

IBA GLOBAL

October 2011

INSIGHT



New world disorder

America's diminishing influence on a fast changing world

America's \$14trillion debt: the financial woes that are humbling the global superpower

After the awakening: elusive justice in the birthplace of the Arab Spring

Murdoch exposed: News Corp's crisis brings corporate governance to the fore

Reluctant reformers: the enigma of India's economic success without legal sector liberalisation



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From the Editor



America's role in the world is changing fast. Two decades ago, following the end of the Cold War, US President George Bush senior was competing with Mikhail Gorbachev to appropriate the phrase 'new world order'. In March 1991, after the expulsion of Iraqi forces from Kuwait, he made a key speech to Congress, outlining the sole global superpower's approach to the Middle East. 'Now, we can see a new world coming into view,' he said. 'A world in which there is the very real prospect of a new world order. In the words of Winston Churchill, a "world order" in which "the principles of justice and fair play...protect the weak against the strong ..."' In the same speech, Bush stated: 'Our friends and allies in the Middle East recognise that they will bear the bulk of the responsibility for regional security. But we want them to know that just as we stood with them to repel aggression, so now America stands ready to work with them to secure the peace.'

Throughout 2011, however, as bloody revolutions have unfolded across the Middle East and North Africa, America has been less keen to adopt this position. Over the past 20 years, there have been military interventions in Somalia, Haiti, Bosnia, and Kosovo, as well as post-9/11 military action in Iraq and Afghanistan. The wars in Iraq and Afghanistan are estimated to have cost as much as \$4.4trillion, contributing significantly to America's \$14trillion fiscal plight, which has remarkably widespread implications.

These implications are explored in our cover feature (**Uncle Sam and the new world disorder**, page 12). Among the leading authorities quoted in the article is Zbigniew Brzezinski, who was US National Security Advisor to President Jimmy Carter, broker of the historic peace deal between Egypt and Israel in 1978. He sums up America's current predicament well, saying: 'Domestic paralysis and gridlock undercuts our capacity to deal with our domestic problems and take on a leading world role.' Michael Mandelbaum, author of *The Frugal Superpower*, agrees: 'America will do less and international relations will be transformed'.

James Lewis

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From 'storm and stress' to global law



Visiting St Petersburg for the first time was unforgettable. I was invited to the beautiful Imperial Russian capital to address the inaugural St Petersburg International Legal Forum during the White Nights festival in May.

It was an extremely successful conference attracting 800 delegates, including lawyers and government officials from Russia and the CIS, and elsewhere in Europe and Central Asia. I had the honour of speaking at the plenary session, together with Russian President Dmitry Medvedev, on the theme of law as an instrument of innovative and secure global development.

President Medvedev stressed that the judicial system and legal services regime should be reformed to help achieve sustainable and secure growth. I could not agree more. The legal services regime is changing rapidly throughout the world. This is true in some BRIC countries, and I'm sure the Middle East will follow.

I noted that the emphasis of President Medvedev's remarks was on the internationalisation of the legal profession. This should be the agenda not only for the Russian Federation, but also for the many jurisdictions throughout the world. I believe that the International Bar Association must be the forum for assisting the transformation of the legal profession to a global profession capable of delivering the most advanced legal services. I am proud that my IBA colleagues are working hard to achieve this aim. Almost immediately following the close of the conference; I received a letter from the Federal Chamber of Advocates and the Minister of Justice, Alexander Kononov, inviting the IBA to host its Annual Conference in Russia. I very much appreciate the enthusiasm of the Russian legal profession for the IBA and wish to hold the event there as soon as is practically possible.

I have also had opportunities to attend a number of other large international conferences of bars and law societies in my months as IBA President. I was impressed by the initiative of the bar leaders at the 8th European Conference of the German Bar held in May. Along with the Paris Bar, which held its Bicentennial Ceremony last year, it is determined to promote its own and its members' internationalisation. I support those initiatives unconditionally.

I have attended numerous regional lawyers' conferences such as the Inter-Pacific Bar Association Conference in Kyoto, the Presidents of Law Associations in Asia Conference in Taipei, and the American Bar Association Annual Conference in Toronto.

They were all extremely successful and provided those involved with excellent opportunities to learn from each other and build professional networks. A new committee created under the umbrella of the IBA Bar Issues Commission – the Cross-Border Legal Services Committee – will focus on this trend and encourage rapid progress.

In my report to the IBA Council Meeting this year, I described 2011 as a time of 'storm and stress'. The global financial crisis remains a major issue, and we had riots, revolutionary movements and political unrest around the world. There were also large natural disasters: the worst being the earthquake and tsunami in Japan, and the Fukushima nuclear accident which followed.

Initially, these events may not appear to be issues for the legal profession. However, I believe that we need to address the hardships in peoples' lives that may have been caused by these problems. I asked the IBA officers to turn their committees' attention to those issues, and I am pleased to note that many feature in sessions at the Dubai conference.

The role of in-house counsel is changing dramatically as a result of the financial crisis. In-house lawyers are required to manage the delivery of legal services from sources throughout the world in the most efficient and economical way. They now need to have highly innovative management skills and extensive professional networks. More importantly, as ethical and corporate governance issues become increasingly essential, so too do in-house lawyers' professional independence and privilege.

As reported on the IBA website, in September 2010 the European Court of Justice (ECJ) handed down a landmark judgment in the Akzo Nobel case. The ECJ held, in the context of investigations by the European Commission, that internal company communications with in-house lawyers are not covered by legal professional privilege. The Court's judgment rests on the proposition that a lawyer is not independent if bound to his or her client by a relationship of employment.

As the decision was expected to have far-reaching implications for in-house counsel and their companies, the IBA intervened at an early stage in support of preserving privilege. Disappointingly, the ECJ dismissed the appeal, rejecting the arguments raised by the appellants and the nine intervening professional bodies and States. This is one of the topics we took up for the showcase to be held at the Dubai conference, an indication that the IBA will continue to follow developments on this issue.

The IBA is well positioned to help the transformation of the legal profession that is underway in many jurisdictions. We should not simply apply one single set of rules to countries with diverse cultures, religious beliefs and languages. Generosity, friendship and mutual understanding are the keywords for my leadership as IBA President. The IBA's voice is of no value without the support of the global legal profession, and I sincerely hope that you will enthusiastically take part in future IBA activities.

Akira Kawamura

News

Siemens GC Peter Solmssen on governance, corruption and democracy

RUTH COLLINS

Since 2006, the exposure of a series of bribery, corruption and price-fixing scandals at Siemens has led to numerous court hearings and multi-million dollar fines. Peter Solmssen, then executive vice-president and general counsel of GE Healthcare, was brought in to 'clean up' the company and firmly bring the issue of compliance to the table.

Solmssen, Siemens AG general counsel, spoke about his experiences in a plenary session on governance, corruption and democracy at Session 480, 'The Rule of Law in a Globalized World', at the Salzburg Global Seminar, in August 2011.

'It was the CEO's feeling – and I would agree – that there was a problem both in the operating mechanisms in terms of transparency and responsibility and that there was no existing functioning compliance organisation,' he said.

'The company did have a compliance leader but he had a grand total of 15 people globally working for him. We very quickly built up a team of about 600 and, more importantly, changed



Peter Solmssen
General Counsel, Siemens

'The company did have a compliance leader but he had a grand total of 15 people globally working for him. We very quickly built up a team of about 600'

the culture of the company to make compliance a top priority for all its business leaders.'

Between 2006 and 2008, the US Securities and Exchange Commission and the US Department of Justice investigated Siemens for alleged violations of the US Foreign Corrupt Practices Act. After extensive negotiations, the company pleaded

guilty to charges of bribery and corruption on 15 December 2008 and agreed to pay US\$800m in fines to the US authorities and €395m in Germany.

As Solmssen noted, the investigations revealed the full extent of the corruption scandal and the involvement of senior management: 'The interesting lesson from the investigation was that the decisions over either corruption or price-fixing were made at a relatively high level, despite the denials of certain former officers of the company. The evidence shows that the knowledge and the support of these illegal systems came both from headquarters and from local management.'

In the business world, Solmssen strongly believes that senior management is directly responsible both for enforcing the rule of law in the workplace and for creating a work ethos that prioritises compliance. But he is also a firm believer that large companies like Siemens have a role to play in fighting corruption on a more universal level: they should look not only to enforce the rule of law in the way that they conduct business, but also capitalise on their combined market power to help 'drive out corruption and promote transparency' in the global marketplace as a whole.

Read the full article at www.tinyurl.com/IBAnews-siemens.

IBA Anti-Corruption Committee responds to Anti-Bribery Management System draft specification

The IBA Anti-Corruption Committee has submitted a response to a consultation by the British Standards Institute (BSI) on the draft of its proposed specification for an Anti-Bribery Management System (ABMS).

The BSI works with business to develop standards for all areas of commerce. In light of growing awareness of the need for anti-corruption systems, and particularly the emphasis placed on 'adequate procedures' to prevent bribery by the UK Bribery Act, the BSI is developing a British standard for ABMSs. This

aims to be applicable to small, medium and large organisations in the public, private and voluntary sectors operating anywhere in the world.

The Anti-Corruption Committee welcomed the specification, but suggested various changes. One concern was that certain provisions had been drafted too widely, imposing obligations on too broad a range of situations or relationships to be practicable. For example, the draft standard proposed that organisations conduct due diligence on all business partners, irrespective of the risk in the relationship. According to the Committee, this would create an onerous burden that in many cases would do little to combat corruption, particularly as the definition of business partners was itself very broad, encompassing clients and suppliers.

Other provisions appeared reasonable to the Committee for large multinational businesses, but unrealistic for smaller entities. The response therefore emphasised the need to amend the wording of the draft standard to clarify that the measures put in place as part of an ABMS will depend upon the risk of bribery and the resources of the organisation.

The consultation on the draft BSI standard ABMS has now closed. No date has been set for the final version to be published. The draft is available at www.tinyurl.com/IBAAntibribery-guidance. The full IBA submission can be found at www.tinyurl.com/IBAAntibribery-submission.





Annual Conference 2011, Dubai – speakers announced

Nobel Laureate, international lawyer and Egyptian presidential candidate Dr Mohamed ElBaradei will be among over 1,000 distinguished speakers at this year's IBA Annual Conference in Dubai.

Dr ElBaradei served three terms as Director General of the International Atomic Energy Agency (IAEA), during which he pioneered safety and compliance measures to strengthen the existing nuclear non-proliferation regime. In October 2005, he and the IAEA were announced as joint recipients of the Nobel Peace Prize for their 'efforts to prevent nuclear energy from being used for military purposes and to ensure that nuclear energy, for peaceful purposes, is used in the safest possible way'.

In 2011, ElBaradei emerged as a high-profile opposition figure in the Egyptian protests that culminated in Hosni Mubarak's resignation, calling on the need for open politics and a just rule of law. He announced his intention to run for the presidential elections in March.

Other speakers at the conference will include: Cherif Bassiouni, President Emeritus of the International Human Rights Law Institute, US; Gabriela Knaul, Special Rapporteur on the Independence of Judges and Lawyers at the UN Office of the High Commission for Human Rights, Brazil; George Freeman, Vice President and Assistant General Counsel of The New York Times Company, US; Chief Justice Iftikhar Muhammad Chaudhry, from the Supreme Court of Pakistan; and Juan Mendez, UN Special Rapporteur on Torture at the UN Office of the High Commissioner for Human Rights, US.

