that most bills take as long as eighteen months to come to fruition and many others simply fade away because in that time, a new government may have come in) which has meant that

structural problems have not been confronted. Whether or not the government which eventually emerges from the stalemate of the recent election is a reforming one will be critical in Italy's and the eurozone's longer term economic success.

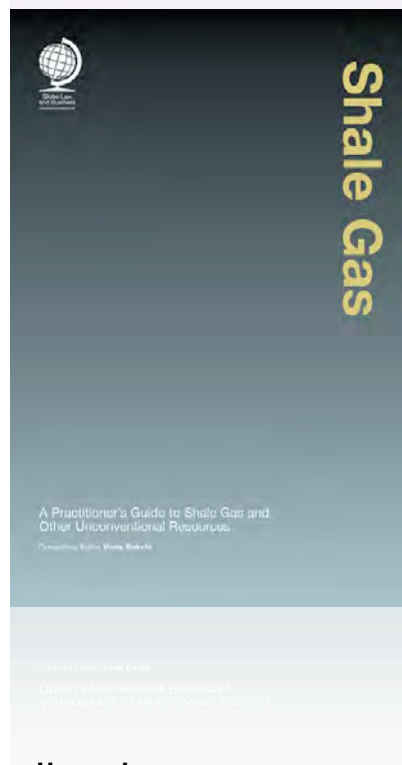
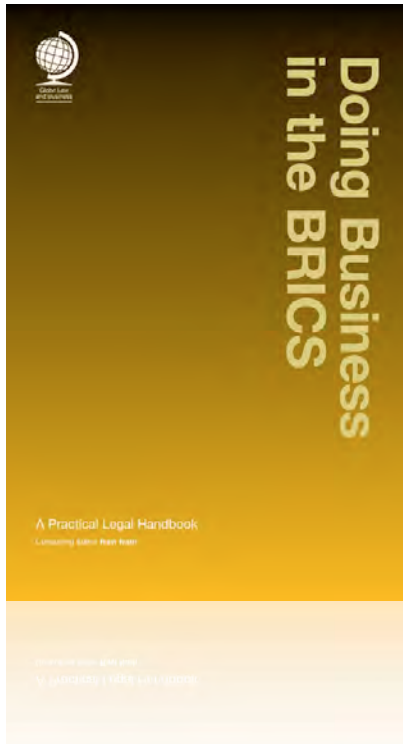
But on a more positive note, Simonelli says: 'let's not forget that Italy is a major world economy, ranked eighth globally by the World Bank. Yes we have problems but we are not alone in that.' Toffoletto agrees and says that comparisons with Greece are not justified: 'the entire nation of Greece produces as much as the Italian region of Lombardy.' Toffoletto argues that Italy will not sink the euro: 'Italy has huge capacity and spirit. It will just be a long and complicated process.'

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# Equal justice slipping away

Despite President Obama making all the right noises, American justice is imperilled as the full implications of *Citizens United* are felt in judicial elections.

**SKIP KALTENHEUSER**

President Obama's well-received inaugural speech hit upon solid themes of equality before the law: '... a free market only thrives when there are rules to ensure competition and fair play.' But the hard-fought gains toward 'EQUAL JUSTICE UNDER LAW,' the ideal engraved over the entrance to the Supreme Court building, is imperilled. Federal courts can do mischief – decisions by the conservative Supreme Court majority and the United States

Court of Appeals for the District of Columbia Circuit build corporate insulation against class-action and private lawsuits, and whittle away at regulatory reforms. But the peril may be greatest where the legal rubber meets the road for most Americans: the state courts.

While the Supreme Court grabs the media's spotlight, including speculation on political fallout, it handles hundreds of cases each year. Other Federal courts up the tally, but state courts

still handle 95 per cent of the country's litigation. These courts are where aggrieved consumers who've been defrauded by financial institutions seek protection, terribly injured workers seek more than meagre workers compensation, consumers seek some parity in conflicts with corporations like insurance companies that renege on obligations, people whose property or health is impacted by polluters seek redress and those harmed by medical or pharmaceutical negligence seek compensation. State courts are where the little guy seeking justice runs his daunting legal gauntlet against the well heeled.

But the Supreme Court, in its role as final arbiter of the Constitution, can rock the state courts. The *Citizens United* case, in which Justice Anthony Kennedy wrote 'independent expenditures do not lead to, or create the appearance of, quid pro quo corruption', welcomed limitless money, including that riding stealth vehicles. *Citizens United* received great attention during Presidential and congressional elections. Less noted is its role as an accelerant of alarming trends in judicial elections, both at the state supreme court level and lower courts.

According to the Center for American Progress (CAP), six states that have seen the most cash in judicial elections – Alabama, Texas, Ohio, Pennsylvania, Illinois and Michigan – have supreme courts dominated by pro-corporate judges. In 403 cases from 2000 to 2010, those judges ruled for corporations 71 per cent of the time.

### United front to control courts

The seamless web of influence includes interplay with state legislatures. Brendan Fischer, counsel at the Center for Media and Democracy, observes that in 2010, the first election after *Citizens United*, wealthy donors helped Republicans obtain new majorities in state legislatures across the country, and helped far-right governors into office. In return, they adopted much of the agenda of the American Legislative Exchange Council (ALEC), supported by many of the same donors. As laws implementing the ALEC agenda are passed, the gatekeepers against legislative excess are state courts. For example, judges have struck down voter-ID laws as violating state constitutions.

On its website, one can glimpse some ALEC goals, such as state legislatures 'prohibiting courts from creating new claims (for lawsuits) on their own'. Another is to maintain 'state sovereignty over environmental protection', stopping Environmental Protection Agency (EPA) 'overreach' in its air and water rules.

Beyond voter laws, state courts are also players in the hyperactive arena of gerrymandering

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*'Backers don't like disclosure. I once thought the judiciary was sacrosanct, it isn't now... This is about the corrupting, corrosive, distortive influence of big money on the courts'*

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James Nelson

Recently retired Montana Supreme Court Judge

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state legislative and US congressional districts. Voter demographics and priorities are changing, diminishing Republican Party attraction for voters.

Now schemes are being hatched in swing states to alter the award of state electoral votes in Presidential contests. The system already essentially disenfranchises voters in solid blue or red states, but these schemes would further thwart popular intent. Such mischief requires controlling courts as well as legislatures.

### Justice for sale

William Blake, a doctoral student at the University of Texas, studies the impacts of elections on state supreme courts. He observes that as job security decreases, as in supreme court races that are partisan, justices become both more attuned to public opinion and more polarised on partisan grounds. Blake sees little to refute the findings of Chris Bonneau and Damon Cann, of the political science departments





of the University of Pittsburgh and Utah State, respectively. Comparing the 2005 decisions of non-partisan supreme court justices of Nevada with the partisan supreme court justices of Michigan and Texas, Bonneau and Cann didn't detect quid pro quo exchanges between contributions and decisions in Nevada, but did in Michigan and Texas. Contemplating the chicken or the egg, they concluded contributions drive judicial votes, not the other way around.

But Blake notes that, quid pro quo or not, 'powerful interests are able to stack state supreme courts with judges who sincerely share their interests.' He points to a 2001 survey of 2,400 state judges by Justice at Stake that found over a third of state supreme court justices believe campaign contributions influenced judicial decisions; and to a 2007 Justice at Stake poll of business leaders, with 79 per cent believing campaign contributions affect decisions.

A 2011 poll by this group shows 83 per cent of the public believes contributions influence decisions. It's not hard to imagine a spiral effect from the public's overwhelming lack of faith in a fair shake from judges. People with legitimate grievances will avoid the financial costs of a court casino.

Money continues to wash away prior spending levels. In 1990, state supreme court candidates raised around \$3m total. In 2012, TV ad spending alone reached nearly \$30m across 51,000 ads. Studies of state high court elections by university and reform groups, including the Brennan Center for Justice and Justice at Stake, demonstrate the

increasing amounts of money coming from non-candidate groups.

Forty per cent comes from a handful of national groups and political parties. Such groups fund three-quarters of attack ads.

Typically, these ads wildly distort a judge's rulings or a candidate's

background. The approximate parity of prior elections between the largest groups on the left and the right goes away as financing by business and specific interest groups dominates.

### Crippling funding cuts

Increased campaign funding runs contrary to trends of reduced funding for state courts, raising filing fees, cutting staff and salaries and diverting resources from civil trials. New York and California both have huge reductions in funding. California's Chief Justice Tani Cantil-Sakauye predicts this will be 'devastating and crippling' for her state's ability to dispense justice. Dismissed part-time New York judges now work as volunteers to keep justice in motion.

None of this bodes well for the little guy fighting large companies or banks. Iowa now operates with a smaller workforce than in 1987, but handles double the number of cases. Now aggrieved litigants worry about judicial motivations of financial expediency, and curious rulings that curb prospects for a fair day in court. Add to that the prospect of judges chilled by worries of becoming targets if not thought adequately friendly to business, and their desire for contributions in future contests. Small wonder confidence in the courts is plummeting.

A Center for American Progress (CAP) report by Billy Corriher, updated to consider the 2012 state supreme court races, underscores special interest money swamping campaigns at the supreme court level. An increasing number of races log spending in the millions.

Consider 2012 re-election of North Carolina Supreme Court Justice Paul Newby. According to the CAP study, Newby benefited from more than \$2.5m of independent spending. This pushes a state public financing programme that had once been a model for curbing money in judicial races towards irrelevance. As in many elections, the Koch brothers were big players through their SuperPac, Americans for Prosperity, as was the state Chamber of Commerce. In 2009, Newby ruled against tobacco farmers in a dispute with tobacco companies. North Carolina tobacco companies that benefited provided hundreds of thousands of dollars towards Newby's re-election.

Tobacco's largess to Newby raises serious doubts as to how well big money and the ideal of justice mix, but consider an upcoming case involving a recent redistricting map. Newby received over a million dollars from the Republican State Leadership Committee, which was keenly involved in the Republican-controlled state legislature's drafting of the map. A case claiming the map disenfranchises minority voters is before the State court. Despite North Carolina ethics rules, which say that judges



should not hear cases where their ‘impartiality might reasonably be questioned’, Newby will hear the redistricting case.

Michigan’s state supreme court is also causing raised eyebrows. Two conservative justices, Stephen Markman and Brian Zahra, received \$400,000 of ads paid for by the Michigan Association of Realtors after the justices joined a 2011 opinion easing the path for mortgage companies to foreclose on homeowners. The state Republican Party spent \$4.5m on ads for the two, with no disclosure of the sources that contributed that money. On the Democratic side, the state party spent \$5m from undisclosed sources on ads supporting three candidates.

It’s difficult to be surprised by much out of the Texas legal system, where judges actually campaign with the promise of upholding more death sentences. The politicisation of criminal law and executing defendants for votes is not a worry in Texas, it’s a done deal.

The ‘hang ‘em high’ reputation enjoyed by much of the Texas judiciary distracts from the flagrant corporate tilt of conservative Republicans who comprise the Texas Supreme Court. According to CAP, Justice Don Willett was easily re-elected, backed by large sums from energy companies and their law firms. In 2007, after oil companies failed to sway the state legislature to protect them from lawsuits by workers, Willett and his colleagues obliged by declaring contract employees such as oil-rig workers cannot sue employers for on-the-job injuries. A year later, in a lawsuit over hydraulic ‘fracking’, Willett ruled against energy company liability for policy reasons, stating common law must accommodate ‘cutting-edge technologies able to extract untold reserves from unconventional fields.’

Independent expenditures are not at all limited to local players. In 2012 Justice Josiah Coleman won a seat on Mississippi’s Supreme Court with a million in independent spending, half of it from the Law Enforcement Alliance of America, which CAP notes has been associated with the NRA and US Chamber of Commerce.

What drives such involvement? One motive is erecting judicial barriers to lawyers seeking theories to get around the Protection of Lawful Commerce in Arms Act, the National Rifle Association-backed liability shield for the gun industry passed by Congress in 2005. State supreme courts have been battlegrounds in past attempts to establish liability, such as variations on negligence. Other industries, including energy, financial and insurance, also seek to undermine their liability.