For more information on the conference visit www.tinyurl.com/IBA-dubai.

Ireland Prime Minister welcomes IBA to Dublin

Ireland Prime Minister Enda Kenny and Minister for Justice and Equality Alan Shatter recently hosted meetings for a visiting IBA presidential delegation in Dublin, the location for the 2012 IBA Annual Conference.

Discussions centred on preparation for the IBA's 2012 flagship event, during which the Irish Government expressed delight that Dublin was selected to welcome thousands of delegates to the week-long gathering of the international legal profession.

IBA President Akira Kawamura told *IBA Global Insight*: 'I am delighted by the very warm welcome extended to the IBA by the Taoiseach, Enda Kenny, and by everyone that we met during our visit to Dublin. The pledges of support for the IBA's 2012 Annual Conference augur well for an extremely successful event. The convention centre is an impressive venue, which I am certain our international delegates will very much appreciate.'



Rosneft embraces new Western partner after abortive BP deal

RUTH COLLINS

The recent news that ExxonMobil has signed a deal with Rosneft to explore oil and gas reserves in Russia's Arctic shelf has ruffled more than a few feathers.

As *IBA Global Insight* reported earlier this year, after initial excitement, BP and Rosneft's momentous US\$16bn share swap deal quickly fell apart following a dispute with Russian investors in TNK-BP, BP's existing Russian joint venture.

It is not altogether surprising that Rosneft has looked to Exxon for help. Even while the arbitration tribunal was still reviewing BP's shareholder dispute, Rosneft had announced plans to undertake joint operations in the Black Sea with BP's US rival. In fact, the terms of the new deal may be much more favourable to Rosneft, since instead of swapping stock, the deal will reportedly see Rosneft gain access to at least six of Exxon's oil fields, including assets in the Gulf of Mexico and on land in Texas.

In a joint statement issued by Exxon and Rosneft, they announced their plans 'to undertake joint exploration and development of hydrocarbon resources in Russia, the United States and other countries throughout the world, and commence technology and expertise sharing activities.'

While BP is still recovering its reputation from the infamous Gulf of Mexico oil spill, Exxon and Rosneft's plans to drill in this area will no doubt concern environmental groups. As well as deep water drilling, it is expected that

the pair will opt for other contentious extraction methods such as hydraulic fracturing ('fracking') on land.

However, as with the BP deal, Rosneft is set to gain much by the way of experience, drilling expertise and the foreign partners endorsing the bulk of exploration risk. For Exxon, the benefits of striking a deal with Russia's largest oil producer are clear: 'The deal will not only enforce Exxon's position in the Russian market, but also enable the company to gain access to tremendous resources and have the opportunity to use its technology to produce oil in a harsh environment,' says Valery Nesterov, an oil and gas analyst at Troika Dialog.

As to how mutually beneficial the deal will be, 'the devil is in the detail,' says Nesterov. 'So far the companies have only outlined the scope of future cooperation, so this needs to be underpinned by specific details and contracts'.

Read the full article at www.tinyurl.com/IBAnews-rosneft.



IBA Executive Director and OECD Secretary-General discuss best practice, policies and regulations

OECD Secretary-General Angel Gurría and IBA Executive Director Mark Ellis met in Paris during the IBA's 9th Annual Anti-Corruption Conference to discuss potential cooperation between the two global bodies.

Mark Ellis told *IBA Global Insight*: 'It was a pleasure to discuss with Mr Gurría and his colleagues how both organisations might, for the betterment of the legal profession and wider society, further extend collaborative efforts. Currently, together with the United Nations, both organisations are jointly working on a global initiative to raise awareness among the legal profession of key international anti-corruption instruments.'

Ellis said that the Anti-Corruption Strategy for the Legal Profession project was an example of how the mutual interests and goals of the IBA and the OECD intersect.

He added: 'There are a number of other areas such as corporate governance, competition law, social responsibility and promotion of the rule of law where the IBA and the OECD can hopefully pool expertise in the pursuit of fairer policies and regulations around the globe.'



OECD Legal Director speaks to the IBA about global economic crisis, globalisation and development

REBECCA LOWE

Corporate governance, the future of global economic cooperation, financial regulation, and anti-corruption measures were just some of the topics discussed by Nicola Bonucci, Director for Legal Affairs for the Organisation for Economic Co-operation and Development (OECD), during a wide-ranging interview with the IBA.

The hour-long webcast, conducted by award-winning CNN presenter Todd Benjamin, was streamed live to IBA members on 31 August.

Asked about the OECD's response to the current financial climate, Bonucci said that a main difficulty was that the world was currently battling with not one crisis, but two: the level of debt and the level of growth. The solution, he argued, was 'to grow more'.

'The difficulty is how to achieve that without jeopardising and creating further debt, and this is where it becomes very tricky for the OECD countries in particular to play with those two parameters.'

He added: 'But clearly, when you look at the macroeconomic situation and when you look at the social situation [...] one of the main challenges [...] is the level of unemployment. If you raise the level of employment in OECD countries, you start to generate growth, to generate wealth, to generate expenses, to boost consumption and to reduce the level of debt.'

Bonucci also outlined steps the OECD is taking to spread its membership further afield. Currently, the five largest emerging powers – China, Brazil, Russia, India and South Africa – remain outside the organisation. The legal director admitted the OECD should become 'more open', while stressing that any attempt to become universal would probably make it 'less useful and relevant'.

However, the OECD has set up an Enhanced Engagement Programme to encourage membership among emerging economies, Bonucci said.

Russia is in the process of accession, while Brazil and South Africa are both parties to the Anti-Bribery Convention, and China and India have 'approached' the organisation and asked for advice on green growth projects.

'But I think what we should also focus our attention in the future as the OECD is not so much what we call the emerging countries, which have indeed emerged in fact already, but the future emerging countries,' he added. 'Let's try to see where the Chinas, Indias, Brazils of the next ten years are.'

Where Russia is concerned, the OECD is currently conducting a rigorous analysis of every government sector to evaluate the country's suitability for accession. Its record on bribery and corruption will not render it ineligible, Bonucci explained.

'Becoming an OECD member is like when you turn 50 and you go to have a full check-up. We're going to start on areas of weaknesses and we're going to say to Russia; you need to correct those weaknesses. If we believe that those weaknesses are not major, you can correct them afterwards.'

Developing a multi-disciplinary approach to tackling corruption remains one of the major challenges facing the OECD – but this is an area where Bonucci believes the Organisation could have a significant impact. 'If we also look at the link between economic crimes at large, very often you can see that when you have corruption, you have money laundering; when you have corruption you have bid rigging; when you have bid rigging, you have money laundering [...].'

'I think the OECD could really bring added value, because we are a multi-disciplinary organisation and we can bring a more holistic view of how to combat those illegal movements of money.'

For edited highlights of this interview go to page 43.

To view the full interview visit www.tinyurl.com/IBAwecast-bonucci.

Human rights news

Egypt: Justice in doubt

REBECCA LOWE

Lawyers have raised concerns that members of the Mubarak regime may escape justice for their alleged role in the killing of demonstrators during the Egyptian revolution.

Former President Hosni Mubarak and his two sons, Galal and Alaa, are currently standing trial on charges of corruption. The former leader has also been charged with conspiring to kill protesters, which holds a 15-year sentence or the death penalty.

Victims – who never thought they would see these powerful men being held to account in courts of law – have celebrated the hearings. Yet some believe the Egyptian judicial process is inadequate for the task. The Arab Center for Independence of the Judiciary and the Legal Profession (ACIJLP), believes that Egyptian criminal law is not equipped to deal with the crimes committed during the uprising and should be updated in line with international human rights law.

In a report entitled 'The prosecution of those involved and accused of killing peaceful demonstrators during the 25th January Revolution', the ACIJLP recommends that Egypt ratifies the International Criminal Court's Rome



Statute, which it signed up to on 26 December 2000.

Speaking to the International Bar Association, ACIJLP Director Nasser Amin says: 'We have a big problem in Egypt now concerning Mubarak and some of his generals. Our problem is that the Government wants to try them now, but at the same time we don't have any article in the Penal Code defining a crime against humanity. We only have murder. It is a very difficult situation.'

The report states that the prosecution of those accused of killing demonstrators according to the Penal Code 'leads to aberrant results'. Many could be convicted only of manslaughter, it says, or may be released completely. Those who planned but did not carry out the killings might also escape punishment.

The trials are not the only legal challenge facing the country. Dr Hani Sarie-Eldin, Managing Partner

of Sarie-Eldin & Partners law firm in Egypt and member of the new political Free Egyptians Party, is one of many lawyers and activists to voice concerns about the electoral process currently underway, believing that parliamentary elections should wait until after a new Constitution has been drafted.

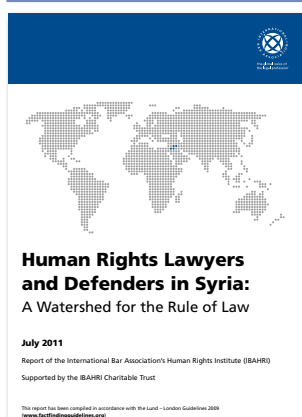
This, he says, would give parties time to garner support, thereby preventing the old regime simply taking back power under a new mantle, and avoid potential problems arising from running elections under temporary legislation.

'The new Constitution might change the face of the Government and then we would have to start the whole thing again,' he says. 'And opposition parties need more time to build themselves. You can't build a massive base across the country in a few months.'

The future is not all bleak, however. 'I'm sure we'll get there in the end,' he adds. 'There is no way to go back.'

Read the full article at www.tinyurl.com/IBAnews-egypt-justice.

The International Bar Association's Human Rights Institute (IBAHRI) conducted a fact-finding mission to Egypt in July 2011 to examine the role played by the legal profession and Egyptian Bar Association in upholding the rule of law and defending human rights. A report detailing the main findings and conclusions of the mission will be released shortly.



Syria report launched amid violent clampdown

A panel discussion to launch the IBAHRI's report on Syria, entitled *Human Rights Lawyers and Defenders in Syria: A Watershed for the Rule*

of Law, outlined the many obstacles facing human rights defenders and NGOs working in the country as widespread violent repression of protesters continues.

Members of the IBAHRI mission delegation, who visited Syria in March 2011, the day after popular unrest kicked off in the southern city of Daraa, took part in the event, on 28 July.

The panellists described the IBAHRI meetings held with the Ministry of Justice and the Ministry of Social Affairs, and reported on the IBAHRI recommendations on how the ministries may contribute positively to enhancing the independence of the judiciary.

Among its criticisms, the report outlines how the Syrian Bar Association, once a bastion of independence, has now become beholden to the executive.

Barrister and mission delegate Michael Lynn said: 'It is quite striking that there have been these rallies and people killed, and we haven't heard any condemnation from lawyers or the Syrian Bar Association. There don't appear to have been any complaints about extra-judicial killings or arbitrary arrests.'

A film of the discussion, along with interviews with speakers and BBC TV Arabic interviews with IBAHRI Co-Director Phillip Tahmindjis and Dr Abdel Salam Sidahmed, Associate Professor at the Political Science Department of the University of Windsor, Canada, can be viewed via the IBA website [interviews in Arabic].

The report, including a full list of findings and recommendations can be downloaded in English and Arabic via the IBA website: www.tinyurl.com/IBAHRI-syria.

Khodorkovsky trial not fair, says IBAHRI report

The Russian trial of billionaire Yukos Petroleum CEO Mikhail Khodorkovsky was not fair, according to an IBA report published last month [September 2011].

The report makes several criticisms of the trial, which took place from March 2009 to December 2010. It claims that the indictments were unclear and that the defence was not provided with a list of approved witnesses at the start of the trial, while the list of prosecution witnesses was accepted from the beginning. The report also criticises Khodorkovsky's detention, which it states hindered his access to legal counsel.

A further concern was the lack of daily courtroom protocols, which in the Russian legal system take the place of transcripts of the trial.

Phillip Tahmindjis, Co-Director of the IBAHRI, said: 'We retained an expert Russian-speaking observer for the report, who attended every hearing of the trial. The IBAHRI is the only organisation that had a full-time observer based in Moscow attending all sessions.'

Khodorkovsky, along with his colleague Platon Lebedev, was convicted of stealing approximately two-thirds of the total petroleum



'The IBAHRI is the only organisation that had a full-time observer based in Moscow attending all sessions.'

output of Yukos and of laundering the proceeds in excess of US\$16 billion. Each was sentenced to 14 years in prison, later reduced on appeal to 13 years. This in effect eliminates Khodorkovsky from the Russian presidential elections, which are due to be held next year.

The report can be downloaded from the IBA website www.tinyurl.com/Khodorkovsky-trial-observation.



The ICC needs better equality of arms for defence, says report

The IBA's International Criminal Court (ICC) Programme has released its latest report, entitled *Fairness at the International Criminal Court*, which calls for greater equality of arms for the defence.

The report examines the Court's approach to ensuring fairness, focusing in particular on judicial, institutional and policy developments at the Court that impact the fair trial rights of the defence. It highlights institutional and policy concerns, the challenges that ICC judges face in balancing competing fairness concerns, and calls for the establishment of the defence as the fifth organ of the court.

The report and the full list of conclusions and recommendations may be downloaded at www.tinyurl.com/IBA-ICC-fairness.

Fact-finding report on Zimbabwe released

The latest IBAHRI fact-finding mission report on Zimbabwe, published last month [September 2011], illustrates how the rule of law is still under threat in many areas in the country.

One main concern outlined in the report is the lack of independence of the judiciary and Attorney-General, which has had a significant impact on achieving justice for victims of violence during the 2008 elections.

The report, entitled *Zimbabwe: time for a new approach*, was launched in Johannesburg, South Africa, on 21 September in conjunction with the third anniversary of the Global Political Agreement (GPA), a power sharing agreement between Robert Mugabe's Zimbabwe African

National Union- Patriotic Front (ZANU-PF) party and the opposition Movement for Democratic Change (MDC) party.

The report makes recommendations to the Government of Zimbabwe, the African Union, the Southern African Development Community (SADC) and the wider international community. These include the necessity of respecting the provisions of the GPA and finalising a road map for its implementation, and completing the constitution-making process.

Marie-Pierre Olivier, IBAHRI Senior Programme Lawyer, said: 'Our mission had broad terms of reference, which allowed the delegation to explore a variety of issues, including the independence of the judiciary, the constitution-making process and

the relationship between extractive industries and human rights.

'The delegation was able to meet representatives of all parties to the GPA and collect views from a wide range of stakeholders. The report contains recommendations to ensure the rule of law is respected and the next elections in Zimbabwe can be free and fair.'

A panel discussion on the findings of the report and the future of Zimbabwe took place three years after the GPA took place, on 21 September 2011, in Johannesburg, South Africa. Unity Dow, former Justice of the High Court of Botswana; Sternford Moyo, Co-Chair of the IBAHRI; and Tinoziva Bere, President of the Law Society of Zimbabwe, were on the panel, which was moderated by Marie-Pierre Olivier, IBAHRI Senior Programme Lawyer.

British Foreign Secretary: 'shine a spotlight on Iran's human rights record'

The international community has a 'vital role' to play in highlighting Iran's poor human rights record, the UK Foreign Secretary told a roomful of activists, lawyers and journalists at an awareness raising event in September 2011.

UK Foreign Secretary William Hague addressed the audience, followed by exiled Iranian lawyer Mohammad Mostafaei, who spoke about the huge challenges and pressures facing the legal profession in Iran. The event comprised two panel discussions, focusing on reporting on Iran and campaigning for Iranian prisoners of conscience. The evening, hosted by *The Times*, closed with a letter read by Diana Quick, from imprisoned lawyer Nasrin Sotoudeh to her son.

The IBAHRI, along with several other NGOs, including Amnesty International, Human Rights Watch and Justice for Iran, spoke to attendees at the event and provided information about its work and ongoing projects in Iran.

Speaking to the 500-strong audience, Mr Hague spoke of Iran's 'breathtaking hypocrisy' in suppressing protest at home while supporting it elsewhere in the Middle East. He said: 'The actions of the Iranian regime are holding Iran back, isolating its people and suffocating their immense potential, and preventing Iran from enjoying normal and productive relations with the outside world.'

'Hundreds of opposition members, human rights activists, lawyers and journalists languish behind bars. More journalists are imprisoned in Iran than in any other country in the world, with the sole exception of China, and the intimidation of journalists is on the rise as part of a crackdown on political and press freedoms [...].'

'Even those attempting to hold the Iranian authorities to their own constitutional obligations are targeted, in particular lawyers seeking to defend the persecuted.'

The foreign secretary highlighted the case of Mostafaei, who was forced to flee Iran after defending Sakineh



'Hundreds of opposition members, human rights activists, lawyers and journalists languish behind bars.'

Mohammadi-Ashtiani, a woman sentenced to death by stoning for adultery. Javid Kian, who took over her case, was accused of acting against national security and has now disappeared.

Mr Hague added: 'The international community has a vital role to play: to shine a spotlight on Iran's human rights record and to hold its authorities accountable.'

In 2010 and 2011 the IBAHRI undertook human rights training with Iranian lawyers and established a twinning programme between the Iranian Bar Association and the Malaysian Bar Council, organising workshops on common human rights and legal issues.

The IBAHRI has also organised legal aid study visits with Iranian lawyers and written intervention letters to the Iranian authorities regarding the cases of lawyers Nasrin Sotoudeh, Houtan Kian, Mohammad Mostafaei and Khalil Bahramian.

To view the IBA's coverage on Mostafaei and Ashtiani visit www.tinyurl.com/IBAnews-mostafaei.

IBAHRI Justice for Burma Campaign update

The IBAHRI has been holding talks with European Union Member States to discuss the establishment of a UN Commission of Inquiry (COI) into international crimes in Burma.

The meetings took place in Brussels ahead of EU representatives gathering at the Meeting of the Human Rights Working Group (COHOM) of the European Council on 6-7 September, where they discussed the forthcoming resolution on the human rights situation in Burma.

The IBAHRI and the Open Society Foundations organised the meeting to provide expert opinions to Member States on the establishment of a COI. Speakers included representatives from Burma Campaign UK, the Burma Lawyers' Council, the International Federation of Human Rights and Human Rights Watch.

The experts summarised the current human rights situation in Burma, addressed the lack of legal remedies for victims at the national level and explained why a COI is the best way forward for deterring the commission of further crimes and ensuring justice for victims.

Shirley Pouget, IBAHRI Project Lawyer, said: 'The COI has so far not been included in the UNGA resolution because EU States continue to believe that this is not the right time, but these briefings have put the issue back on the agenda for discussion in Brussels.'

Visit www.tinyurl.com/IBAHRI-burma for more information on the campaign and email IBAHRI Programme Lawyer Shirley Pouget at shirley.pouget@int-bar.org for further details on how to take action.





Uncle Sam and the new world disorder

Ultimately, the projection of global influence comes down to wealth. When America goes broke, it really isn't all about the economy.

SKIP KALTENHEUSER

Is America's role on the world stage being written out? Or is the country simply being forced by new realities to call its shots more carefully, perhaps even enhancing influence and credibility assuming it makes the right calls?

Leaning toward the second perspective requires at least an act of faith. Indicators are piling up that the nation that took the lead in vanquishing the Axis powers, was instrumental in rebuilding Europe and Japan, and which out-distanced a gasping Soviet empire, has taken so many slings and arrows that Uncle Sam is limping.

True, things are relative. Many countries are stumbling under the weight of their challenges, after the finance sector ran roughshod over the globe. But none has taken on the world class burdens the United States has. And some are proving very nimble in their priorities as a society, and will reap the rewards as America pays the price of domestic neglect.

America will be pinching pennies, sooner rather than later. That growing awareness now makes the country nervous every time the phone rings for Captain America. Witness the angst over playing even second chair in showing Gaddafi the door in Libya, while President Obama carefully keeps US troops from harm's way, and plays the artful dodger with the Declaration of War Clause and the War Powers Resolution.

New priorities, harder choices

Among those pushing for a more tempered foreign role is Michael Mandelbaum, director of the American Foreign Policy Program at the Paul H Nitze School of Advanced International Studies (SAIS) at Johns Hopkins University.

'The growing fiscal burdens the United States will have to bear will impose restraints on foreign policy,' says Mandelbaum. 'In the coming cash-strapped era, I recommend that the country continue its active role in Europe, East Asia and the Middle East, while cutting back on the kinds of military interventions leading to nation-building that have become common in the post-Cold War era, from Somalia to Iraq.'

Mandelbaum notes that during the first two post-Cold War presidencies, the US militarily intervened in Somalia, Haiti, Bosnia, Kosovo, Afghanistan and Iraq. Motives varied, but the resulting nation-building efforts were frustrating

– relevant institutions are not quickly created – and were not a hit with the US public.

The US role – often that of 'the world's de facto government' supplying needed services many governments can't – will be hamstrung by a loss of support from an increasingly strapped US public, says Mandelbaum. 'America will do less, and international relations will be transformed.'

Already, the economic role is shifting. Mandelbaum notes that Americans are no longer the world's consumers of last resort for buying other countries' exports. The dollar remains the world's principal currency, but if confidence

in America's economic dependability wanes, that status may depend on the lack of a viable alternative.

Mandelbaum, who wrote *The Frugal Superpower: America's Global Leadership in a Cash-Strapped World*, sees downsides including a reduced ability to serve as a buffer among nations not actually hostile to each other, but that harbour fears hostility might bubble up. For example, reassuring Western Europe that Russia can't intimidate.

Drawing down US forces in

Asia may increase nervousness among countries in that region that have depended on the US to counterbalance historical tensions. Antagonisms between Japan and China still linger.

In other words, a reduced American role has its perils, as 'there is no other country or group of countries willing or able to do what the US does around the world,' says Mandelbaum.

On the other hand, there are alterations in US domestic behaviour that might get more consideration because they can have international consequences, says Mandelbaum. 'There is no single measure that could make the world less dangerous than substantially reducing the consumption of oil.' He advocates a sharp increase in the gasoline tax as the easiest way to achieve that and to promote alternatives, a comparatively affordable and worthwhile sacrifice that would sustain some American clout even as its foreign policy retrenches.

Spare a dime?

Ultimately, the projection of global influence comes down to wealth. When America goes broke, it really isn't all about the economy. Consider a few bellwethers of America's long-term prosperity.

US external debt – private and public debt owed to non-residents – exceeds US\$14 trillion, more

Domestic paralysis and gridlock undercuts our capacity to deal with our domestic problems and take on a leading world role,'

Dr Zbigniew Brzezinski
US National Security Advisor to
President Carter

than the entire European Union owes. The sorry cha-cha played out over the congressional vote to raise the US debt ceiling served to undermine US financial credibility and the image of America as the safest harbour in stormy seas. The US ranks last in its current account balance – its net trade. China, Japan and Germany are top-ranked.