### **No quid pro quo endgame in sight**

James Nelson, who recently retired from the Montana Supreme Court after 19 years,

points to *Republican Party of Minnesota vs White*, which challenged Minnesota’s prohibition on candidates seeking election from discussing issues that might come before them. ‘The US Supreme Court ruled 5–4 that, though candidates couldn’t promise how they’d vote, they could announce their positions on various issues’, says Nelson. ‘Most state ethics rules then (2002) prohibited that. Now they can say what they’re for or against. That doesn’t have to be a promise for people to figure out how a judge will vote.’

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*It’s difficult to be surprised by much out of the Texas legal system, where judges actually campaign with the promise of upholding more death sentences*

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Nelson, originally appointed by a Republican governor who chaired George W Bush’s 2004 campaign, is horrified by where the politicisation of the courts is heading. ‘The more parties get directly involved in judicial selection, the more they put people on the bench who are loyal to the party platform – the law be damned.’ Beyond attempts to change the way judges are selected and retained by allowing more political levers, Nelson believes ‘court de-form’ efforts will be made to skew courts with qualification requirements – such as prosecutorial or district judge experience – that move in an ideological direction. Other efforts across the country include creating wacky grounds to impeach judges.

Nelson sees elections becoming so expensive that only the rich can compete – limiting the pool to wealthy business-types or those with similar backing. ‘Politicizing the courts impacts a lawyer’s willingness to be a judge,’ says Nelson. ‘Trying to follow money can be like looking at a Cayman bank account, layer upon layer. Backers don’t like disclosure. I once thought the judiciary was sacrosanct, it isn’t now. Academia won’t be sacrosanct in a few years, nothing is sacrosanct now. This is about the corrupting, corrosive, distortive influence of big money on the courts.’

Someone might mention this to Justice Kennedy. ☒

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# Time to wake up

Recent events suggest a sea-change on corporate abuse of tax havens. *IBA Global Insight* assesses whether they will pave the way for meaningful and lasting change.

JONATHAN WATSON

Addressing the annual meeting of the World Economic Forum in Davos in January, UK Prime Minister David Cameron called for a clampdown on tax avoiders. 'Individuals and businesses must pay their fair share,' he said, adding that companies who fail to do this need to 'wake up and smell the coffee, because the public who buy from them have had enough'.

Coffee? Why would a British Prime Minister, especially someone educated at the terribly British institutions of Eton and Oxford, use such

a quintessentially American expression? Aren't the British supposed to prefer tea? Of course his comments were aimed at Starbucks, the coffee chain that has had so much bad publicity in the United Kingdom and elsewhere over its tax affairs. Analysis revealed that in the last three years, the coffee chain paid no corporation tax at all in the UK, despite making sales of £1.2bn. Over the last 14 years, Starbucks has only paid £8.6m in corporation tax.

In response to this, in December 2012, the campaign group UK Uncut staged over 40 protests across the UK at Starbucks shops.

'There is genuine public outrage that multinational companies are being allowed to avoid tax while benefits and essential services are cut,' one protester said. A leaflet distributed on the day called on the UK government to wake up and smell the coffee – a message that appears to have resonated with the Prime Minister's advisers – and speech writers.

Prior to these protests, Starbucks CFO Troy Alstead had been subjected to aggressive public questioning in the UK by an influential cross-party group of MPs, the Public Accounts Committee (PAC). Representatives of Amazon and Google, who face similar criticism over their tax affairs, were also called in for questioning.

The Committee's subsequent report branded global firms operating in the UK that pay little or no tax as an 'insult' to British businesses. Committee chair Margaret Hodge urged Her Majesty's Revenue & Customs (HMRC), the UK tax authority, to be 'more aggressive and assertive in confronting corporate tax avoidance'.

Starbucks subsequently attempted to defuse the situation – and limit the damage to its brand and reputation – by making the rather odd move of agreeing to hand over up to £20m (\$31.48m) to the UK government over the next two years. Kris Engskov, managing director of Starbucks UK, announced that the company would pay



‘a significant amount of tax during 2013 and 2014, regardless of whether the company is profitable’.

A further PAC report, released earlier this year, complained that rich businessmen who designed tax avoidance schemes were ‘running rings’ around HMRC. The tax agency is failing to crack down on these schemes, the report said, claiming that they are deliberately marketed to wealthy individuals and cost the government £5bn a year in lost tax receipts.

HMRC should ‘name and shame’ those who are benefiting from tax avoidance schemes, says Hodge – something the authority did just a few days later by publishing a list of names and addresses of ‘deliberate tax defaulters’ on its website. However, this list, which included a hairdresser, a greengrocer and a knitwear manufacturer, was criticised for focusing on small businesses.

### What’s a ‘fair share’ of tax?

There have been calls for big companies and wealthy individuals not to avoid tax in many countries. But some point out that there is nothing new here. Roger McCormick is visiting professor at the London School of Economics and a member of the IBA’s Task Force on the Financial Crisis. ‘Aggressive tax avoidance has been common knowledge for many, many decades,’ he suggests. ‘Politicians have grappled with possible changes in the law to try and address the question, but they have not yet really found a solution.’

If the politicians really are that concerned, they should put on their legislative hat and think about whether they should change the law, McCormick says. ‘Tax avoidance is legal. There is no clear borderline between what is regarded as aggressive tax avoidance and what

*‘The system that operates internationally does allow companies, within limits, to set up companies in their group which are in low-tax jurisdictions and to trap revenue in those jurisdictions’*

**Roger McCormick**

*Visiting professor at the London School of Economics and a member of the IBA’s Task Force on the Financial Crisis*

### OECD action plan

The Organisation for Economic Co-operation and Development (OECD) says its action plan to tackle base erosion and profit shifting will include proposals to develop:

- instruments to end or neutralise the effects of hybrid mismatch arrangements and arbitrage;
- improvements or clarifications to transfer pricing rules to address specific areas where the current rules are deemed to produce undesirable results from a policy perspective (the current work on intangibles would be included in a broader reflection on transfer pricing rules);
- updated solutions to ‘jurisdiction to tax’ issues, in particular for digital goods and services (these solutions may include revised treaty provisions);
- more effective anti-avoidance measures that complement the previous items. These can be included in domestic laws or international instruments. They might include General Anti-Avoidance Rules, Controlled Foreign Companies rules, Limitation of benefits rules and other anti-treaty abuse provisions;
- rules on the treatment of intra-group financial transactions, such as those related to the deductibility of payments and the application of withholding taxes; and
- solutions to counter harmful regimes more effectively, taking into account factors such as transparency and substance.

Copies of ‘Addressing Base Erosion and Profit Shifting’ can be downloaded for free from the OECD website at [www.oecd.org/ctp/BEPS/ENG.pdf](http://www.oecd.org/ctp/BEPS/ENG.pdf).



is not aggressive. Where does tax planning – which presumably is legitimate – stop, and tax avoidance start?’

Judith Freedman, Professor of Taxation Law at the University of Oxford, has some of the answers and agrees that the current furore over tax is aimed at behaviour that has been around for a long time. ‘Over the years, tax avoidance has been the frequent subject of parliamentary and media attention, although this ebbs and flows,’ she says.

Freedman co-authored a paper for the Oxford University Centre for Business Taxation (OUCBT), which attempts to define what sort of behaviour can be considered ‘tax avoidance’ and highlights the many legal difficulties that arise from an inexact use of the term. Oversimplifying the debate and searching for individual and corporate villains will not help to solve the underlying problems, the paper says. ‘Even if public naming and shaming influences a few taxpayers in the public eye to impose their own voluntary constraints, it will not necessarily affect the worst avoiders, and may even encourage some non-compliance from those who feel “everyone is at it”.’

The ire directed at Starbucks exemplifies much of what is wrong with the current debate, says the paper. The company has been criticised for not paying tax where it is making sales, but sales are not the basis for the corporation tax, so this alone is no cause for criticism.

‘The system that operates internationally does allow companies within limits to set up companies in their group which are in low-tax jurisdictions and to trap revenue in those jurisdictions by the judicious use of things like royalty payments or payments for the use of a brand and so on,’ McCormick explains.

‘We could argue that the tax base should change, but unless and until that occurs, the fact that there is a high turnover but no taxable profit is not in itself an indicator that the taxpayer is behaving in an unreasonable way,’ say Freedman and her co-authors, Professor Michael Devereux and Dr John Vella.

According to Heather Self, a partner (non-lawyer) with Pinsent Masons, one passage in the OUCBT paper is particularly useful in understanding any debate about paying tax: ‘While concepts of fairness and morality play an important role in any political debate about taxation levels and distribution, in order to ascertain what tax is actually due in a way that is practical and enforceable by society it is necessary to have a *legal* definition of what is to be taxed (tax base) and at what rate. The answer to those questions must ultimately depend on the law. There is no other way of determining the tax due.’

Self recognises that a General Anti-Abuse Rule

(GAAR), which is currently being considered in the UK, may be needed as a backstop measure to protect against aggressive avoidance. ‘A lot of people have come round to the view that a focused, narrowly-targeted GAAR could work in practise,’ she says.

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*‘The Obama administration has made a number of proposals that it continues to support, but, so far, Congress has not seen fit to adopt them’*

Leslie Samuels

Cleary Gottlieb Steen & Hamilton

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‘However, there’s a lot of concern about whether there will be political pressure for it to be expanded and become much more of a general anti-avoidance rule,’ she adds. ‘That could cause significant uncertainty. It wouldn’t necessarily result in much more tax being collected, but if it makes the UK seem like a capricious tax system where companies don’t know what their tax burden is going to be, that could frighten away genuine economic investment.’

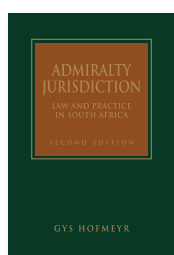
Self mentions the Indian government’s treatment of Vodafone as a case in point. The mobile phone giant is still fighting a retrospective tax charge of approximately \$2bn relating to its \$11.2bn acquisition of a majority stake in the Indian operations of Hutchison Whampoa in 2007. Many observers claim the dispute has spooked foreign investors, who are nervous of facing large and arbitrary tax demands if they put their money into the country.

### One hundred years behind the times

While tax lawyers argue that much of the public anger about tax might not be entirely justified, many also accept that fundamental reform of the international tax regime would be welcome. In this they echo the message of campaign groups like the Tax Justice Network (TJN), which produced a report last year arguing that it is now ‘beyond doubt’ that many of the governing principles underpinning international tax are fundamentally flawed.

The report argues that government proposals for dealing with corporate tax avoidance involve trying to patch up an outdated international system that is beyond repair. ‘We need to move towards a very different way of taxing companies

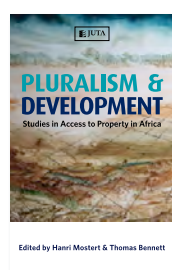
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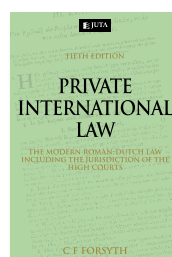
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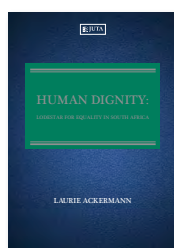
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*'We need to move towards a very different way of taxing companies that treats them first of all as a single company and then apportions the profits to the countries where genuine economic activity happens'*

John Christensen  
Director, Tax Justice Network

that treats them first of all as a single company and then apportions the profits to the countries where genuine economic activity happens,' says TJN Director John Christensen. 'We need unitary taxation, which has been used for many years in the US at state level.'

Under this system, multinational companies would be treated as a single entity for tax purposes. Their profits would be determined on a worldwide basis and then allocated to different jurisdictions in accordance with a pre-established formula based on factors such as assets, labour and sales. This should help prevent multinationals like Starbucks shifting profits around the world to reduce their tax bills.

While lawyers accept that this would be no bad thing, they are sceptical about the chances of finding international agreement on it. 'Whilst clearly providing a number of benefits, it is equally clear that this system raises a number of problems, including difficulties surrounding the design of the all-important formula that will suit all the relevant jurisdictions and not be open to manipulation by taxpayers,' the OUCBT paper says.

However, the signs this year are that reform is on the way. In February 2013, the OECD published a major report, 'Addressing Base Erosion and Profit Shifting', which represented a significant step in an attempt to address the issue. Commissioned by the G20 group of the world's major economies, it was presented to the G20 meeting held in Moscow in February.

The report notes that the tax practices of some multinational companies 'have become more aggressive over time, raising serious compliance and fairness issues'. Some, based in high-tax regimes, create numerous offshore subsidiaries or shell companies, each time taking advantage of the tax breaks allowed in that jurisdiction. They also claim expenses and losses in high-tax

countries and declare profits in jurisdictions with a low or no tax rate.

'These strategies, though technically legal, erode the tax base of many countries and threaten the stability of the international tax system,' says OECD Secretary-General Angel Gurría. 'As governments and their citizens are struggling to make ends meet, it is critical that all taxpayers – private and corporate – pay their fair amount of taxes and trust the international tax system is transparent.'

The report also says that current international tax standards, some of which are based on principles developed by the League of Nations in the 1920s, 'may not have kept pace with changes in global business practices, in particular in the area of intangibles and the development of the digital economy'.

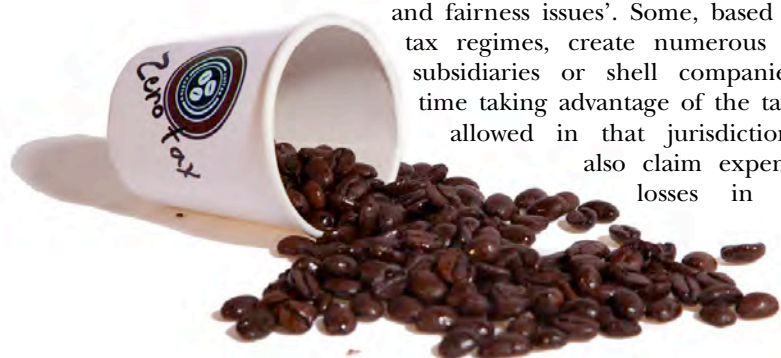
For example, it is quite easy now for companies to be involved in the economy of other countries by selling people goods via the Internet, without having a taxable presence in that country. And while companies become increasingly integrated across borders, tax rules have remained uncoordinated, meaning that a number of structures, technically legal, take advantage of the differences between domestic and international tax rules.

The report also takes aim at offshore tax havens, which it says have become global financial centres in their own right and benefited from massive inflows of funds that previously went in tax payments to OECD member countries. Figures suggest that in 2010, Barbados, Bermuda and the British Virgin Islands received more foreign direct investment than Germany or Japan.

Offshore havens don't just act as a base for multinationals to deposit funds; the funds are recycled for further investment into developing nations. The British Virgin Islands (BVI) accounted for 14 per cent of all investments into China in 2010, second only to Hong Kong (45 per cent). The US trailed far behind with four per cent. Cyprus is the top investor into Russia, with 25 per cent of all foreign investment, while Mauritius accounts for a quarter of all foreign investment into India.

The OECD says it will draw up an action plan in the coming months, developed in co-operation with governments and the business community, which will further quantify the corporate taxes lost and provide concrete timelines and methodologies for solutions to reinforce the integrity of the global tax system. The plan will be put to the G20 in July.

Stuart Chessman, Director of International Tax at Vivendi and Co-Chair of the IBA's Taxes Committee, believes the development of a global action plan may be significantly more difficult than the reports' authors seem to think. 'The implementation of such a plan





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**29–30 April 2013**

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is not something that can be achieved in the near term,' he says. 'It will require changing innumerable domestic tax laws and income tax treaties in most countries.'

In that regard, it's striking that the report has a dramatically cooler attitude towards the physical presence requirement for nexus in income tax treaties, 'viewed here as a contributor to the base erosion process,' Chessman says. 'After all, the OECD has been for many decades perhaps the main force behind the creation of the current framework for international treaties.'

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*'These strategies, though technically legal, erode the tax base of many countries and threaten the stability of the international tax system'*

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Angel Gurría  
Secretary-General, OECD

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Predictably enough, Taxand, a global organisation representing specialist tax advisors to multinationals, says a harmonised approach to international tax planning entails significant risks relating to 'double taxation' for businesses. The European Union's Financial Transaction Tax (FTT), introduced by 11 EU Member States in February 2013, illustrates the problems chairman Frédéric Donnedieu de Vabres associates with a unitary system. He fears the FTT may disregard long-term inter-country agreements. 'The complexity of an international system also needs careful consideration,' he says. 'The location of taxable profits, or "permanent establishment", for example, is an extremely difficult area, and one made even more complicated for companies with intangible assets, whose profits are essentially global in nature.'

#### **Difficulties will test political will**

While the work may be difficult, the political will to undertake it seems to exist – for now, at least. After the OECD report was published, the finance ministers of France, Germany and the UK sent a joint letter to the *Financial Times* business newspaper, outlining their determination to deal with tax avoidance.

This determination may have little effect if it is not matched in the US. But according to Leslie Samuels, senior counsel at Cleary Gottlieb Steen & Hamilton in New York, 'this topic is on the front burner, and the pot is boiling rapidly'.

Samuels became a partner at Cleary Gottlieb in 1975. Between 1993 and 1996, during the first term of the Clinton administration, he served as Assistant Secretary for Tax Policy in the US

Treasury Department, and between 1994 and 1996, he was Vice Chair of the Committee of Fiscal Affairs in the OECD.

He notes that in the US, there are now legislative proposals that would involve changing how the country taxes foreign income, particularly the income of foreign subsidiaries. There is also a proposal to deal with intangibles, which have been the focus of a lot of recent discussions, including the recent OECD paper. Those proposals have not been enacted, although the Obama administration is expected to re-propose them when it puts out its next budget.

'The Obama administration has made a number of proposals which it continues to support, but so far, Congress has not seen fit to adopt them,' Samuels says.

In early 2012, the administration put out a 25-page 'framework for business tax reform' that called for a 28 per cent top corporate income tax rate. The framework proposed a tax rate of no more than 25 per cent for certain domestic manufacturers and a permanent research credit. The framework also called for a 'minimum tax on overseas profits'. That was the Obama administration's 'effort to say that they were willing to discuss corporate tax reform,' Samuels says.

Congressman Dave Camp, the chairman of the influential House Ways and Means Committee, has also proposed rewriting the US approach to international taxation by creating a territorial system of taxation, in which the US would only tax domestically generated income. The proposal sets up a tax system in which companies would not lobby again for a temporary tax holiday because their overseas earnings would be out of reach of US tax authorities.

Chessman says it's likely that various proposals will all be considered this year in the US. 'Whether international tax measures will be adopted that will increase taxes on international operations of US multinationals depends on the nature of the possible overall agreement on the content and economics of the tax reform,' he says. 'You also have to keep in mind that multinationals of other countries operating in the US – or potentially subject to tax there – will also monitor this process very closely.'

Although debates about tax avoidance may have generated more heat than light over the years, they may at last be leading to meaningful moves to reform an outdated international regime. It is this outdated regime, rather than the multinationals that benefit from it – sometimes understandably, sometimes questionably – that should be the real focus of campaigns against corporate tax avoidance. ☒

**Jonathan Watson** is a journalist specialising in European business, legal and regulatory developments, he can be contacted by email at [watsonjonathan@yahoo.co.uk](mailto:watsonjonathan@yahoo.co.uk)





## Global leaders:

# Mark Malloch Brown

Mark Malloch Brown was Kofi Annan's right hand man at the United Nations, first as his Chief of Staff and then as Deputy Secretary-General. He has advised the UK government on the United Nations, Africa and Asia, becoming Lord Malloch-Brown. In this in-depth interview, conducted by the IBA's Director of Content, James Lewis, he discusses turmoil in the Middle East, reform of the UN, and the future of global governance.

**James Lewis (JL):** We'll talk about global governance, other big issues, reform of the United Nations [UN], the need for political vision – and events between Israel and Gaza really bring all of that into sharp focus. Perhaps you can share with us your assessment.

**Mark Malloch Brown (MMB):** Often, if one's a retired international affairs type, one sounds a little boring when one says 'in my day ...' But when it comes to Israel and Palestine, one actually has every excuse for saying 'in my day'. Because never has there been a crisis which is so circular. We've been there before, almost whatever happens.

You know, Israel has, before now, stood on the cusp of invasion of the Palestinian territories. It, before now, has invaded and occupied those territories. We've just seen it, time after time, and the frustration is that it's as though no lessons are learnt, while other parts of the world have, over recent decades, in glorious revolutions in many cases, collected the political courage to resolve their disputes.

In the case of the Middle East, particularly the Israeli-Palestinian conflict, I think the frustration for all of us on the outside is, why does it have to go so many rounds? Why does it have to continuously repeat itself? When will Israel learn that there is not a military solution to containing the threat of Gaza?

And when will those in Gaza learn that they have no choice but to find a *modus vivendi*, a peace agreement with Israel, which allows both sides to prosper and bring up their families in

peace and security, as those of us in the rest of the world are largely able to do? And so, you know, it brings back old ghosts, this conflict, and old frustrations.

**JL:** You're clear that the United Nations needs to be reformed. The situation in Syria was already making that a pressing need; you're saying we've got a recurring problem. You and Kofi Annan really had this as your project, reform of the United Nations; what did you want? What were you aiming for?

**MMB:** Well, we were starting from the proposition that here is an organisation which had pretty much not changed since its early beginnings in the 1940s. Certainly the humanitarian and development operations had grown in scale, but the fundamental governance of the whole system remained largely as it had originally been set up.

And, over time, there come the inevitable, sort of, barnacles of middle age, and they grow up around the machinery, making it even less responsive and effective. And so we felt, look, here's a very different world; there are new emerging powers who are not represented enough in the councils and decision-making of the UN.

There are non-state actors such as NGOs, but also groups, such as lawyers, business and so on, all of whom should have a critical voice in the building of a new global society. And yet, the UN wasn't really organised to allow that voice to be heard and channelled into advice or decisions.



*'The World Bank has been on a steady decline because of this rise of investment capital going into the developing world from so many other sources. Today, frankly, it's a shadow of its former self'*

Above all, the organisation was not right-sized for its times. The general 'hit' on the UN is vast, unaccountable bureaucracy and, in truth, in its total, it's rather smaller than the city government of Vienna, or the fire department of New York.

So we needed, in our view, to rebuild a UN which was more representative of its time, more effective at taking on a growing global agenda; an organisation which could use the great wave of globalisation to take it to a position where it became the manifest institution for managing this new global integration that had occurred.

**JL:** Picking up on that, and coming back to Syria as well, you've described the doctrine of 'responsibility to protect' [R2P], as very much a Kofi Annan project, and it responds to the points you're making about a sense of optimism, and yet, we see the situation in Syria. Does that mean that R2P is dead in the water?

**MMB:** It's taken a serious amount of beneath-the-water-level damage.

**JL:** Is it fatal?

**MMB:** I don't think so. My defence of the current condition of the UN is: it isn't working well, but in an era of globalisation, global management arrangements are indispensable. Now, it's certainly possible that the UN could fall

by the wayside, and a new network of institutions and arrangements come up.

You're seeing some of that in the emergence of things like the G20. But if you take the problem that responsibility to protect was trying to address, which is that the human rights and welfare of people is, at times, too important to be trusted to their governments, that idea is very clearly one which isn't going to go away. It's at the basis of an awful lot of the development of international law.

The idea is that, at a global level, not just a national level, institutions need to be accountable to people and principles and values, and to show consistency in how they treat people. And responsibility to protect was about what happens when you get a major state/people breakdown, and a government turns on its own people, or a portion of those people.

**JL:** Describing Syria, almost.

**MMB:** Well, which describes Syria. And, you know, and when that happens, the doctrine, which is really at this stage a lot of articles in learned law journals, and books by academics and policy makers, myself included, but in terms of actual, adopted international law, it's a paragraph or two in General Assembly Resolutions and suchlike.

**JL:** It's very much nascent.



**MMB:** It's nascent. And, you know, in fact, the first real reference to it in the Security Council Resolution was Libya. And in a sense, there also lay the seeds of the current problem because it got slipped into the Libyan resolution, and strangely, the Russians and Chinese barely commented on it.

It went racing through, despite their historic suspicion of it. And then of course, when it was seen as, in their eyes, yet again opening the door to a western intervention and military action which went, in their view, way beyond



what the Resolution had anticipated, it raised all the old spectres again, of this being a doctrine not of global equity and global human rights importance, but rather a thin-end-of-the-wedge vehicle for western intervention.

**JL:** You would say that the Security Council really does need to be reformed now. This institution goes back to 1945. The Security



*'In the case of the Middle East, particularly the Israeli-Palestinian conflict, I think the frustration for all of us on the outside is, why does it have to go so many rounds? Why does it have to continuously repeat itself?'*

Council particularly reflects the order as it was then. Things have changed. Are we likely to see change – would Britain give up its permanent seat, for example? Should Germany be on there? Brazil, India?