Civil rights struggles aside, America once revered public education as an egalitarian hallmark. It sent millions who served in the military during and after the Second World War on to higher education – vastly expanding the skills and productivity of its workforce and the overall quality of middle-class life. Now Americans are watching its educational accomplishments wither. Of 34 OECD countries, in the past decade and a half, the US education ranking has fallen from the top to the middle, and below average in maths. Reading proficiency of 15-year-olds in China, which not long ago had over half its citizens below the poverty line, is better than those in the US.

The slide in education will have profound effects on America's future workforce and wealth. If the US could bring its students up to the average performance in Finland, now the top ranked education system, it would reap a gain of US\$103 trillion over the lifetime of those born in 2010. There are few signs of that happening amid the budgetary slash and burn.

Even more embarrassing is health care, the cost of which impoverishes countless families. Americans spend the most on care, yet their health care system is ranked 37th, and access for many is elusive. Costly ailments, such as diabetes, are expanding as rapidly as waistlines.

Bridges to nowhere, or anywhere – just fix them

Investment in a nation's future infrastructure is another bellwether of future clout. In the 1950s, President Eisenhower launched a national highway system that may have doomed Route 66 but ultimately put America in high gear. Well-planned, long-term infrastructure planning has since fallen from political grace. The World Economic Forum published a report that ranks the quality of American infrastructure as 23rd in the world.

The deterioration in existing infrastructure is so profound that the estimate for getting roads, bridges, water lines, sewage systems and dams back to adequate condition is over US\$2 trillion, according to the American Society of Civil Engineers. The US is spending less than 40 per cent of what is needed to meet basic infrastructure needs.

Embarking on such repairs would, of course, stimulate the economy and of employment, but it remains unlikely. There is a proposal in Congress, known as the Build Act, for an independent national infrastructure bank that would be modelled after the Export-Import Bank, which turns a profit. The government would provide a modest level of seed money, perhaps US\$10bn, and the bank would start lending on portions of projects, bringing in other investors, from sovereign wealth funds to global pension funds. According to a bill proponent, Senator John Kerry, in the US the private sector currently provides only six per cent of the nation's infrastructure funding. Global investors in infrastructure development invest in other countries.

Contrast US infrastructure lethargy with other nations now starting to stride the world

National Security Advisor speaks

Dr Zbigniew Brzezinski served as US National Security Advisor to President Carter, and was instrumental in normalising relations with the People's Republic of China and brokering the Camp David Accords. He recently took questions at the SCIS Global Security Forum 2011. Here are some excerpts of Brzezinski's comments and reflections on international affairs:

On the impact of the debt crisis: 'Where are we headed as a solitary actor?' Brzezinski wonders. 'How do we get out of the debt issue, into which we've slid as a kind of indirection? Domestic paralysis and gridlock undercuts our capacity to deal with our domestic problems and take on a leading world role.'

On the Arab Spring: 'We can assist nations as they change themselves, perhaps we can help in Egypt. But let's not go in and tell Egyptians how to suck eggs. They have their own sense of self and culture, we can't impose on that.'

On the Middle East: 'We didn't enter the Middle East as a major power until after WWII,' notes Brzezinski. 'We were welcomed with open arms. All of that is changing... every relationship is now pointed in a negative direction one way or another.'

On Israel and Palestine: Brzezinski describes 'the persistence of the Israeli-Palestinian conflict, which makes people in the region think we're not serious about solving it.' He says the two sides ignore the potential of a two state creation becoming the Singapore of the Middle East, a lost opportunity. This failure 'works terribly against our interests'.

On Iran: 'If we don't engage in politics that encourage the fusion of Iranian fundamentalism with Iranian nationalism, the theocratic movement will be transitory. It's based in the more backwards rural areas, and Iran is urbanising.'

On the importance of America: 'We don't have an intelligent discussion in this country about America in the world. One is desperately needed if we are to play a role in the world, which is necessary, because without us the world is going to be far more unstable.'

stage. According to Kerry, Brazil invested over US\$240bn in the past three years, with US\$340bn planned for the next three years. Europe's infrastructure bank financed US\$350bn from 2005 to 2009. China's 2009 infrastructure spending was nine per cent of GDP, or US\$350bn, and grows at a rate of 20 per cent annually. The US spends less than two per cent of its GDP on infrastructure. In the next five years, China plans to spend a trillion dollars on infrastructure. India is now completing a half-trillion-dollar highway phase and will double this by 2017. By 2014, Brazil will spend US\$900bn on energy and transportation projects.

Every year, the American economy bleeds US\$80bn just from blackouts on outdated transmission grids and traffic-jams. Like Sherman McCoy, the anti-hero of Tom Wolfe's *Bonfire of the Vanities* and the epitome of the fallen 'Masters of the Universe', America is 'haemorrhaging money!' As Federal, state, county and city budgets become paralysed in the new era of austerity, proposals for alternative financing sources for essential projects ought to gain widespread support. Kerry points out that capital is fluid and what doesn't flow to America flows to its competitors. And yet, as deficit negotiators argue about how many IOUs can dance on the head of a pin, the successful creation of even a modest national infrastructure bank is by no means imminent or certain.

How to humble the last superpower

Mark Shields is a former Marine who was an operative for Robert F Kennedy and other Democratic Party icons. He has provided weekly analysis for PBS's award-winning *NewsHour* for 23 years. Asked what upended US foreign policy, Shields answers, 'America went to war against a nation that had never attacked America, represented no serious threat to America, and had done no harm to America. For the first time in 160 years, America went to war *without* a military draft and *with* multiple tax-cuts.'

A study just out from Brown University's Watson Institute for International Studies pegs the cost of US military action in Iraq, Afghanistan and Pakistan at US\$3.7 trillion, perhaps rising as high as US\$4.4 trillion. There will be at least a trillion dollars in interest payments and expenses. Of this year's likely US\$1.4 trillion deficit, a tenth is from war spending.

'The growing fiscal burdens the United States will have to bear will impose restraints on foreign policy,'

Michael Mandelbaum
Director, American Foreign Policy
Program, Johns Hopkins University

The memory of pain

Perhaps the burn from Iraq and Afghanistan has been bad enough to reinstate what

Shields calls the 'Dover Test – if the American people are prepared for the sight of young Americans in flag-draped coffins coming home to Dover Air Force Base – a test Bush finessed by banning photographers and press.'

Marvin Kalb, a diplomatic correspondent during the Vietnam War who was promoted to Nixon's 'enemies list', and his daughter, Deborah Kalb, have just published *Haunting Legacy*. It's

On post-cold war missed opportunities: 'We blew it after 1991, when we were universally seen as the victor state in a peaceful but long Cold War. We were hailed as the economic model for the world. Then we took a leave of absence from global responsibility. Our society became preoccupied with domestic concerns. We failed to seize our opportunity.'

On America's recent excessive aggression: 'we became warriors with a distorted view of reality, driven by concerns and fears, instead of a realistic view of the international scene. We push countries to cooperate, but they're not there out of conviction. Foreign policy in recent years is a mishmash of over-militarism, unilateralism, demagoguery and deception, to put it mildly.'

On ill-conceived interventions: 'A foreign army in a fundamentally different culture and religion is not an instrument for creating a nation,' observes Brzezinski. 'A country already exists, a foreign army can't change that unless it crushes the country.'

On the future: 'I don't expect a dramatic reversal,' says Brzezinski. 'The combination of our insecurity, our lack of understanding of the world, and the absence of serious alternative leadership is a problem confronting us for some time to come.'

On Obama: 'the speeches of Obama are fundamentally, historically correct. He understands what is needed, and how the world is changing today. What is lacking on his side is systematic, strategic implementation of his strategic analysis.'

On the Republicans: 'On the other side, there is the absence of any alternative vision, (only) a rejection of Obama's, and very irresponsible tangents by would-be presidential candidates,' says Brzezinski. 'Foreign policy prescriptions range from mystical to idiosyncratic to escapist to simply ignorant. Looking at some of the comments by potential candidates leads people to wonder if our country is in a state of some sort of delirium.'

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The Fruits of America's efforts in the Middle East

For American weavers of foreign policy there's no solace in a poll released in mid-July, assessing the Arab world's view of the United States. According to the Arab American Institute (AAI), favorable attitudes doubled with President Obama's election, reinforced by his Cairo speech. They are now in free fall. Obama's favourable ratings across the Arab world are 10 per cent or less. The poll found that in five of six Arab nations surveyed, America was less well regarded than Turkey, China, France or Iran. Instead of giving plaudits to the US for efforts in the post-Arab Spring environment, there is primarily resentment over 'US interference in the Arab world', seen as the greatest obstacle to peace and stability in the Middle East, second only to the continued Palestinian occupation.

When *IBA Global Insight* asked AAI president James Zogby how a majority of those surveyed could disapprove of the US killing of Osama bin Laden, a serial mass murderer who attacked the US and targeted innocents. Zogby says the revealed attitudes 'have nothing to do with support for bin Laden, they have to do with his killing not being germane to issues of higher concern. After the context of the Iraq war, any display of American power is not well received, even though public attitudes toward bin Laden had turned negative long before his death.'

Zogby said that another survey under way reveals that Iran's behaviour in the region is 'seen as decidedly negative, with Iran viewed as a regional menace'. But when compared with the US, Iran is still viewed more favourably, and the Arab world would react strongly against the US if it bombed Iran.

'The region paid close attention when the Prime Minister of Israel lectured President Obama after Obama's May 22 speech affirming the need for a two state solution with an independent Palestine,' says Zogby. 'When Benjamin Netanyahu was then immediately invited to and cheered by Congress, it made America's Government appear dysfunctional, as did Congressional attacks on Obama whenever he did outreach to Muslims.'

After the high initial expectations for real engagement and progress in Palestine, this dysfunctional image makes people believe America can't deliver what it promises, says Zogby. 'The survey numbers are a statement of the disappointment.' To have influence in the Middle East, Zogby says 'the White House has to show it is decisive enough to resolve the Palestinian conflict without being hamstrung by Congress.'

their measure of the lasting impact of America's harried 1975 exit from what LBJ called a 'raggedy-ass little fourth-rate country', and from the first war the US lost. Despite George Bush Senior's proclaiming the 'Vietnam syndrome' dead after the first Gulf War, the Kalbs maintain that the 'Vietnam syndrome' is alive and well, impacting policy-makers and presidents in the 36 years since, including Obama. No President wants another failure on his watch.

No easy cure

In any case, the leader of the free world is busted. David Stockman, director of Ronald Reagan's Office of Management and Budget, articulated it on a recent radio programme, 'We have both parties in denial about the huge magnitude of this problem... we're really rolling the dice if we think there's indefinite patience in the global bond market for us to continue to issue six billion of new debt, day in and day out.'

Despite his time in the Reagan administration, Stockman eventually disowned supply-side economics and the marriage of large tax cuts

with large deficits. He advocates 'a massive retrenchment of a defence budget that makes no sense at US\$800bn in the world that we live in today. This is an obsolete approach to our security.' Stockman says Obama should call in 'the whole national security establishment' and demand 'a five-year plan to take down spending by 20 per cent, by hundreds of billions a year.'