**MMB:** I certainly think that Brazil and India have to come on, as two of the three that you've mentioned. I think the German issue probably needs to be taken account of through a more effective European representation. You know, Europe seems to always think that its inability to pick who should represent it means that the rest of the world is willing to put up with just having more Europeans there.

Frankly, I don't think the world is ready at the moment to add Germany to France and Britain as a third European permanent member. It was still possible a few years ago when this came up,

and Germany was one of the group of countries asking that. I think Germany's moment may have, in that sense, passed.

Sometimes time and delay is not exactly the enemy of progress that one anticipates. And I actually think any UN Security Council reform adopted now, in some ways, would be wiser and more mature than what I – and others – were pressing for some five years back.

The reason for that is that it's become clearer and clearer that reform has to be on two tracks: not just reform of membership, but reform of procedures, use of the veto, how items can be introduced, enforcement, and agreement on what the enforcement capabilities of the Council are. So it needs a general retooling and updating.

And then, within that, on the membership, perhaps rather than adding permanent new members, we try to move to a place where all members are elected on a 'long-term lease' basis. You know, 15 or 20 years, because today's world is a bit of a rollercoaster. Those who are up now are not necessarily always going to be up.

**JL:** With the IMF [International Monetary Fund] and the World Bank, there is that problem, isn't there, that you have an American and a European head at the Washington base that are unaccountable. Do they really act in the interests of the poor, or are they acting in the interests of the market? And they're unaccountable while they're doing that: what's your feeling?

**MMB:** Well, it is strange, because, you know, both institutions have always been much better run than their critics give them credit for, and staffed by people with a real commitment, a vocational commitment, in the case of the World Bank, to reducing poverty; and in the case of the IMF to financial stability and growth, and other good things. They are actually remarkable institutions, the modern international 'mandarinate' if you like.

But they have always struggled to escape the label that they are western dominated. Look at the boards of both. They've managed to achieve,



in the membership of their two boards, a lot more reform and shift of ownership than we managed at the UN in the Security Council. And yet, despite all that hard work, they're still routinely dismissed as unaccountable and out of touch, and all the rest. Whereas the UN, with a governance model dating from the mid-1940s, somehow is seen as more representative and legitimate.

So they struggle. And, in truth, while the world goes on changing, a few years ago, the IMF looked as though it was largely played out, and now, a good old-fashioned long-running financial crisis in, of all places, Europe, has brought the IMF swinging back into vogue.

The World Bank – which, when I was lucky enough to work there, was at the height of its authority and power – has been on a steady decline, and not because I left, I hasten to say, but just because of this rise of investment capital going into the developing world from so many other sources, which has squeezed it in an unanticipated way. Today, frankly, it's a shadow of its former self.

**JL:** Before we move on to focus on the Millennium Development Goals, which is an important project for you, and one that's very much on the agenda, I just wanted to come back to finish off on the Middle East, really. We started talking about...

**MMB:** We'd never finish on the Middle East!

**JL:** We'd never finish, no. But I wanted to just read a section from your book – which predated the Arab Spring really – and come up to date, if we can.

You say: 'The Arab world's political future lay like a fallen tree across a path to its economic development. Until it was cleared, it would have no progress, no stability.' As I said, that was before the Arab Spring: what's your view now, two years on from when the Arab Spring started?

**MMB:** What lay behind those words was an extraordinary group of books that we commissioned when I headed the UN Development Programme, called the Arab Human Development Report. And an astonishing group of Arab authors wrote these reports, and my job was to go and be the poor suit who had to explain to Arab ambassadors why we had engaged in what they saw as a hostile act against them.

But you know, these books, as I say, with Arab authors, declared that the Arab world had these three big deficits: a deficit of democracy, a deficit of gender – the marginalisation of women in economy and society – and a deficit of secular education, and a lot of rote Muslim teaching,




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*'There is a strangely powerful call in the language around the Millenium Development Goals about democracy being an enabling condition for reaching them. 2000 was a moment of great optimism. It was before 9/11, and Iraq; it was after the collapse of the Berlin Wall'*

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but without the kind of, if you like, post-enlightenment scientific secular education that had been such a spur to Western development.

And as a Westerner one could never get away with this kind of critique, so a group of Arab authors, again, writing for UNDP in this case, but with that umbrella of UN legitimacy, wrote something which, within a week or so, had downloaded a million copies in Arabic over the internet. It lit up the airwaves of the new satellite television stations like Al Jazeera, that were pretty new in the region at the time.

And so I became, through this process, deeply convinced that, in the Arab region – and I'd make this case across the whole world – when the politics stultifies and when it gets stuck (which is different to saying, it has to all be democratic, good democrat though I am) but when systems stultify, there's no accountability, there's no change, the system becomes more and more unresponsive to the growing demands of a youth, then you are set for a fall. And that's what's happened in that world.



Now, having also lived through the change in Eastern Europe, what I'd say is that these changes... are not overnight fairy stories.

With Eastern Europe, I watched it take ten years to move from post-communist chaos, weak governments, you know, coming in, one after another, to something akin to the stability of their Western European neighbours. And I'm sure something similar will happen in the Arab world. But I think we will continue to see a lot of instability of government in countries like Egypt or Libya, or even Tunisia.

And, you know, there'll be a lot of 'we-told-you-so' from neo-conservatives and other groups. But in truth, if this journey only takes ten years, the people of the region will be very privileged, because actually, it's a flash in time.

And if, at the end of it, there is an Egypt which is more akin to Turkey, you know, a big secular country with a dynamic market, and high rates of growth, but with a very respectful Islamic quality to its governance, if that's its point of stability in a democratic rule of law system ten years from now, whatever happens in the meantime will, I suspect, be a price worth paying.

**JL:** The core of what we need to discuss is the Millennium Development Goals (MDGs). You played a strong role in writing these. It was something that Kofi Annan really pushed hard.

I think you'd be more critical; you said that they were rushed. Ban Ki-moon has brought it back onto the agenda, because we're approaching 2015, which is when the eight goals were meant to have been reached. He's putting together his task force to look at it, co-chaired by British Prime Minister David Cameron, I believe. The question is, if you were writing the MDGs now, and you had more time, what would you add? What would be in there?

**MMB:** Well, I think the first thing to say is, they probably wouldn't be as good. That's not an entirely flippant remark: it's precisely because they were done in a rather hurried way, without a sense of the historical importance that would quickly become attached to them, that they were... They liberally borrowed from things that others had written before, but had been written principally by a group of western policy types, clustered around an organisation called the OECD DAC – the Development Assistance Committee of the OECD [Organisation for Economic Co-operation and Development].

And you know, they'd taken these things out of a bunch of global conferences in the 1990s, around the environment, women, reproductive health, other things, and put them together. But because *they* had put them together, they didn't have this global legitimacy. It goes back to what I was talking about earlier, in the UN.

We were able to borrow from that, add some things which weren't there and, I'm sorry to say, take some things out, which we just recognised we could not get through the UN by consensus.

**JL:** What did you take out?

**MMB:** Well, you know, the family planning stuff is fudged because of the conservatism that you would anticipate on that. We didn't have a democracy goal, because again, that would have been deeply resisted, but actually there is a strangely powerful call in the language around the MDGs, in the document, about democracy being an enabling condition for reaching them.

But perhaps more important than the process of how it was done [were] the times in which it was done, which, in two ways, were very different to now. The good thing about 2000 was, it was a moment of great optimism about the world and the coming millennium. It was before 9/11, and Iraq; it was after the collapse of the Berlin Wall.

There was a sense that we were embarking on a new era of global cooperation and stability, and everybody was going to get richer together, and you know, some people even foolishly declared history dead.

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*'This sort of myth, of "problem Africa", has hung heavily over the kind of private investment which could help move things forward. That, though, is really, dramatically changing'*

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**JL:** Development is the eighth of the Millennium Development Goals. Why is there such a problem in achieving that? And the goal, to make it explicit, is to develop a global partnership for development.

**MMB:** It was a weak goal, because, while President Bush at the time was rather keen on these goals for reasons of his own genuine personal philanthropy and care about these kinds of issues, but also some political stuff...

The conference to organise the funding of the goals took place in Mexico, and he felt that he'd rather let Mexico down, because he'd been preoccupied by other issues since becoming president.

And he was, in the same way that President Obama is now about a tilt to Asia; President Bush, on election, had been about a tilt to Latin America and Mexico.

So you know, for all sorts of local and personal reasons, he was rather in favour. But many in his administration were not. And Goal 8, which suggested there was a global obligation on the rich to help the poor, really rubbed up against the edge of American particularism, if you like, and exceptionalism.

The United States, to this day, has not signed the [UN] Convention on the Rights of the Child – it is almost the only country that hasn't. It has not accepted the jurisdiction of the International Criminal Court. So there were problems getting a stronger Goal 8. I hope, this time, that will be easier.

And that's where the world is going to be easier this time round; there's a lot more agreement about development, and what makes for successful development, the need for collaboration around issues of global trade, and global intellectual property, and global laws and frameworks and all the rest.

**JL:** That all seems to have taken off in Asia, it seems to be a relative economic success story, particularly China and India. And it's been instrumental in meeting the first of the MDGs to halve extreme poverty, but Africa's the problem.

And I'm just wondering whether the private sector is put off by political risk in Africa, or what the issue is.

**MMB:** You're right. Africa's MDG problems remain huge, because it's the only continent in the world whose population will double by 2015 from one billion to two billion. But until this point, there have actually been more very poor people in India than in the whole of sub-Saharan Africa because it's a matter of size.

And you know, the actual MDG performance in Africa has been much more varied, with much more good news than the popular myth allows. You've got about half the countries of Africa, between a third and a half, who have made really significant progress. Tanzania will achieve the goal of universal primary education by 2015; a lot of others will halve poverty, actually, believe it or not.

And so it's a much more significant success story – even though it's patchy – than people believe. But you're right. This sort of myth, of 'problem Africa', has hung heavily over the kind of private investment which could help move things forward. That, though, is really, dramatically changing.

I always think of London as Africa's extra-territorial, additional commercial city. I chair the Royal African Society, and so have a fairly good finger on the pulse of all the law firms, all the private equity firms, all the multinationals which are building businesses in Africa out of London, or at least, supported by services out of London.

Half of the top ten growing economies in the world, in terms of annual growth rates, are African countries. It's exhibiting some of the early-stage growth of Southeast Asia, at the time I lived there in the 1980s. And you're starting to see a self-sustaining growth curve, driven significantly by the development of new energy and oil resources in Africa, but not exclusively, and with a middle-class narrative beside that, of people moving to cities, becoming middle-class, needing the goods and services the middle classes need, wanting the infrastructure that middle classes need.

So, in everything from banking to insurance, to cement production, to mobile communications, to travel and tourism, you're starting to see dramatically higher rates of growth in Africa.

It's a changing story. This is not just a story about bleak, unending poverty. It's a story about countries getting onto the bottom line of economic transformation. ☒



This is an edited version of the interview. It can be viewed in full at [tinyurl.com/MMBrown](http://tinyurl.com/MMBrown)







# Cambodia: China is buying its only true friend in the region

**The new global superpower's adoption of its smaller Southeast Asian neighbour is compromising diplomacy and human rights in the region.**

**JOEL BRINKLEY    Phnom Penh, Cambodia**

**C**ambodia's elected dictator, Hun Sen, is demanding that the national assembly pass a new law when its next session begins in April. The proposed law would jail politicians for using nasty language. Everyone knows that it is aimed only at his opponents. No one in government or the courts would dare attack Hun Sen for his language or anything else.

This comes on top of a long-standing defamation law that already allows politicians to go after anyone who says something 'defamatory' – a term that has no precise definition, which is why such laws are under question all over the world.

All of this is relatively new for Cambodia. Certainly, it has been a repressive state for all of time. But Hun Sen and his acolytes have held back in many respects to give the multiple Western nations who donate billions of dollars in foreign aid each year the false notion that Cambodia is a democracy of sorts.

Year after year, smiling Cambodian leaders attend the pledge conferences put on by these Western donors, including the United Kingdom, the United States and many others. The Cambodians hold out their hands. But first they have to listen as Western ambassadors and aid officers stand at the podium, look them in the eye and lambast them for rampant corruption and jaw-dropping human rights abuses. Last autumn, about 100 NGOs met in Phnom Penh and decided they would make additional aid conditional on human rights reforms.

Each year, Hun Sen and his aides promise to reform. But little ever changes. Still, the government managed to maintain a democratic facade – a moderately free English-language press and a variety of civil-society institutions including several human rights groups – so the donors could find reason to continue giving the money anyway.

'There's a free press,' Peter Jipp, a senior specialist with the World Bank, once told me with a cheery grin. 'You don't find that in other states – Laos, Vietnam. There's a developing civil-society network. So, in the parlance of the donor community, these are the champions!'

Those journalists and civil-society groups wrote primarily in English, which meant that hardly any Cambodians could read what they were writing. Illiteracy is widespread in the state, so even Khmer versions were inaccessible to most.

### Enter China, exit democratic freedoms

But now the government, always unhappy with criticism, seems unwilling to accept it in any language at any time. The reason: China is pouring more money into Cambodia than all the other nations combined – \$8bn in the last few years. After meeting with Chinese officials last year, Hun Sen won a commitment for another \$5bn over the next few years. And, most important, all of that money comes with no strings attached – no demands to end corruption, home seizures, dissident repression or any of Cambodia's many other social ills – problems endemic in China, too.

In October 2012, for example, Mam Sonando, a 71-year-old radio station owner, was sentenced to 20 years in jail for criticising the government on air. He'd been broadcasting and offering similar viewpoints for decades.

At about the same time, newspaper journalist Hang Serei Odom was found dead in the trunk of his car, hacked to death with an axe. He had been writing about illegal logging, a longstanding problem in Cambodia. The reporter was the first journalist killed there in four years; Irina Bokova, director general of the United Nations Educational, Scientific and Cultural Organization (UNESCO), denounced the killing.

Meanwhile, the accused killer of Chutt Wutty, an environmental activist who was shot dead last spring while visiting an illegal logging site, was tried recently – and set free, even though two reporters for the *Cambodian Daily*, an esteemed English-language newspaper, were there with him, watching as he was shot and killed.

Is it any coincidence that these, and several other repressive acts, came a short time after Hun Sen visited Beijing and came away with those promises of \$5bn more in loans and grants over the next few years – no strings attached?

### China adopts Cambodia with favours in return

For several years now, China has been working to curry favour with whichever Southeast Asian states it can – trying to counter US influence, particularly Washington's 'pivot' to the region – now that Beijing is fighting the bitter diplomatic

war with several nearby nations over the South China Sea. Today, China has essentially bought Cambodia, now a staunch ally – and the only one in the neighborhood. Laos is an ambivalent friend. North Korea is a resentful dependent state. Everyone else in the region is angry over China's claims to almost the entire South China Sea and adjacent waters.

Not long ago, Hun Sen commented: 'China respects the political decisions of Cambodia. They build bridges and roads, and there are no complicated conditions,' adding that 'China talks less but does a lot'. No hectoring about human rights. But that's a 180-degree turn for him. Years ago, Hun Sen called China 'the root of everything that is evil' in Cambodia because of Beijing's longtime support of the Khmer Rouge that continued for a decade after they fell from power in 1979.

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*China is pouring more money into Cambodia than all the other nations combined – \$8bn in the last few years*

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Hun Sen's new and unstinting loyalty to China was on full display during the November conference of the Association of Southeast Asian Nations (ASEAN).


President Barack Obama attended – the first American president to visit Cambodia – and, as he drove from the airport into town, the streets were virtually deserted. All he could see from his window were Chinese flags and billboard portraits of the Chinese Premier Wen Jiabao, who was also visiting. Street-side crowds had cheered Wen as he drove into town days earlier.

At the end of the ASEAN meeting, with Obama and Wen there, Hun Sen read a statement asserting that the group had reached consensus: the South China Sea controversy would not be 'internationalized' – meaning that each ASEAN nation would have to negotiate with China on its own.

That's what China wanted – private debates with small, individual states rather than arguments with a large, unified block of countries. However, nearly all of the other ASEAN members angrily complained that they'd never agreed to any such thing; but it was too late. ☒

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





# Speculate and arbitrate to accumulate

**Third-party funders have flooded the investment arbitration world in recent years, taking on claimants' risk for a share of the award. Some suggest these funds assist access to justice, while others say they exploit flaws in a system already in serious need of reform.**

**REBECCA LOWE**

**A**rgentina is not having an easy time of late. Beleaguered by a tidal wave of investment treaty arbitration claims following a series of vast debt restructurings – after the country's record \$94bn default in 2001 – it has found itself facing potential pay-outs to investors of tens of billions of dollars. In one recent landmark decision, *Abaclat and Others v Argentine Republic*, 60,000 Italian bondholders were given the right to file a \$1bn group claim against the country after it was ruled that their restructured sovereign bonds could qualify as expropriated 'investments'. According to Argentina's chief legal advisor to the Treasury, Eduardo Barcesat, the International Centre for Settlement of Investment Disputes (ICSID) is little more than 'a tribunal of butchers' that favours corporations over governments. Argentina wants out.

Argentina is not the first state to declare a lack of faith in ICSID, the World Bank body set up to arbitrate between foreign investors and states. Bolivia, Ecuador and Venezuela have already withdrawn from the institution, claiming it denies them autonomy over public policy and puts too much power in the hands of investors. For investors, the argument is far from convincing: if a state expropriates funds illegally, it cannot complain when asked to honour the covenant it signed. To default undermines future trade agreements, they point out, and destabilises the world economy.

Over the past three years, third-party litigation funders have vigorously entered the debate. With tens if not hundreds of millions of dollars at their disposal, they assist companies by agreeing to fund their claim for a share of the eventual award. Such a service assists access to justice, they say, by keeping costs down.

However, concerns have been raised that, as third-party funders spread their risk across an extensive portfolio of cases, frivolous lawsuits will become more common. With a conspicuous absence of international regulation, there are currently no rules determining the amount of control a funder can take over a case, or whether its presence should be disclosed. And with both lawyers and funders being repeat players in the industry, there is unease over potential conflicts of interest for counsel and arbitrators.

Yet there may be more serious ethical issues at stake. Are funders who take on claims against struggling states any different from the disgraced 'vulture funds' that grew up in the 1990s, which buy the debt of weak nations at a heavily discounted rate and then claim for a higher amount? Funders deny the analogy is fair: the huge sums they invest in claims are incomparable, they insist, and such cases wouldn't prove profitable anyway. However, now sovereign bondholders have been given permission to recover debts through international arbitration, there could be new scope to enter potentially vulturous territory. While the majority of Abaclat creditors seeking redress from Argentina may have an arguable case for reimbursement, what about the cheap bonds on the secondary market, sometimes bought for as little as a fifth of their original value? And what about similar potential cases against euro-crisis countries or post-Arab Spring states desperately rebuilding entire nations? Where does the vulturous line lie, and how do third-party funders orientate themselves along it? With so little transparency in the system, few currently have the ability to judge.

*'You look at the rapid rise of investment cases and you think, wow, the world didn't really expect this. And you wonder, is third-party funding going to put this on steroids?'*

Catherine Rogers

Professor of Law, Penn State University

Maya Steinitz, Associate Professor of Law at the University of Iowa and a leading scholar on third-party funders, is clear that investment arbitration funding should be subjected to rigorous scrutiny due to its public policy dimension. 'Investment arbitration is waged against governments, which

means it is ultimately the public who end up paying,' she says. 'Traditionally we have regarded states as having sovereignty over deciding how to deal with public policy issues such as a financial crisis. Now they have to deal with third-party funders who, unlike the original claimant, never had a direct stake in the country.'

### Boom now, bust later?

Third-party funding may attract controversy, but one thing is undisputed: the industry is growing, and growing fast. Burford Capital, the world's biggest litigation funder, was founded by former Time Warner General Counsel Chris Bogart and former Latham & Watkins partner Selwyn Seidel in 2009. Registered in Guernsey, it is one of a handful of firms with at least \$100m in its coffers to fund litigation and arbitration. Other big players include Juridica Investments Ltd, Calunius Capital, Allianz ProzessFinanz and Harbour Litigation Funding.

The funding model has so far proved highly lucrative. Typically, funders will claim around 20 to 50 per cent of the recovery proceeds, while spending an average of \$8m on each investment claim. Burford, which commits up to a quarter of its funds to international investment cases, saw its profits grow nine-fold from 2010 to 2011, while Juridica's grew by nearly 600 per cent. For Bogart, this is a clear sign that the legal sphere was gasping for help. 'I've done this full-time now for three-and-a-half years and the response has been extraordinary,' he tells *IBA Global Insight*. 'It clearly suggests there was a dramatic need for incremental capital into the legal market to make it work properly. What is going on is really a correction of a longstanding under-serving of the legal market.'

Seidel, who left Burford to found Fulbrook Capital Management in 2011, describes the change in the industry over the past three years as 'like night and day'. 'I see it in front of me, growing and growing,' he says. 'It is no longer an emerging industry, it is maturing, and in my view it will inevitably reach maturity and be a good part of financial day-to-day life.'

A commercial claim is no different from any other asset, Seidel explains, and can be compared to a security or share. 'They can be bought, sold, financed, pledged. I think they will eventually be part and parcel of derivatives. Some people say, isn't that a bad thing? Well, they are good and bad. They can be good just like any other derivatives.'

For some, however, such ideas set off alarm bells. Mention of derivatives inevitably brings to mind root causes of the current financial crisis. While comparable problems don't currently seem to exist in the investment arbitration market, there are concerns that this may change



## When funding goes wrong: *Juridica Investment Ltd v S&T Oil Equipment and Machinery Ltd*

In 2007, S&T Oil Equipment and Machinery Ltd, represented on a contingency fee basis by King & Spalding, brought an ICSID arbitration against Romania.

However, within a year of filing the claim, the law firm allegedly informed their clients that unless they located an outside funding source, they would resign. In May 2008, S&T Oil entered into an agreement with Juridica Investment Ltd whereby the funder agreed to pay for part of the arbitration in exchange for a percentage of any proceeds.

In late 2009, King & Spalding informed S&T Oil that it wished to withdraw from the case, claiming that

the company had not produced a 'critical piece of evidence'. S&T Oil called the claims 'false, untrue, inflammatory, and highly defamatory'. King & Spalding declined to comment.

King & Spalding and S&T Oil notified Juridica of their falling-out. In November 2009, Juridica asserted that S&T Oil made 'material misrepresentations' about the facts underlying the case and refused further funding. S&T Oil denied the charges, and has declined to comment further. The funder demanded 'immediate reimbursement of all sums' paid to S&T Oil under the investment agreement.

In July 2010, the ICSID panel dismissed S&T Oil's case against Romania after the company failed to find alternative funding. In December, Juridica filed an action against S&T Oil at the London Court of Arbitration (LCIA) to retrieve its \$3.5m investment.

In February 2011, S&T Oil filed a complaint against Juridica alleging violation of the Racketeer Influenced by Corrupt Organisations (RICO) Act in the US District Court for the Southern District of Texas. S&T Oil alleged that when entering into the agreement, Juridica omitted material facts, including that the agreement violated attorney-client privilege (the company claimed that soon after entering

the agreement, its lawyers began seeking legal advice from Juridica), and that Juridica intended to use S&T Oil's attorney-client privilege information against the company. Juridica denied the charges, and has declined to comment further.

In March 2011, the District Court denied S&T Oil's application for a temporary restraining order against the LCIA proceeding, and dismissed the case the following month. In January 2012 the US Court of Appeals for the Fifth Circuit affirmed the district court's order dismissing S&T Oil's case. The LCIA arbitration is still ongoing.

as claims continue to multiply: 19 ICSID cases were registered in 2002, which rose more than 150 per cent to 50 cases in 2012. 'One of the real dangers is a boom in the number of cases brought because there is funding available,' says Eric Branbandere, Associate Professor of International Law at Leiden University's Grotius Centre for International Legal Studies. 'The procedure is very costly so many claimants are reluctant to engage funds. But if third-party funders invest, the threshold is lowered – especially if they want to spread risk to several cases and are perhaps a bit less rigorous in assessing the meritorious character of a claim.'

'It is certainly a concern,' agrees Penn State University Professor of Law Catherine Rogers,

who specialises in international arbitration. 'You look at the rapid rise of investment cases and you think, wow, the world didn't really expect this. And you wonder, is third-party funding going to put this on steroids?'