Senate Appropriations Committee Chairman Daniel Inouye recently made the point that defence and other war related costs – adjusted for inflation – have experienced substantial growth of 74 per cent, or US\$364bn, since 2001. In contrast, taking into account inflation and population growth, non-defence discretionary spending represents no increase over what was spent in 2001, a year in which the US generated a surplus of US\$128bn.

Domestic political forces are weighing in against foreign interventions. In a major shift, there's a growing split in the Republican Party, with increasing numbers embracing a more isolationist viewpoint. Meanwhile, the US Conference of Mayors – a group influential with the Democratic Party, and concerned about the US spending US\$2.1m on defence every minute – recently passed a resolution to end the wars as soon as strategically possible and to shift those dollars to domestic economic investment.

An understudy for Uncle Sam

Institutions created to help provide a counterweight to the Soviet Union and balance during the Cold War are now less relevant. And it's not just the US defence role that's under pressure. At his last policy speech as US Defense Secretary, delivered in June in Brussels, Robert Gates left little doubt about his concerns of imbalanced burdens among NATO countries.

'While every alliance member voted for the Libya mission, less than half have participated at all... Frankly, many of those allies sitting on the sidelines do so not because they do not want to participate, but simply because they cannot. The military capabilities simply aren't there'.

Speaking on Afghanistan, Gates noted, 'Future US political leaders, those for whom the Cold War wasn't the formative experience that it was for me, may not consider the return on America's investment in NATO worth the cost.' This is particularly likely given that the US share of NATO expense has gone from 50 per cent of NATO spending during the Cold War to 75 per cent now.

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Diplomatic dispatches

Dennis Hays capped a diplomatic career by serving as ambassador to Suriname under President Clinton. He now runs The Emergence Group, advising on matters such as justice sector reform and anti-corruption policies in emerging nations. Hays notes that, as in most areas, 'perception plays a major role in how much influence and credibility a nation has. A nation perceived to be dynamic, aggressive in advancing its agenda and willing to take risks often has things go its way – how could it not? If we are talking about counter-terrorism or the projection of military might we are talking about the United States. If we are talking about economic, commercial, or intellectual force we are talking about China.'

However increasingly, Americans are not feeling particularly dynamic. A June CNN poll found nearly half of Americans believing it 'very' or 'somewhat' likely another Great Depression will land within a year. So, if the US military projection is adjusted? 'The United States can appropriately be much more aggressive in promoting American business,' says Hays. 'And not just the Fortune 500 businesses, but also the medium and small businesses that can and should be exporting and manufacturing internationally.'

Needless to say, even when the US was flush with cash, it often missed the right bets and plays. Michael Ussery served as ambassador to Morocco under George Bush Senior. He laments the isolationist cries in Congress and recalls missed opportunities in post-communist Europe. 'The West told the new nations that democracy and capitalism would bring them the lives they wanted and wished them good luck. We figured our interests were served as long as communism was gone. Some of these countries still suffer from failed transitions. With a more hands-on approach, East Europe might have escaped the corruption and mafias that have been hallmarks of certain nations.'

A new narrative, a new signal?

Last Spring, a 'Mr Y' published a paper calling for 'A National Strategic Narrative'. Mr Y turned out to be a pseudonym for two senior members of the Joint Chiefs of Staff: Navy

Captain Wayne Porter and Marine Colonel Mark Mykleby. They decried the way America sets its priorities, relying far too heavily on military as the primary tool for engaging the world, while missing the vital connection between foreign policy and domestic policy. To become the most influential player in a deeply inter-connected global system, say the authors, America must invest less in defense and more in sustainable prosperity. The paper caught the attention of policy wonks and think tanks because such papers are rarely launched to the surprise of the powers that be.

'America went to war against a nation that had never attacked America and had done no harm to America. For the first time in 160 years, America went to war without a military draft and with multiple tax-cuts.'

Mark Shields
Analyst, PBS NewsHour

Last century's designs for containment required controlling events through deterrence, defence and international dominance in a closed system. Porter and Mykleby now perceive an open system constantly disrupted by unpredictable events. As control is elusive, the goal now is building credible influence by investing in sustainable domestic resources like education, energy, agriculture and infrastructure. The authors underscore that it is no longer a world of zero sum competition – China doesn't have to lose for America to gain – but one of interdependence that exacts a penalty for overreacting to perceived threats.

Steve Clemons of the New America Foundation believes power is a function of future expectations. If so, the rising challenge to American influence may be the expectations Americans have for themselves. Last year a *National Journal* poll found nearly half of Americans thought China the world's strongest economy. But though China has six times the population of America, America's economy is two and a half times as large.

If, as Porter and Mykleby contend, America's future influence depends on domestic prosperity that allows the nation to lead by example, Americans have some work to do at home, starting with how they view their country. ☒

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Not so intellectual property

Backed by Obama and hailed as a panacea for unemployment, the overhaul of America's intellectual property regime has proven popular, but could nevertheless turn out to be a dramatically wrong turn.

SKIP KALTENHEUSER

Touted as 'historic' and as 'a jobs-creating bill', the Leahy-Smith America Invents Act passed Congress by huge margins, radically changing the US patent system. President Obama embraced the bill, signing it on 16 September. How regrettable.

'Historic', yes, in gutting the core concepts of US patent law brilliantly enshrined in the 1787 Constitution: 'The Congress shall have power...To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and *Inventors* the *exclusive Right* to their respective Writings and Discoveries.' [author's emphasis] As the close of the American Revolution coincided with the dawn of the Industrial Revolution, those dictates built the mother of invention, a national patent system that transformed the US economy into the world's mightiest and most innovative.

'Jobs-creating', only if retitled the Patent Lawyers Full Employment Act, while confronting the inevitable chaos. But those jobs will be fleeting, once the new system ultimately tears down the value of patents.

The primary driver of the bill is Senate Judiciary Chairman Patrick Leahy, who's been pushing such changes for many years. The

primary driver of Leahy is computer giant IBM, the most important employer in Leahy's state of Vermont. The Director of the US Patent and Trademark Office (PTO), by the way, is David Kappos, IBM's former Vice-President for Intellectual Property Law, who lobbied for similar changes while at IBM – a spin of the revolving door.

Forgive the broad strokes on this complex topic, but chief features include switching America's unique 'first to invent' (FTI) system to a more European 'first to file' (FTF) system, which some claim is of dubious constitutionality. There are also increased opportunities to challenge a patent's validity after it's been granted.

Paul Michel, the former Chief Judge of the United States Court of Appeals for the Federal Circuit – the judicial turf charged with patent cases – is so alarmed that last year he resigned his lifetime appointment to sound warnings on the bill. That's dedication rarely sighted in Washington. Michel says, '[I can] guarantee that if I went into private practice I could hold up any patent for almost a decade in post grant proceedings; it would never reach trial in district court.'

What is the worth of a patent that goes nowhere before it's obsolete or invented around?

Even now, the average time to get a patent granted is already approaching four years, unless applicants can afford to pay extra fees to move up the examination queue.

Michel scoffs at claims of job creation. With a backlog already at 1.2 million applications, he says aspects of the law will further slow the granting of patents. Moreover, Michel figures that attempting to make a go of the new system would require the PTO to pick up another hundred judges and another thousand patent examiners. That won't happen with a PTO starved of funds, after years of Congress raiding the patent fees that might otherwise fully fund PTO needs. Congress still holds the purse strings.

David Boundy, Vice-President for Intellectual Property at Cantor Fitzgerald, sees a number of other changes that combine with FTF to create the perfect patent storm. Cumulatively, they will bedevil the reliability of patents while increasing pressures on smaller entities and driving up their costs throughout their run down the patent gauntlet. For example, there's the grace period that, under FTF, allowed inventors to pitch their creations to multiple potential investors – such as a room full of angels – without losing the right to perfect and file their patents within a year of the sales pitch or publication.

Under FTF, the scope of that grace period is now greatly diminished, with the new complexity and expense of 'provisional patents' after initial disclosure of an invention, for intermediate steps prior to deciding on a final patent. No one really knows how that will play out. Under the new law, it's unlikely the Wright brothers could have patented their flight inventions once they made them public flying their plane at Kitty Hawk, says Boundy. Large companies, of course, have no such problems discussing their inventions and calling their financial shots in-house.

Boundy also notes ambiguities in a sloppily written bill that will have 'cases interpreting the law going to the courts for twenty years before lawyers really know how to advise clients.'

Although some university groups have expressed support for the new law, Chris Gallagher, Senior Policy Director at New Venture Advisors, thinks many will rue the day. Gallagher works with clients involved in early-stage innovation, including scores of university technology transfer folk. 'Most understand the flaws in the new grace period, but were told by superiors not to speak out,' says Gallagher.

Expanded use of 'prior user rights', which elevates trade secrets over patents, insulating

companies who've kept their technologies secret from having to pay royalties, also concerns Gallagher. 'With patent reliability weakened, private investment in patent-supported start-ups will diminish, foreclosing for many the choice of using the independent start-up business model. Now schools seeking to build their research programmes won't get traction.'

For startup companies, the American market remains the main event. As net job increases in America come from startup companies, calling this a 'jobs bill' is a sad joke. Abraham Lincoln described patents as adding 'the fuel of interest to the fire of genius.'

Beyond the implicit deal of sharing knowledge with the world, patents are about capital formation that allows newcomers into the game. That's why established companies like IBM and Microsoft work so hard to knock back the value of patents for potential competitors with disruptive technologies, says Gary Lauder, of Lauder Partners venture capitalist firm.

'Without reliable patents, investors will take fewer risks,' says Lauder. 'The US gets ten times the angel and venture capital of Western Europe – which recently declared an "innovation emergency", so why are we harmonising with them? They should be harmonising with us. FTF forces a race to the PTO, which favours large companies with superior resources, as does post-grant review, which creates opportunities to delay patents and bleed small companies. These problems have suppressed small-entity innovation in Europe and Japan, and will do so in America.'

For startup companies, the American market remains the main event. As net job increases in America come from startup companies, calling this a 'jobs bill' is a sad joke. Abraham Lincoln described patents as adding 'the fuel of interest to the fire of genius.'

Where's the sizzle now? ☒

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After the awakening

Tunisia has been praised for initiating a transition of momentous regional and global significance. But justice in the birthplace of the Arab Spring is more complex than attention-grabbing headlines reveal, and everyone has a role to play.

TOM BLASS

It is a nondescript building, notwithstanding garlands of razor-wire and the permanent presence of armed guards. When *IBA Global Insight* asked a bystander to confirm that this was indeed the Tunisian Ministry of Justice, he laughed, 'only for the powerful!'. And yet on 20 June, it was the turn of a man whose shadow, only six months ago, had loomed over all the ministries, indeed the whole country, to complain that justice had been skewed. After the Tunisian High Court sentenced (in absentia) its ousted former president Ben Ali to 35 years' imprisonment, the verdict was greeted with jubilation and tears of joy.

Attempting to draw a line beneath 23 years of despotic rule, judge Touhami Hafi reached his decision after only six hours of deliberation. Summary justice indeed. Inevitably, Ben Ali's lawyer called it a 'joke'. But it worried some

of those that say that if the due process of law lacks credibility, justice will be both prolonged and undermined.

Nizar Najaf of the Tunisian Ministry of Justice said that there was nothing untoward about such a swift verdict in criminal cases in Tunisia. The judge, he said, was free to act as his conscience dictates. He added that were the defendant in the dock to be cross-examined and to present evidence on his own behalf, the process would have taken very much longer, and that in the event of Ben Ali successfully being extradited, he would have an opportunity to ask that the proceedings be begun again. 'This is the law in Tunisia,' he added.