The funders are emphatic in their response: profitable investments require strong claims, and there is nothing wrong with a 'boom' if the cases involve claimants with genuine grievances. 'The meritorious litigation it encourages is litigation that should have a voice, but for unfair reasons can't make its voice heard,' comments Seidel. 'And usually that means that the claimant doesn't have the money, and often doesn't have the money because of what the defendant has done to it.'



Yet what about borderline cases, where the claimants may try to overwhelm the defence with evidence? For those who believe the investment arbitration system is already overly investor-friendly, such concerns are very real. Andrea Dahlberg, Arbitration Practice Manager at Allen & Overy, concedes that ‘there is an imbalance’ stemming from the lack of effective lawyers in developing nations with a good understanding of treaties. Yet the top London law firms do their bit to ‘level the playing field’, she stresses, by providing regular pro bono training for African and Latin American lawyers. ‘There is something of a gap here,’ she explains. ‘But there are a lot of lawyers involved in this. We tackle everything, from how to negotiate these treaties to how to get the best advantages for the state.’

While funders can hardly be blamed for pre-existent flaws in the system, they are clearly far from the levelling force that many believe ICSID and its fellow institutions so desperately need. Despite being approached by a number of state defendants, Seidel, Bogart and Mike Smith, CEO of Calunius, all admit they are yet to take one on. While funding products for defendants have been developed – such as taking a fixed multiple of the amount invested or a percentage of the difference between the claim and final award – such arrangements are generally likely to prove less lucrative than claimant awards.

Bogart, however, claims the reason he hasn’t financed a defendant state has nothing to do with unwillingness. ‘We are completely agnostic,’ he says. ‘Frankly, it has more to do with the fact that governments have access to capital at a lower cost than I do. So it is cheaper for a government to fund its own litigation than it is for me.’

### US Chamber of Commerce: a vehement critic

Whatever the merits of a case, questions remain over the amount of control a funder should be permitted to take. While most funders claim they do not want full control, and would almost certainly fall foul of champerty and maintenance laws around the world should they attempt to take too much, there are currently no international regulations outlining what level is acceptable [see **Champerty and maintenance – a brief history** box, page 48]. Most funders admit they expect a degree of input over the choice of arbitrator and counsel, as well as any potential settlement. They may also expect access to privileged documents.

‘Some funders say, I am financing, I want an influence,’ says Benoit Le Bars, co-founder and Managing Partner of Lazareff Le Bars, which specialises in international arbitration. ‘I think this is problematic. It is not a good thing for the arbitration world to have financial institutions



intervening and influencing lawyers in their work.’

It is concern over potential conflicts, along with fears about funding for non-meritorious cases, that has prompted the US Chamber of Commerce to become one of third-party funding’s most vehement critics. ‘Third-party investments in litigation represent a clear and present danger to the impartial and efficient administration of civil justice in the United States,’ says the US Chamber Institute for Legal Reform. Indeed, with many funders enjoying strong connections to the legal profession, it is inevitable that lawyers may find themselves conflicted. Seidel’s former firm Latham & Watkins is one of the leading investment arbitration specialists, while Smith’s former firm Freshfields is now representing Rusoro Mining in its claim against Venezuela – a

*‘The funder will have an influence over the case, but lawyers have to be very careful in saying my duty is to the client, not to the funder. There are very serious ethical issues that have to be looked at here’*

Andrea Dahlberg

Allen & Overy Arbitration Practice Manager

claim being funded by Calunius.

Even lawyers who support arbitration funding in principle concede that such issues need urgently to be resolved. ‘The funder will have an influence over the case, but lawyers have to be very careful in saying my duty is to the client, not to the funder,’ warns Dahlberg. ‘There are very serious ethical issues that have to be looked at here.’

While a sprinkling of laws exist in Australia and the US, no jurisdiction has seriously addressed the pressing issues of control and conflicts of interest. The best attempt has come in the form of voluntary regulations in the UK – a Code of Conduct produced by the Association of Litigation Funders of England and Wales in 2011 – which outlines a series of important commitments for funders, including avoiding ‘unduly influencing’ the lawyers and observing confidentiality of material. However, the Code has been criticised for its lack of detail and non-binding character, and leaves many issues unresolved – including rules on disclosure. And for many, disclosure is key.

‘I’m definitely not among those who say funding doesn’t have to be disclosed,’ says Shearman & Sterling partner Emmanuel Gaillard, one of the world’s top international arbitrators. ‘I strongly believe that to assess conflicts of interest, some degree of transparency is required.’

While Seidel throws his support behind disclosure – mainly as he believes the presence of a funder could add credibility to the case and encourage opponents to settle – other funders are more reticent. It could encourage defendants to sidetrack a case with satellite legislation, they argue, and arbitrators may use it as an excuse to award adverse costs against the claimant. In international arbitration there is currently no standard system of how costs are allocated – though funders, lying beyond the arbitrators’ jurisdiction, cannot be forced to pay.

One common refrain among funders when demands for disclosure are made is that they are no different from any other lender, such as a bank or hedge fund, or a private equity fund that owns part of the business. ‘I promise, if you are a portfolio company of a multibillion dollar private equity fund and engaged in a significant piece of arbitration, that fund is exercising a heck of a lot more control than Burford ever would,’ says Bogart. ‘And law firms won’t want that disclosed because they probably have a client relationship with that fund. That is the elephant in the room that nobody wants to talk about.’

Bogart stresses that he would be happy with new disclosure rules as long as they apply to everyone. Smith, whose company Calunius had to disclose its funding of Rusoro Mining against Venezuela and Oxus Gold against Uzbekistan due to stock exchange rules, thinks similarly. ‘A lot of people see third-party funders as a different animal to other funders, but they are not really. So I say, let’s get some common guidelines in place that apply to all stakeholders behind the scenes on both sides.’

Carving out a threshold for disclosure should not prove too challenging: any financier with over ten per cent ownership, or with a direct stake in the award, or with rights over confidential material, could potentially be eligible. Deciding who should put such guidelines in place may prove more difficult. Calunius Capital CEO Leslie Perrin, who was involved in the drafting of the UK Code of Conduct, has voiced his support for international guidelines for litigation and arbitration. Yet such rules would have no enforcement powers, and Walter Remmerswaal, Managing Director of third-party funder Omni Bridgeway, confessed at a recent funding roundtable that they may have limited effect in practice. ‘If I want to make a deal with the general counsel of BP and he is willing to do business on extremely favourable commercial terms, who’s going to tell us we cannot do the deal because it falls outside the code?’

## Champerty and maintenance – a brief history

Third-party litigation funding was forbidden at common law under the ancient doctrines of maintenance and champerty. Maintenance refers to the funding of a claim when the funder holds no valid interest in the claim itself. Champerty takes it one step further by adding that the funder has a direct financial interest in the outcome of the claim.

In 1843, British philosopher and social reformer Jeremy Bentham explained the origins of maintenance and champerty – to avoid unfairly influencing a case through money and power – and why the concepts eventually fell out of favour: ‘A mischief, in those times it seems but too common, though a mischief not to be cured by such laws, was, that a man would buy a weak claim, in hopes that power might convert it into a strong one, and that the sword of a baron, stalking into court with a rabble of retainers at his feet, might strike terror into the eyes of a judge upon the bench. At present, what cares an English judge for the swords of a hundred barons? Neither fearing nor hoping, hating nor loving, the judge of our days is ready with equal phlegm to administer, upon all occasions, that system, whatever it be, of justice or injustice, which the law has put into his hands.’

England and Wales abolished maintenance and champerty as crimes and torts in the Criminal Law Act of 1967, though the common law principles continue to apply to funding agreements. In more recent years, several US states have abolished the doctrines or limited their application. Over the same period, the US has developed contingency fee arrangements, which allow lawyers to gain a share of the profits of litigation in lieu of their fee. In the UK, lawyers are permitted to enter into conditional fee agreements, whereby the client agrees to pay lower (or no) fees if the case loses, and the full amount plus a ‘success fee’ if the case is successful.

Only the arbitral institutions – ICSID, the UN Commission on International Trade Law (UNCITRAL) and the International Chamber of Commerce (ICC) – have the power to enforce compliance. However, Victoria Shannon, former Deputy Director of the North American Office of the ICC International Court of Arbitration, believes they may prove reluctant. ‘Arbitral institutions want to ensure their rules are applicable in all jurisdictions so they are very careful about what they put in them. I doubt they will want to touch this issue with a ten-foot pole.’

### Vulturous prospects

What is clear is that, without transparency, speculation about potentially ‘vulturous’ activity can only grow. While stressing that her research is in the early stages, Steinitz believes the vulture fund analogy merits attention. ‘There are

certainly hedge funds and other entities that are paying close attention to see if there’ll be the kinds of opportunities that the sovereign debt crisis in the 90s presented,’ she says. ‘The vulture funds that bought the arbitration awards against states are in a way what started this. Other investors thought, why wait until there is an award? Why not get involved earlier?’

Robert Volterra, co-founding partner of Volterra Fietta and one of the world’s top public international law specialists, dismisses the vulture fund argument. ‘In terms of third-party funders, I do not see the overlap with “vulture funds”,’ he says. ‘Apart from the fact that some NGOs do not like the fact that they are part of a process that makes governments keep their promises and punishes them for stealing from foreign investors.’

For Volterra, the term ‘vulture fund’ is ‘inflammatory rhetoric’ created by NGOs and



the media (though it is also a term used by judges in London's High Court). Countries such as Argentina, Indonesia and Zambia portray themselves as too poor to repay the debt, but, says Volterra, the reality is that they were not bankrupt, but they simply 'wished to allocate their resources elsewhere'. The result? Nobody trusts the country and its recovery will be stalled.

Over recent years, following a spate of bad publicity for 'vultures' targeting poor African nations, policymakers have demonstrated a more liberal approach to the issue. The UK passed a law to limit vulturous activity against developing countries, while some jurisdictions have adopted 'collective action clauses' (CACs) in their bond agreements to prevent small

*'I think commercial claims will eventually be part and parcel of derivatives. Some people say, isn't that a bad thing? Well, they are good and bad'*

Selvyn Seidel

Co-founder of Burford Capital and founder of Fulbrook Capital Management

numbers of creditors demanding full repayment of debts if a supermajority of stakeholders agree to restructured terms.

Yet with Abaclat looming ominously on the horizon, the floodgates have been opened for sovereign bondholders across the world to recoup their debts through international arbitration. In this murky legal no-man's land, CAC laws have no enforceability, and several struggling states may find themselves vulnerable. According to a 2009 study by the International Monetary Fund, the 25 nations with the highest likelihood of default are signatories to an average of 48 BITs. 'ICSID arbitration could blow a hole in the international community's collective action policy,' says Michael Waibel, Deputy Director of the LLM programme at Cambridge University, in an article for the *American Journal of International Law*. 'The importance of this potential loophole for sovereign debt markets cannot be over emphasised.'

While Bogart et al concede that some less credible operators may pursue vulnerable states, they vehemently deny that it is part of their own business plan. Ethics aside, it simply

isn't profitable, they say; while vulture funds can snap up debt at hugely discounted prices, the hefty sums involved in investment arbitration force a more careful selection of cases. 'Small defendants are obviously less appealing from a recovery prospect or from a vulturous prospect,' says Smith. 'So you wouldn't want to be investing in claims against impoverished sovereign states. It doesn't make economic sense.'

When asked what the definition of vulturous is, however, Smith takes a long time to respond. His first answer – 'something we would avoid' – seems unsatisfactorily circular. He qualifies it with something more concrete: 'You wouldn't go after a state where people are living on a dollar a day.' What about Egypt, where a quarter of the population lives below the poverty rate, and which is currently facing more investment claims than any African nation? 'In GDP terms, Egypt is not a weak country,' he replies, before conceding: 'There is no science to this, it is purely art. But at some point you say "no".'

### Profiting from justice

While there was a time that any third-party investment in a dispute was deemed champertous and immoral in many jurisdictions, now there seems a growing consensus that the principle is sound. As Lord Justice Rupert Jackson notes in his 2010 UK review on civil litigation costs, such funding promotes access to justice and can help filter out less credible claims by allowing impartial experts to gauge their merits before they reach court.