Nonetheless, the rapidity with which the court reached its verdict jars with remarks made by Tunisia's General Prosecutor Mohamed Sharif (number two in the Ministry) in an interview

with *IBA Global Insight* only a few days before the trial, that justice in the post Ben Ali era would be free from political interference.

Transitional issues

Tunisia is, in both the literal and also the populist figurative, sense of the term, in a difficult place. There is a war on its doorstep. The government is transitional, and until elections later in the year (already once postponed and at the time of writing scheduled for 30 October), lacks a clear mandate from an increasingly dissatisfied population for whom justice is rapidly coming to be as much about employment and meeting basic needs as it is political freedom and human rights. Security is also a fear, and Tunis at night is subdued, its streets largely empty.

In the midst of rising discontent and hunger for change, the entire legal establishment must also undergo a transition – and one that will not be without pain. ‘We were in a difficult position under Ben Ali,’ one lawyer said. ‘On the one hand we had a vocation as lawyers to uphold justice. But Ben Ali and his entourage also used the judiciary as his ‘right arm’, an instrument with which to achieve his desired ends,’ and, he added, those that refused to be so used paid a price.

Knowing the extent of interference during the *ancien régime* is difficult. Mohamed Sharif insists it was limited to political cases, ie, those that involved union leaders, student and political activists or critical academics and journalists – but that good quality justice was dispensed in most others. ‘The problem was that there was no category of “political” cases; they were always only treated as common crimes.’

‘The regime... used people against each other – in a sense, everybody was made to feel that they were guilty, even if the crimes were actually against them. Connections were everything. There was always a deal that had to be done in order to get on in life.’

A female Tunisian lawyer

But the effects of cronyism were more pervasive than that. Key to having power was knowledge. One young, female lawyer remembered how ‘the regime was extremely smart. They always had something against you. And they used people against each other – in a sense, everybody was made to feel that they were guilty, even if the crimes were actually against them. Connections were everything. There was always a deal that had to be done in order to get on in life.’

Legal privilege?

While there’s been little blood spilt in the so-called Jasmine Revolution, quietly, scores are being settled through a process called ‘*dégagement*’, ie, the disengagement of individuals seen as having been dangerously close to the regime by institutions including universities, schools and law firms. Gathered in the offices of the bar association (one room off a corridor of others in the bustling Palais de Justice), a small knot of magistrates



was discussing changes since the revolution. One hot topic of discussion was the story of a lawyer, accused of having been a personal representative of 'the clan', who has opened up a vendetta with the head of the bar association.

One barrister told me that her brother had been killed in the demonstrations in January and she was awaiting news of a trial date for his killer, a former police officer now in detention. It was a salutary reminder that despite its privileged position, the legal profession and its members are not at a remove from the events that shake the world of the everyday.

In another office, that of the Association of Tunisian Magistrates, the shared concern was the fate of members whose refusal to kowtow to dictats from either the Ministry of Justice or from individuals within the '*pouvoir*', had earned them internal exile to far flung court rooms in distant towns and provinces, far from their homes and 'out of harm's way'. One said, 'In August we find out whether our applications to return home will be successful. But everything is very uncertain. Nobody knows what will happen.' It is this sense of uncertainty that pervades everything in Tunisia currently, and is set to do so until a government is elected that has a mandate, and the blessing of the electorate.

'Revolution lite?'

In late June, at a swanky hotel in the Mediterranean resort town of Ghardames, the Tunisian Investment Authority held its first international investment forum since the overthrow of Ben Ali. Tunisia needs investment urgently, both to reassure existing investors that their operations remain secure, and to

encourage new investors to give the country a chance. While ministerial limousines and shade-wearing security details waited in the forecourt, a succession of grandees appeared to congratulate themselves and each other on the blossoming of the Arab Spring. 'The sweet smell of jasmine is now wafting across the whole of North Africa and the Middle East,' said Tunisia's interim president, to the applause of international investors, briefly looking up from their BlackBerries.

But it was easy to forget that sole credit for the overthrow of the Ben Ali regime belongs to the country's people, fed up with depotism, but also with the complacency of powerful institutions and individuals, both in Tunisia and abroad, whose complacency had allowed it to flourish for so long. A bowdlerised revolutionary rhetoric punctuated the event. This was not the place or time for banners or chanting, but glossy brochures extolling 'a new Tunisia – New Opportunities', lavish buffet meals over which to discuss contracts, and long-winded speeches extolling Tunisia's many virtues: a highly-educated workforce; openness to the international community; and a desire to move onwards and upwards as the country finds its feet.

Unravelling 'Le Labyrinthe'

The vast majority of the foreign investors in the country, with factories and plants in sectors from textiles to aeronautics, had been established years before when the prospect of political change was almost unthinkable and when the price of doing business was 'cooperation' with the 'entourage', the circle close to the President, and in particular



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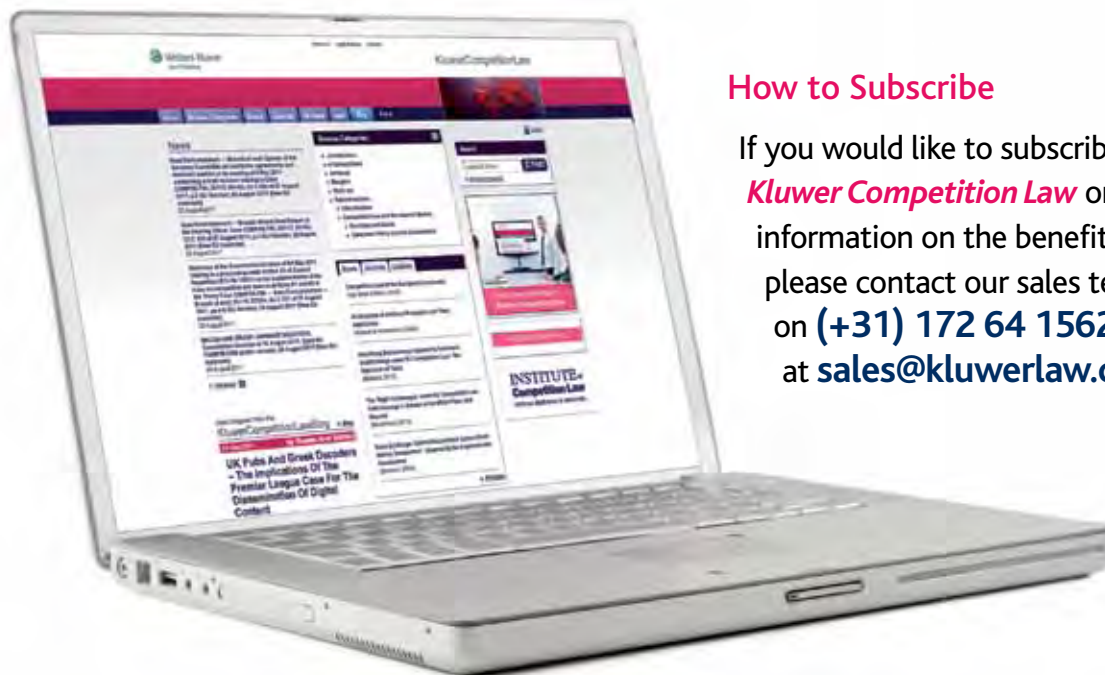
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his wife's family. Many are now attempting to undo their involvement with the past by 'letting go' of managers and employees whom they say were imposed upon them and who now stand to damage their reputations in the New Tunisia.

In March, a law was passed obliging the government to confiscate assets belonging to the presidential entourage. Newspaper headlines have described the byzantine confusion of its fingers-in-pies as 'Le Labyrinthe', extending to 285 companies valued at billions of dinars of assets and employing around 1,500 people. To a large extent, this mostly affects domestic companies, but foreign investors are also caught up in this process of grand-scale 'dégagement.'

For example, in early 2010 (the spring before the Arab Spring), Orange Telecom announced,

'It is this sense of uncertainty that pervades everything in Tunisia currently, and is set to do so until a government is elected that has a mandate, and the blessing of the electorate.'

to much fanfare, a major joint venture project in Tunisia with a local subsidiary of the Mabrouk group, Investec. Orange had a 49 per cent stake in the resulting entity: Orange Tunisia. A year later, Investec's assets were confiscated by the government; the company had been owned by the President's daughter and son-in-law.

Orange's stake remains unmolested, the government being unlikely to do anything that might dislodge such a strategic and important investor as the French telecoms company, the presence of which not only provides much needed investment but an important global brand with which to attract others. One speaker at the conference urged foreign companies to 'take the risk now – don't defer your investments until you see the signs of political stability. The opportunities are now'.

Uneven progress

It's certainly true that the challenges are immediate. Unemployment rates among young people are around 30 per cent. Among graduates that figure is 45 per cent. Foreign direct investment in industry dropped 23 per cent in the first quarter of 2011 as against the comparable figure for 2010. And since the ousting of Ben Ali, 41 companies have shut up shop, mostly in response to industrial unrest.

The government, planning minister Abdul Hamid Triki told reporters, had taken emergency measures to create some 40,000 new jobs in all sectors, and in particular to address the economic disparity between the relatively wealthy, developed, coastal and eastern regions of the country, and the languishing southern and western areas.

But among the conference speakers, Mustapha Nabli, the governor of the Central Bank, was the most forthright and realistic. Tunisia's precarious social economy he said, could quite conceivably get worse. 'Soon, new graduates will be entering the job market. They will be searching for jobs which do not exist.' There are, he intimated, huge political pressures on a government that, as yet only exists in nascent form. Nor did he shirk from reminding the international community of its obligations to the country that it has repeatedly praised for initiating a transition of momentous regional significance.

Tunisia has had pledges of cash. At the G8 meeting at Deauville, on 27 May, the G8 members announced a 'partnership' under which multilateral development banks are prepared to raise US\$20bn for Egypt and Tunisia by 2013, while the EU and the US say that they are committed to assisting Tunisia in the long term in their own respective capacities. But, said Nabli, it wasn't going to be enough. The war on Tunisia's eastern border was 'not of Tunisia's doing,' but is proving expensive: in part because it's bearing the brunt of a refugee crisis. But there are also important revenues lost as Tunisian migrant workers return empty-handed, with little prospect of domestic employment. Without sufficient compensation, said Nabli, the Arab Spring in Tunisia may yet fail to blossom into summer.

And if the revolution falters in Tunisia, what hope is there elsewhere? Tunisians are educated, secular and international in outlook. The religious and ethnic faultlines that so blight other Middle Eastern and African countries are remarkable by their absence. Despite all the problems besetting it, it is in pole-position to become the model of a democratic state in the Muslim world. But it's going to need help, if the ordinary Tunisians that own the revolution are to get the justice they deserve. And justice is not the sole responsibility of the Ministry that bears its name. ☒

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From democracy to development

Elections are becoming the norm not the exception in Africa, but if this is to positively influence development, ensuring that those who win power deliver on their pre-election promises is the major challenge for states across the continent.

KAREN MACGREGOR

Last year, 13 African countries staged largely peaceful elections and this year there are more than two dozen national-level polls being held in some 20 countries, more than ever before. Violent conflicts are down, electoral turnouts are impressive, and there is popular support for democracy and a growing civil society voice. Turning democracy into development, however, could prove considerably more difficult and governance and leadership have been identified as key challenges facing Africa in the decades to come.

'Elections have become the norm, not the exception in Africa', write Jakkie Cilliers, Barry Hughes and Jonathan Moyer of the Institute for Security Studies in Pretoria, in a report *African Futures 2050: The next forty years*, published early this year. While during the 1960s and 1970s Africa averaged only 28 elections per decade, by the 1990s this had grown to 65 per decade and between 2000 and 2005 there were 41 elections.

There has also been an increase in free and fair polls, indicating that the electoral process is strengthening with the holding of more elections. While electoral legitimacy remains low, it too is improving; losers have been more willing to accept outcomes and peaceful elections have become more frequent, write Cilliers, Hughes and Moyer.

Nevertheless, a recent World Bank report argues that accountability – 'ensuring that politicians and civil servants do what they say they will do' – is Africa's major governance challenge. Political leaders seek to retain power by dispensing money and access to resources rather than delivering public goods and services. Parliaments and courts have

often not been able to provide the checks and balances that are necessary to restrain poor governance, says Africa's Future and the World Bank's Support to it.

It has been a tumultuous year so far. Peaceful popular uprisings in Egypt and Tunisia, and South Sudan's relatively smooth referendum and independence from North Sudan in July, have been high points. Violence in Côte d'Ivoire after a contested presidential election, and the rebellion in Libya, have been troughs. Nigeria's April elections delivered mixed results: the International Crisis Group reported in September that while the country somewhat broke its cycle of deeply flawed polls, there were still 'serious problems' including questionable majorities and extensive violence that claimed more than 1,000 lives.

Still, research has shown widespread popular demand and support for democracy across the continent, that 'Africans value democracy both as an end and as a means to improved government policies, performance and social well-being', and that people see democracy in procedural as well as substantive terms. Turnout figures are encouraging and both popular and elite participation are rising, with opposition parties competing more at the polls and strategic boycotting waning.

'Popular understandings of democracy are based on liberal notions and include the protection of civil rights and liberties, participation in decision-making, rules for elections and electoral participation. Africans, therefore, believe civil liberties are essential, central to their overall quality of life,' African Futures 2050 reports. 'There appears to be a wholesale rejection of the failed political systems of the past'.

Despite these gains, the authors stress, there are concerns over the depth of democratic attachment, 'preferences for democracy coexist with pockets of authoritarianism' and there is not total rejection of authoritarian rule. Also, while people support democracy as the best form of government, 'relatively few are satisfied with the way it actually works. Citizens demonstrate disappointment with the supply of democracy and policy outputs by their governments, and disappointment with the performances of elected representatives.'

One in four elections have been affected by violence, there has been election rigging, limited transition from ruling to opposition parties and a number of elections have ended in stalemate and a negotiated government of national unity, write Cilliers, Hughes and Moyer.

Democratic gains in Africa have been welcomed. But there is no evidence that democracy leads directly to economic growth and development – although globally, rising per capita income has been shown to relate to greater democracy. Economic growth is more closely linked to other aspects of improved governance.

For this reason, the focus on Africa has been shifting from promotion of democracy to concerns about the quality of governance. It has been argued that improved governance is a precondition for development, with governance including democracy and the protection of rights, the rule of law and low levels of corruption, and the efficiency and quality of policies.

The World Bank believes Africa's governance challenge is acute for three reasons. First, it has a large number of fragile states (20 of the world's 33 most fragile) with extremely weak public sectors. Second is political instability, with too many contested elections followed by crises and conflict (Kenya, Zimbabwe and Côte d'Ivoire in recent years) and lingering instances of coups and non-democratic transfers of power (Guinea, Mauritania, Niger and Madagascar). Third is the 'resource curse' of resource-rich countries, which have experienced widespread corruption and civil conflict.

But while the link between democracy and development is ambiguous, says African Futures 2050, it is widely accepted that democratic institutions improve 'developmental governance' including economic policy, public sector effectiveness and reduced corruption. There is also evidence that accountable governments are better at dealing with challenges and better at allocating scarce resources towards development, for instance in health and education.

'And while the relationship between democracy and economic growth may be

poor in the short term, over time democracy generates electoral incentives for politicians to compete by advocating redistribution and expanded welfare commitments.'

Human security is crucial to good governance and development, and here too the news is mixed. In the past decade there has been a dramatic decline in violent conflicts in Africa, thanks largely to peace support operations. By mid-2010, eight out of 16 UN peacekeeping operations and 103,000 personnel were in Africa. The African Union has set up an African Standby Force, and last year some \$5.7bn was spent on peace support in Africa.

'Regional, pan-African and global forces are all at work to see the continent through its socio-political transitions. There is good reason to be cautiously optimistic that this critical element of the development process will mostly continue to change positively.'

On the other hand, says African Futures 2050, there are disruptive forces facing the continent. 'Movements to urban areas may bring improvements in economic activity, but also can be destabilising. While militarised violence has decreased, crime has increased. The impact of the drug trade through West Africa will also have increasingly disruptive impacts. And climate change may give rise to increased migration and conflict.'

The problems of armed conflict and state fragility are unlikely to disappear but they are likely to decrease, as per capita income rises across the continent. Ultimately, security will depend not only on states but also on the resilience of societies to change. 'The good news is that key foundations of such resilience, including human development, economic growth and better governance, appear likely to strengthen,' write Cilliers, Hughes and Moyer.

Ironically, the development process itself is reinforcing old challenges, including conflict over the wealth that commodity production generates, and it is giving rise to new challenges. 'Yet domestic, regional, pan-African and global forces are all at work to see the continent through its socio-political transitions. There is good reason to be cautiously optimistic that this critical element of the development process will mostly continue to change positively.' ☒

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Azizah al-Hibri

The founder and chair of KARAMAH – Muslim Women Lawyers for Human Rights was appointed to the US Commission on International Religious Freedom in June 2011. Here she shares her views on women's rights in the Middle East, the developments and implications of the Arab Spring and Western perceptions of the Muslim world since 9/11.

RUTH COLLINS

In March this year, over the course of some of the most turbulent days in recent Egyptian history, US-based charitable and education organisation KARAMAH – Muslim Women Lawyers for Human Rights – conducted three workshops in Cairo. While many other organisations would have shied away from tackling contentious issues on Egyptian soil during this period, KARAMAH took the opportunity to bring together hundreds of scholars and intellectual leaders to discuss Islam, the rule of law and women's rights in the country's capital.

During her lecture on the rule of law in the Middle East at the Salzburg Global Seminar on 26 August, KARAMAH's founder and chair Dr Azizah al-Hibri described Egypt as historically the 'undisputed leader of the Arab world'. Although Egypt's revolution has been largely hailed as a success story following the resignation of President Hosni Mubarak after 18 days of relentless protests, there is still much speculation over what Egypt's future might hold. In our interview, al-Hibri explains why she thinks Egypt has strong prospects for reform: 'Egypt has a better chance than some of the other countries [in the Arab world], in particular because it has a good group of educated men and women... who have historically been active in the educational and constitutional processes throughout the Arab world and are also well-acquainted with the West.'

Nonetheless, perhaps contrary to Western preconceptions, Middle Eastern countries such as Egypt and even Syria dispel 'the stereotype of Muslim women being oppressed, uninformed and restricted to the home,' notes al-Hibri. 'In countries such as Egypt, Lebanon or Syria, this idea just doesn't work. Damascus and Syria in general have been known not only for educated women but also literary women and women in leadership. In fact, Syria has actually always been pretty strong on women's issues and the women's unions have found ways to fight oppressive cultural practices.' She cites a clear example that dates back some 20 years when female peasants in the Syrian countryside were actively encouraged to keep pay cheques and thus gain financial independence from their husbands.

Potential roll back

However, in spite of the seemingly positive steps that either Egypt or Syria have made in terms of women's rights, she is quick to point out that reform, in the case of Egypt, or a regime change, in the case of Syria, may have adverse effects on women's rights issues. In terms of Egypt, al-Hibri fears a potential 'backlash' on women's issues, somewhat similar to what followed the assassination of President Muhammad Anwar al-Sadat in 1981,



when certain laws referred to as 'Sadat's laws' were repealed. A newly-proposed custody law has become an increasingly contentious issue in Egypt, and was one of the issues covered in KARAMAH's workshops in Cairo. The proposed law gives the father the right to host his child overnight during the visitation period. Some women activists are concerned about this law and the opportunity it may provide the father to remove the child from the country. Additionally, some calls are being heard to revoke the khul' laws, which were passed a few years ago and gave the woman a reasonably unfettered right to divorce her husband. Although al-Hibri agrees that some aspects of the custody law should be revised and reviewed to allow for all potential misuse, she warns that these debates could signal the potential for a 'roll back', which could, in turn, have a detrimental effect on the progress of women's rights in Egypt. In August 2011, a coalition of feminist organisations reportedly sent a petition to Deputy Prime Minister Ali al-Selmy which called on the government to include women in the committee that will draft the new constitution. It still remains to be seen whether women will be consulted on this matter or not.

As al-Hibri suggested during the session at the Salzburg Global Seminar, in order to truly understand the true causes and implications of the Arab Spring and what it means for the rule of law in the Middle East, the West needs to reject preconceived ideas, 'redefine its view of Islam and re-educate itself about the Islamic world'. As she explained, living in a globalised world has made this all the more essential: 'We are a global village now and we know that policies based on wrong assumptions tend to have bad consequences. So perhaps it is time to look at each other more realistically and accurately, and this can only happen through knowledge, not through stereotypes.'

Al-Hibri cites Simone de Beauvoir's concept of 'I and the Other' as not only an apt way of describing the hierarchical relationship between men and women, but also a useful way of examining what happens in the dynamics of the balance of power among nations. 'The West is now basically the 'I', or perceives itself as the 'I', although things are now changing in terms of its relationship to the rest of the world,' she stresses. 'So it

hasn't really invested much time in finding out truly what the Muslim world is about, what Islam is about and what the Middle East is about.' On the contrary, she points out that the Muslim world and the Middle East have, partly through colonisation and also partly through education, become rather familiar with the West.

Moreover, although the Arab Spring has demonstrated and arguably highlighted the widely differing challenges and problems facing different countries across North Africa and the Middle East, there is still a tendency to generalise and treat the region as a whole rather than focusing on the particular issues at stake in each country. 'What is happening around the Middle East cannot be analysed in one fell swoop,' urges al-Hibri. 'There are different forces at work and they will have different results on the ground.' While we wait to see how the human rights and

women's rights situation develops in each country, she stresses the need for the West not to fall into the trap of resorting to stereotypes, but to try and understand better what is happening 'on the ground' in each country in the present day.

'Egypt has a better chance than some of the other countries in the Arab world, in particular because it has a good group of educated men and women.'

Post 9/11

Ten years on from the attacks on the World Trade Center, which claimed the lives of almost 3,000 people, there are many suggestions

that attitudes towards Muslims and Islam itself have steadily worsened. While this is evident in the gradual rise in inflammatory rhetoric about Islam in the US, particularly in political circles, there have also been certain policies implemented that pose greater restrictions on American Muslims. One prime example is the increased rules on charitable giving that have caused charities and fundraising organised by American Muslims to be subjected to repeated federal investigation into suspected links with terrorism.