How far third-party funders can be blamed for flaws inherent in the system – flaws they amplify, but did not create – is open to debate. Yet while the industry remains less than transparent and unregulated, speculation over excessive control, conflicts of interest and potentially vulturous activity will persist. It is now, at this nascent stage in the industry's development, that funders have the chance to prove their 'meritorious' credentials and put their critics' minds at rest.

The alternative – doing nothing – is not an option when such important public policy concerns are at stake, stresses Rogers. 'There is a general reticence about regulations, and I think that's a healthy scepticism. But with a phenomenon like third-party funding, with the potential to affect investment arbitration so dramatically, I think the idea that we shouldn't do anything is naive and risky.' ☒

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# Africa:

## unemployable millions or global talent pool

**With Africa's class of 2013 set to dominate the world – on graduation, it will join a billion-strong workforce outnumbering China's – *IBA Global Insight* assesses the importance of education across the continent.**

**STEPHEN HAGGARD**

In 2013, Africa began the journey that will give it the world's largest workforce. Two training centres mark its leaders, and the pack following them [see boxes]. It's a 22-year run: The African generation of 2013 has demography on its side and the one billion-strong labour force they join at graduation will outnumber that of India or China. It's clear already that a good chunk of the 120 million Africans who will join the world of work this decade are going to be strong talents, and many will be the top of their field globally. But on current trends millions might never make the starting line. The United Nations estimates that in Sub-Saharan Africa, one in three young people currently have no education or training. For them, the future looks like underachievement, unfulfilled potential and unemployment.

Joseph Stiglitz, speaking to *IBA Global Insight* at the IBA Annual Conference 2012, held in Dublin, expressed the belief that Africa's development can offer a solution to the world's economic crisis. Already China has thrown a lifeline to the world by lifting 300 million people out of poverty in just 20 years – largely by raising the capacity of its primary education system by 30 million places. Could Africa, the world's next talent reservoir, see a similar transformation? It's a matter of necessity, according to Ade Mabogunje, a Stanford University Professor who advises his native Nigerian government when he's not researching Silicon Valley's skill infrastructure. 'Nigeria will go from 150 million to 750 million citizens this century', says Mabogunje. 'If they aren't trained and working, it's a global security crisis, not an economic difficulty. Look at how Boko Haram feeds off educational failure.'



The starting place for an educated workforce is generally the Millennium Development Goal (MDG) 2, set to be reached in 2015: universal primary school completion. A clutch of African nations have already passed the goal or are only a few percent short: Ghana, Kenya, Mauritius, Tanzania, and South Africa and Zambia. Others are definitely going to join them on time: Burundi, Ethiopia and Rwanda. These journeys have featured remarkable discoveries (deworming treatments and uniforms keep children at school more effectively than improved buildings) and painful compromises: often the class sizes rise and quality falls as governments try to squeeze more schooling from their budgets.

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*'By 2015 half of this country will be using their mobiles to make e-cash payments... We are going to see a boom in phone services reaching out to train people in all sorts of skills'*

Derrydean Dadzie  
CEO, Ghanaian IT company DreamOval

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Away from these pacesetting nations, around a quarter of Africa's children do not complete primary. They are deterred by a thicket of interlocking problems from inequality, poverty and disease, to lack of schools or teachers and female exclusion. In some Sahel nations, as many as three children in every four do not finish primary education, while even Nigeria, one of Africa's richest nations, has seen sharply rising numbers of children altogether out of school, to the extent that one in five of the world's out-of-school children is now a Nigerian.

### **The biggest thing we do**

But the future belongs to optimists; it's the prospect of improvement that matters. Ethiopia has shown it's possible to achieve what the United Nations Educational, Scientific and Cultural Organization (UNESCO) Education for All *Global Monitoring Report* hails as 'spectacular success', consistently raising the number of children enrolled in and completing primary by around five per cent per year. There's still a long way to go but Ethiopia's targets, which include 100 per cent of children in school by 2015, and middle income status for the country by 2025, look reachable. Solomon Shiferaw, Head of Planning at Addis Ababa's Ministry of Education, says it's been a matter of scale and sheer will. 'To educate every child we work with every person. It's about national awareness,

parent committees, community involvement as well as the schools themselves. Nearly a quarter of our national spending is on education. It's simply the biggest thing we do.'

Too many nations, however, including the large, significant or resource-rich such as Nigeria, Senegal and Uganda, are not increasing their primary completion rates. Sub-Saharan Africa as a whole has not managed to get primary completion above 70 per cent in a decade of effort. The depressing result is that of the world's out-of-school children, nearly half (48 per cent) are in Africa. Sometimes this is about relative distribution of education within countries, as well as the absolute failure of some governments to provide schools. Uganda's problem is inequality: a poor Ugandan child is twice as likely to drop out of primary, as a poor Rwandan child. London School of Economics Professor of African Development Thandika Mkandawire explains that policy initiatives imposed by foreign donors have often paralysed progress, from education to agriculture. 'The fads come and go, it might be fiscal discipline, or marketisation, or decentralisation, or growth, or productivity drives. In any event, it's always a three-year project to deliver an idea favoured by a donor. It's left many governments with inconsistent and contradictory policies. And the learning is being done by outsiders and not shared among Africans.'

For the dozen or so Sub-Saharan nations who have high levels of universal primary completion, we can expect progress at all levels. Kenya is installing a connected IT suite for every secondary school – thanks to a deal with Chinese IT companies. Indeed, Kenya has raised average total years in education faster than China. Ethiopia has built over 30 new public universities in just 20 years, and is on target for its aim of universal secondary education by 2020. But a two-speed continent is now also a reality. In a recent forecast for the same year, McKinsey Group estimates that by 2020, still less than half of Africans (48 per cent) will be taking education beyond primary. This educated half will be concentrated in the dozen or so vanguard nations, leaving the remainder stuck without progress.

The gap between Africa's winners and laggards looks even scarier when you investigate what is actually learned in schools. A group of South and East African countries collaborate to gather data on their standard achievement tests in primary numeracy and literacy. The range between lowest and highest attainment of basic learning is as follows. In Malawi less than ten per cent of children in school achieve the basic targets; in Mauritius it's over 70 per cent. Test results show that last decade's achievement of getting 50 million children in to African classrooms, has

often been at the expense of quality. 'Many kids are learning close to nothing and they leave school unable to read or do simple sums', says Charles Kenny at the Centre for Global Development. UNESCO's 'Education for All' programme, now over a decade old, and still far short of its goals, is moving its focus in 2013 from enrolling pupils to the quality of teaching. One million teachers must be trained in Sub-Saharan Africa between now and 2015, simply to keep up with MDG goals without lowering the quality of learning. In many places, it's not going to happen.

### Go figure

Away from these gloomy figures, there are rays of hope. The first is that the figures themselves exist. In autumn 2012, the World Bank, UNESCO, the Brookings Institution and others launched statistics portals measuring education performance in Africa in great detail. The sudden glut of educational data services helps to make problems and successes more visible. For example, we know that schools in Kenya are much better at overcoming differences of socio-economic background than in Zambia. Or we see that Rwanda, while closing the education gap between rural and urban regions, is increasing the disparity of the level of education between its richest and poorest citizens. These data-driven insights are calls to action for education planners to target very specific issues for maximum effect. An example of the sort of interventions that become possible, with quality data, is a £30m pilot scheme in Ethiopia, funded by the UK's Department for International Development (DFID), to pay aid in proportion to the number of girls passing the grade ten secondary school exam. It ought to earn a return: World Bank data shows that an increase of one per cent in the number of girls with secondary education boosts annual per capita income growth by 0.3 per cent. The price of educating one Ethiopian child to international standards of school leaving is one fortieth the price of the same achievement in the UK. Go figure.

Politicians in some capitals are showing appetite and boldness for grasping the nettle of educational quality. It's not enough to meet MDG goals for getting kids into school, says Matthias Harebamungu, the former teacher now turned Education Minister in Rwanda. He is surfing a wave of reform that mobilised the whole population and army to build schools, has raised its sights from universal Primary completion to 12-year schooling completion. Harebamungu is already on the next wave – which is about the quality of the learning outputs. Rwanda is now adding classroom ICT into the mix. Buoyed by a dirigiste central authority that China's education planners would admire, Harebamungu has set the task for 2013 as a reform of what schools teach,

and the establishment of a 'curriculum that reaches all corners'. He declares that for Rwanda 'it is key to have people who are not job seekers but job creators'. An acid test for the resilience of such home-grown education drives will be how far this agenda survives the financial pain that donors are likely to inflict upon Rwanda, as punishment for Kigali's troublemaking in the eastern Congo.

Sharpening up school systems may be working in some places, but for some observers, school is the problem not the solution. Nigeria's Ade Mabogunje agrees: 'School education has been oversold. Okay, it can be done. But look at the content. In Nigeria, sitting in classrooms is mainly a way of moving up in social status and getting an unproductive overpaid government job. The kind of education we have is simply a drain on the economy.' Mabogunje is part of a trend that doubts whether universal Western-style state education systems are the answer. He looks elsewhere for other things that can impact on skills. 'Look, in Nigeria there are 200,000 pastors in the Redeemed Church, that's twice as many as serve in the army, and those guys are giving basic literacy skills quite effectively and getting 100 per cent attendance. The government's coffers are empty, despite all our oil, and the figures show that we are getting fewer kids in school. If we are going to make any serious progress in education now, it's got to be around the institutions that do function in this country. That is: family, community, mosque and church, and business.'

### Clever social innovators

Learning outside school is a second area for hope in African education. Social innovators are developing pragmatic systems for second chance and vocational training. Idealists may not like the idea of a 'good enough' approach to learning, where populations get information and training as and when required for work, but it is becoming a norm, with its own established formats.

#### NAIROBI, Kenya – home of an African dotcom boom

Scores of commercial IT colleges cluster around Moi Avenue. Enter one at random – the Computer Pride Training Centre at Cinema Plaza, on the fourth floor of an ugly block. The narrow bright blue corridor leads to a dozen IT laboratories where, from 8am to 9pm, there will be 100-odd students working with tutors, plugged into a 2MB data link. Most are gaining professional certificates from Microsoft or Oracle. For around 30 students, this is also a branch campus of the UK's Middlesex University, where they study for a full British Computer Science degree with the help of certified lecturers and a fibreoptic cable. The London-based course principal, Ian Mitchell, has this to say about his Kenyan graduates.



Farmer field schools, an idea originally pioneered in Indonesia, are now a widely-used format for 'sending farmers back to school' in season-long courses for groups of around 25 farmers in a 'classroom without walls'. In a continent where small-scale agriculture is the norm, education has to function in countryside areas where school attendance is going to be rare. A rigorous three-year study of farmer field school outcomes in Kenya, Tanzania and Uganda showed that learning from farmer field schools raised family income by 60 per cent,

*'Nigeria will go from 150 million to 750 million citizens this century. If they aren't trained and working, it's a global security crisis, not an economic difficulty. Look at how Boko Haram feeds off educational failure'*

Professor Ade  
Mabogunje, Stanford University

while households whose head had no previous schooling could more than double their income. These schools are, unsurprisingly, popular. The students pay, making this option possible whether or not governments have the funds. The model works in cities too: Nairobi's rubbish problem is being addressed, and slum families given income, in a scheme that teaches families to make burnable briquettes from waste. Basic numeracy and literacy get picked up along the way.

Across Africa, the adult learning scene is characterised by innovation and energy. At Macha, a village 30 miles from tarmac or electricity in central Zambia, a remote community with a good V-sat link largely teaches itself farming, IT, health and literacy, and retains

its skilled professionals in the countryside rather than losing them to the cities. Machaworks, as this experiment is known, trains people through relationships as much as classrooms. Machaworks founder, charismatic Dutchman Gertjan van Stam, argues that effective education happens in African societies when communities come together to learn collectively and throughout life. Machaworks is a pin-up for the role of adult learning in creating a prosperous and educated community. If van Stam is correct, the continuous collective education model may be as or even more significant for the future of African workforce development, as what happens to kids on school benches. But such projects are not typical, and the scalability and sustainability of success 'beacons' like Macha has not been proven.

### Silicon Savannah

The answer may lie with Africa's digital entrepreneurs who are using SMS and smartphone apps to earn global attention as innovators in just-in-time learning for adults. Piggybacking on the triumph of the Kenyan phone-based currency M-Pesa, the techies of Silicon Savannah are rushing out apps for phone-based-learning in finance, work skills, literacy and numeracy. This may be scalable and sustainable, says Derrydean Dadzie, who is CEO of Ghanaian IT company, DreamOval. His business makes the software behind a gamut of phone services that already train adult learners in Ghana on themes ranging from breast-feeding your baby to boosting your cocoa crop. Half of Ghana lives on rural smallholdings, just about all of Ghana has a mobile phone, and for Dadzie, that adds up to a business. Dadzie says: 'by 2015 half of this country will be using their mobiles to make e-cash payments. Now in Ghana people really want to learn – there's a huge appetite for education here. The farmers who get SMS lessons about their crops, all double their income. So I am absolutely sure that people will pay for learning on the phone. We are going to see a boom in phone services reaching out to train people in all sorts of skills.'

The final joker in the pack is Africa's newest aid and development partner, China. Up until now, Beijing's interest in Africa has been led by corporations looking for profit. The Renminbi financed around \$200bn of African development in 2012, mostly in oil, minerals, and basic infrastructures for trade. Now, in the second decade of its African love-affair, China is becoming, unwittingly, a stakeholder in softer cultural issues. He Wenping of the Chinese Academy of Social Sciences is calling 'for China to increase its influence in Africa on the ideological front', and identified Education as one of 'many

'They are fantastic. Unbelievable. I wish we got UK students like that. And these men and women are getting good jobs too. I don't think the UK students can match them.' Mitchell, who marks the exams from Nairobi and London side by side, says the higher motivation and superior learning of the Kenyan candidates is always obvious from their exam scripts. Middlesex is expanding its Nairobi offering, and is not alone. In education honeypots like Accra or Addis, the pop-up campus of a university from China, India, UK or the US, is feeding the educational hunger of an African middle class that already outnumbers Europe's.

opportunities for China to achieve this'. You can already find some 20,000 African graduates attending courses in China, a Chinese University campus in Accra, and numerous Confucius Centres around the continent where Mandarin is taught.

China has its own remarkable record of educational transformation, which the West has largely ignored, but Beijing is now preparing to add to the 'Made in China' portfolio. In ten years China has notched up 30 million new primary enrollments and increased numbers in post-secondary from one million to six million. The quality measures have grown in parallel. It's not a perfect record - the children of migrants, minorities and western areas have had a patchy experience. However, China has probably got what Africa needs, with its huge scale, strong focus on rural and adult education, and use of cheap ICT to accelerate learning. Plans to repackaging the formula for Africa are taking shape already.

*'Nearly a quarter of our national spending is on education. It's simply the biggest thing we do'*

**Solomon Shiferaw**

*Head of Planning at Addis Ababa's Ministry of Education, Ethiopia.*

Beijing has started to send its educational experts to African meetings. A UNESCO-led \$8m Africa-China education fund is starting collaborative projects in training rural teachers. Duncan Hindle, former Permanent Secretary in South Africa's Education Ministry, and now a Director of the newly formed China-Africa Educational Roundtable as well as Chairperson at the Institute for Capacity Building in Africa, says that China's engagement in education is going to have significant effects even in the short and medium term. Says Hindle of the Chinese educationalists now eyeing Africa, 'They have different perspectives and huge resources. Their research investment is massive, so they understand the learning process very well, and they have enormous expertise in using IT in learning. That's how they achieved such high skill levels for staggering numbers of people, retraining them for working in industry, in such a short time. In these new partnerships, Africans will be learning that from them. I think we will see benefits fast'.

Chinese-led initiatives will differ from what Western donors and African governments have

#### **SEREKUNDA, The Gambia – one of Africa's poorest nations**

No international degrees are on offer here, but a local entrepreneur opened the Microtech Institute several years ago in a couple of rooms on the edge of a mosquito-thick swamp, with a teetering internet connection and a single bootlegged copy of Microsoft Office. It costs GMD6000 (\$195) for a four-month starter IT course in a country where GDP per capita is \$600, so affordability is an issue. Student Abdou Mankayang says: 'Three quarters of us here have been sent by their employers to learn PC maintenance, because now in Gambia most institutions are moving from manual to digital and people are realising the benefit of computer literacy.' Mankayang, a sponsored student, is hopeful that although he lacks the crucial social connections to get him a job, the training will give him a future: 'There is a bit of greener pasture in the field now.' Landing a job in tech support would make him a lucky man. Be from Gambia's bush rather than the city, or be illiterate like more than half of this country, or be a girl, and you'd be looking at the same option as most (63 per cent) Africans today: unwaged subsistence living.

traditionally done. China's involvement means the top billing, in the first phase of their engagement agenda, goes to research and consensus around what they see as Africa's two education challenges: gender inequality and remote location. School buildings, pupil enrollment, and teacher training are not top of the list.

Zheng Xinrong, Director of the Institute of Educational Foundations of Beijing Normal University, echoes some of the alternative thinking afoot elsewhere in Africa, in her reflections on China's experience of including girls in the policy of nine years of universal compulsory education. 'In China, we found access to school is not the main barrier to girls' education. It's sexual harassment, gendered expectations of girls and boys and unequal treatment of men and women in the job market that are the problems.' China's trajectory as an aid partner for education is moving to 'multi-form' actions, and China's Foreign Aid Ministry, contributing to the recent China-Africa Education initiatives, emphasised the importance of 'rendering intellectual support for social and economic development'.

Africa's class of 2013 is already sure to dominate the world in terms of numbers. The lessons taught in Africa in the years ahead will be among the most important on the planet. No doubt their report cards will vary widely from A+ to Fail, and the class will probably be split into two, but 'try harder' will not be empty words. Smart measurements, innovative approaches in adult learning, and a new role for China as a global educator, give plenty of reasons for everyone to sit up and listen carefully. ☒

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# Brazil's slow justice too appealing for some

**High-profile cases drag on for years. In a system tilted towards those with deep pockets, running out the clock is a favoured tactic for defence lawyers, which politicians accused of corruption see as a safe haven.**

**BRIAN NICHOLSON**

**L**ast year, former federal congressman Talvane Albuquerque received a 103-year jail term for murdering a political rival. However, such seemingly rigorous justice hides the fact that the crime occurred in 1998. Albuquerque's lawyers used a sequence of appeals and procedural loopholes to delay the trial.

This year, former seminary student Gil Rugai got 33 years for killing his father and step-mother – back in 2004. He then walked out of court, with lawyers predicting appeals could leave him free for another four years.

Delaying and even trying to run out the clock is a favoured tactic for Brazilian defence lawyers. Prescription kicks in at 20 years from the date of a murder, but much sooner for lesser crimes or elderly defendants. Politicians accused of corruption or influence-peddling often see it as a valuable safe haven.

High-profile cases that drag on for years reinforce a popular image of Brazilian justice as generally slow and tilted towards those with deep pockets. A public opinion survey by FGV-Rio, a leading law school, consistently shows the judiciary trailing institutions like the armed forces, the Catholic Church, the press and even the executive branch in terms of public trust. But Joaquim Falcão, dean of FGV-Rio, told *IBA Global Insight* that the real problem lies in the 'pathological slowness' of a system groaning beneath 90 million mainly humdrum cases in 2011, including 26 million which started that year.

'Brazil has an excess of appeals,' says Falcão, who holds a Master's from Harvard Law School and a PhD in education from Geneva University. 'Democratic doctrine suggests that two instances,

where one is a collegiate hearing, are enough for the rule of law. But Brazil has four instances, up to the Supreme Court (STF). And unlike the US Supreme Court, the STF cannot select which cases it hears, it must rule on every appeal it receives. This leaves the STF somewhat defenceless and creates a "fatal attraction" for all lawyers to continue their case as far as the STF.'

In 2006, the STF received a record 127,500 new cases. The flood has receded a little, to 67,000 in 2012, thanks to a constitutional amendment allowing the court to declare that some rulings are akin to precedents. Nevertheless, the 11 judges are still swamped. In theory the STF is basically a constitutional court, but Brazil's highly detailed constitution creates numerous opportunities to challenge mundane rulings on constitutional grounds. 'There are now 52 ways to get a case into the STF, and all cases claim to be raising constitutional issues,' Falcão says. 'Over 80 per cent of cases reaching the STF are procedural rather than substantive appeals, and this has an enormous impact on the system at all levels.'

Increasing prosperity has seen a rise in consumer and fiscal litigation – conflicts about taxes, telephones, energy, credit cards and health plans. Many start life in the small claims courts, designed for exactly this purpose, 'but they don't stop there, they can go to the STF,' Falcão says.

Who benefits, apart from the lawyers? Falcão offers a hint: 'Even when government attorneys know they're going to lose, they can appeal and delay a decision because it's a way of financing the state. This also applies to tax payers – both use the slow system as a means of finance.' In general, he says, of the ten largest 'clients' of

the STF, as plaintiff or defendant, perhaps eight are government agencies and two are consumer-oriented companies.

Another constitutional amendment now before Congress would block appeals to the Superior Court of Justice (STJ), the third instance and the rung immediately below the STF, unless appellants can demonstrate that they are questioning an important point of statute law. In theory, the highest appellate court for non-constitutional matters, the STJ is charged with ensuring uniform application of federal law. But the 31-judge tribunal is inundated by 300,000 cases a year.

Falcão favours some restriction on appeals, while ensuring that questions of fundamental social rights still reach the STF. He points to a 'perverse relationship' between a justice system bogged down by appeals and the market for lawyers. 'There's a belief that the slower the system, the more business for lawyers. But this is wrong. It might initially appear to increase the market, but it's distorted growth that feeds popular mistrust of the judiciary,' he says. 'It also favours people with enough money to take their case to Brasília.'

Appeals limitation as currently mooted in Congress faces opposition from the Brazilian Bar Association (OAB). Marcos da Costa, president of the OAB chapter in São Paulo, told *IBA Global Insight* he recognised that justice is abysmally slow in some areas, particularly in São Paulo state, Brazil's largest, which generates roughly a quarter of all cases. However, he says, this is mainly due to judicial overload – some lower-court judges in São Paulo have more than 30,000 cases stacked up. Throw in some weak judges and you have 'rulings that satisfy neither party,' so making appeals essential – one local judge in Greater São Paulo was overturned 90 per cent of the time on appeal.

For da Costa, the root problem in 'slow' states like São Paulo is not excessive appeals but rather a failure to expand the judiciary to keep pace with the increased demands generated by the 1988 Constitution. Enacted in democratic fervour after the end of military rule, it enshrines numerous new rights that naturally create more litigation.

Federal judiciary staff have expanded by 49 per cent since 2001, to 121,700 nationwide, according to official figures, but in São Paulo thousands of state judiciary posts remain vacant, da Costa says. Some 300 new state courts exist just on paper.

Other problems include the slow introduction of information technology and the cumulative effect of prolonged strikes. Hardly a year passes without judiciary clerical staff striking somewhere in Brazil: 2011 and 2012 each saw stoppages of three weeks or more in at least three

states, while 2010 saw a 127-day strike in São Paulo. 'This creates a huge backlog and takes a long time to catch up,' da Costa says. Public sector strikes tend to be frequent and lengthy in Brazil because strikers normally get paid for the time stopped, and compensate afterwards with unpaid overtime.

State Judge Juliano da Costa Stumpf studied Brazil snail's-pace judicial system for a 2008 Master's Degree thesis at the FGV-Rio law school. His main conclusions: 'While external factors contribute to the slowness, they are not among the main causes. Internal factors must be recognised as the most significant causes of slowness.'

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*'The real problem lies in the "pathological slowness" of a system groaning beneath 90 million mainly humdrum cases in 2011, including 26 million which started that year'*

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Many people including several members of the judiciary argue the opposite, a fact that suggests a real avoidance of responsibility. Among the internal factors, specifically, are the omission of judges in (efficiently) managing their courts and the general administrative disorganisation of the Brazilian judiciary, in particular at the first instance.' One reason for inefficient management, Stumpf says, is that circuits are effectively run by the longest-serving judges. These tend to be the most satisfied with the status quo and the least anxious to introduce modern systems and technologies.

Using 2006 data, Stumpf says Brazil had an adequate number of judges – 9.35 per 100,000 inhabitants, and above the United Nations recommended minimum of seven – and was probably above the world average for the ratio of clerical staff per judge. This led Stumpf to the conclusion that a bigger budget is not necessarily the first priority to speed things up. 'I wouldn't deny that more money might be necessary in some circumstances,' he says. 'After all, the population is growing. But first, we ought to try to do the best we can with what we have.' ☒

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