A recent report by the Charity and Security Network indicates that counter-terrorism measures introduced since 2001 have had a discernibly negative impact upon charitable organisations and have directly led to the closure of six American Islam charities. In terms of investigations, it cites the case of Texas-based Muslim charity KinderUSA, which was subjected to federal investigation in November 2004. Despite no initial charges



'The West must redefine its view of Islam and re-educate itself about the Islamic world... policies based on wrong assumptions tend to have bad consequences.'

being filed, the charity's annual donations fell from US\$1.6m to US\$250,000 between 2004 and 2005 following the publication of a number of media reports alleging potential terrorist connections. As this case demonstrates, Western media itself has also been complicit in clouding Western views of Muslims and Islam simply to get a story. As al-Hibri notes, here lies the challenge to Western media to evolve from a 'business that requires grabbing the attention of the reader every two minutes... to change into something that is educational.'

As al-Hibri notes, one of the main bones of contention here is that the increased rules preventing them from fulfilling their religious obligation to give *zakat* ('alms giving') have made Muslims feel that they have been restricted in a way that other religions have not. Under Islamic law, *zakat* requires any observant Muslim in possession of a certain level of wealth to make an annual donation to charity. Therefore, as President Barack Obama highlighted during his historic speech in Cairo in June 2009, 'Rules on charitable giving have made it harder for Muslims to fulfil their religious obligations. That's why I'm committed to working with American Muslims to ensure that they can fulfil *zakat*.' However, as the 2009 'Blocking Faith, Freezing Charity' report conducted by the American Civil Liberties Union suggests, the 'chilling effect' of terrorism-finance laws on Muslim communities in the US in the wake of 9/11 has resulted in a worrying number of American Muslims feeling unable to find a so-called 'safe' Muslim charity to donate to without fear of being the subject of a federal investigation themselves. 'We do understand that there are national security issues and certain things that need to be done,' acknowledges al-Hibri, 'but we also understand that there should be a balance between security and liberty interests and we feel that that conversation has not been developed sufficiently in the US.'

The ongoing discussion of Sharia Law in the US has also fuelled much inflammatory debate. In November 2010, 70 per cent of voters in a referendum approved a proposal to ban the use of Islamic law in courts in Oklahoma. In June 2011, Tennessee enacted a law that granted the state attorney general the power to designate Islamic groups suspected of terrorist activity as 'Sharia organisations' and sentence those suspected of practising Sharia law for up to 15 years in prison. Anti-foreign law statutes have been introduced in as many as 20 other states. Al-Hibri is clear that the American Constitution is supreme in all US courts, regardless of what religious law is presented before them. She notes, that the anti-Sharia laws are essentially 'trying to ban Sharia out of the courtroom, without really trying to understand how and why it (or any other religious law) may have entered the courtroom, and what the significance of such a ban would be for other religions and how any religion works when it goes to court.'

As with the issue of charitable giving, al-Hibri firmly believes the media itself has played its own role in muddying the issues for Americans, when it comes to Sharia Law and how it is perceived in the US. In an effort to reject this 'Frankenstein' image that has been perpetuated by the media, KARAMAH will be hosting a series of town hall meetings this autumn across the US, which will bring together both Muslim and non-Muslim Americans to tell them about Sharia and explain how it enters the US courts. 'The new laws are essentially saying that Americans do not want any Islamic law, ie, Sharia law, in US courts. If they go through, this will also make things very complicated for other religions as it would mean the law is treating one religion differently to others and that would make it unconstitutional,' she says. In fact, the organisation will also be inviting Jewish and Christian scholars to attend the meetings so they can explain how these religions also enter the courtroom. The debate on Sharia law has revealed that there are many non-Muslim Americans who fear that Islamic law is overtaking American law, but this 'is completely unfounded,' according to al-Hibri. A firm advocate of discussion, dialogue and education being the best way to counteract fear, she hopes that the meetings will go far to dispel myths about Islam and Sharia law.

Where there's a negative, there's always a positive

Although 9/11 has certainly had a negative impact on Muslim communities in the US, al-Hibri believes there are also some positives that

The IBA in the Middle East, North Africa and other Islamic states

The International Bar Association's Human Rights Institute (IBAHRI) has covered an extensive range of projects and programmes in the Middle East, North Africa and other Islamic states. The IBAHRI is looking to expand its work within the region and recently undertook a scoping mission to the Middle East and North Africa, to conduct an initial assessment to place an IBAHRI representative in the region.

In July 2011 the IBAHRI released a report documenting the repression of freedoms of the people in **Syria** and of those trying to assert them, examples of political interference in the courts, and an overall lack of judicial independence in the country. The IBAHRI delegation arrived in Syria the week that popular unrest began to spread across the country. The mission report, widely disseminated to UN bodies, national and international governmental and non-governmental organisations, legal organisations and other stakeholders, makes specific recommendations to the Ministry of Justice, the Ministry of Social Affairs and the Syrian Bar Association.

In 2011 the IBAHRI also undertook a high level fact-finding mission to **Egypt**, to examine the role played by the legal profession and the Egyptian Bar Association in upholding the rule of law and defending human rights. A report detailing the findings and recommendations of the mission will be released shortly.

In **Afghanistan**, an IBAHRI legal specialist, based in Kabul, has provided technical legal assistance to the Afghan Independent Bar Association (AIBA), as part of a long term capacity building programme. The AIBA has gone from strength to strength since its establishment in 2008 and this year will hold its second General Assembly (GA).

The IBAHRI has a longstanding working relationship with the **Iranian Bar Association**, organising regular legal aid workshops, study visits and training in human rights and the administration of justice for lawyers and judges.

In early 2011, **Moroccan Parliamentary Members** and Staff attended an IBAHRI workshop, in conjunction with The Westminster Consortium (TWC), to mark the release of the IBAHRI/TWC handbook on parliamentary strengthening. The Handbook is a practical reference tool for parliamentarians and parliamentary staff on upholding the rule of law and strengthening the implementation of human rights obligations, using case studies from the six TWC countries, Morocco, Georgia, Lebanon, Ukraine, Uganda and Mozambique.

should not be forgotten. Shortly after 9/11, President George W Bush visited the Islamic Center of Washington to meet with Muslim leaders and this was widely viewed as an effort to reach out to the American Muslim community. President Obama's visit to Cairo in 2009 also did much to reinforce this message. However, away from politics, according to al-Hibri, another lesser-known positive aspect to come out of 9/11 is the growing numbers of American Muslims entering the legal profession.

As she explains, prior to 9/11, well-to-do American Muslims traditionally encouraged their children to go into fields such as medicine and there was a distinct lack of American Muslims in the legal profession. All too aware of the lack of a Muslim voice in US society, during her lectures al-Hibri would often tell American Muslims, 'If you have two children, kindly sacrifice one to the law profession,' she laughs. She notes that since 9/11, however, 'there have been droves of Muslim students graduating from law schools and going to work in respectable law firms, governmental jobs, and non-profit organisations and doing extremely well.' She adds: 'I think that, as time passes, more of these voices will be heard and will help to dispel any kind of stereotypical view of Islam that existed, to some extent unopposed, beforehand.'

As a further means to dispel myths or stereotypes about Islam and Islamic law and to empower women within the Muslim community itself, every summer KARAMAH invites around 20 Muslim women from around the US and the world to workshops at its headquarters in Washington, DC where they have the opportunity to meet and discuss issues with faculty members

from across the US who offer their time and services free of charge. 'The workshops tend to last three weeks and the participants are about half Americans and half non-Americans. The women are amazed at the cultural differences between them,' enthuses al-Hibri. 'They realise that Islam has many faces and they open up their minds as to how to understand their religion better and affect change in their community.'

These sessions and KARAMAH's overall work is of lasting benefit, believes al-Hibri, since the organisation aims to teach 'not just Islamic law on an equitable basis but also leadership, what it means to be a female leader and what kind of skills you need to develop and also how you can bring these back into society and make changes.' Although many things are uncertain in the Middle East right now, as long as political instability continues, the role of women and their leadership capabilities will become increasingly important in the Arab world in the coming years and organisations such as KARAMAH will do much to enlighten both those in the West and in the Middle East itself on protecting and promoting women's rights and human rights as a whole. ☒

For further information on KARAMAH – Muslim Women Lawyers for Human Rights, please visit www.karamah.org.

Ruth Collins is a freelance journalist and was invited to attend Session 480 'The Rule of Law in a Globalized World' as a Knight Fellow at the Salzburg Global Seminar, 23–28 August 2011. For more information on Salzburg Global Seminar, please visit www.salzburgglobal.org.



Time catches up with Gaddafi

History tells us that the hard work begins now for Libya. Like Egypt, the country has rid itself of a regime that used terror to oppress the population, but Egypt's stagnation reminds us that the road to recovery is never easily travelled.

ANDREW WHITE

Colonel Muammar Gaddafi used to carry with him a selection of gold watches, each of which featured a picture on the dial of the Libyan dictator saluting in full military regalia. The timepieces were handed out to Gaddafi's staff, as well as members of the entourages of visiting dignitaries – a memento of their time in the presence of the self-styled 'King of Kings'.

The clock is now ticking on the last days of the dictator, and those in possession of a watch will likely see its value soar once Gaddafi is run down or gunned down. The latter seems more likely: Gaddafi has said that he will fight until Libya is 'engulfed in flames', and continues to blame 'international forces' for the violence which brought his regime to its knees.

His defiance echoes that of Hosni Mubarak in February this year. 'We will not accept or listen to any foreign interventions or dictations,' the then-president insisted, the

day before he stepped aside and six months before he was wheeled on a hospital bed into a Cairo courtroom, charged with corruption and conspiracy to commit murder after the deaths of more than 800 protestors.

Both countries had become synonymous with state violence, government corruption and widespread poverty. Now, both countries have rid themselves of regimes which used terror as a means to oppress their peoples over decades of autocratic rule. But as Libyans look forward to a future without Gaddafi, Egypt's stagnation reminds us that the road to recovery is never easily travelled.

Since February and the resignation of Mubarak, Egypt's private sector has been suffocated into unconsciousness. There is a witch-hunt underway against organisations perceived to have benefitted unduly under the previous regime, which means that former titans of industry spend more time

looking over their shoulder than looking forward. While this is going on the military-appointed interim government appears uncomfortable engaging too closely with private sector investment, and the country's once-dependable banks have clammed up as restrictions are placed on credit, transfers and other everyday commercial processes.

As of 15 September, the EGX 30 index, which tracks the performance of the top 30 stocks on the Egyptian Stock Exchange, had seen almost 40 per cent wiped off its value year-to-date. Compare with another bourse battered directly by the Arab Spring: on the same date the Tunis Stock Exchange was down just 12 per cent since the turn of the year and the ousting of President Zine El-Abidine Ben Ali.

In Syria, even as President Bashar Assad attempts to silence pro-democracy demonstrations with gunfire and the thunder of tank tracks, the Damascus Securities Exchange is down 47 per cent. That means there's just a seven per cent gap in stock market performance between a country in which the UN estimates more than 2,600 people have already been killed in ongoing attacks by their own government, and another whose own revolution was supposed to have ended in victory as far back as 11 February.

The International Monetary Fund forecasts economic growth of just 1.4 per cent in Egypt in 2011; in September, the country slid to number 94 of 142 countries featured in the 2011–2012 Global Competitiveness Report, down 13 places from last year. This economic malaise is underpinned by the fact that eight months after Mubarak's fall, the private sector is still waiting for promises to be honoured by the interim government: the scheduling of presidential and parliamentary elections, constitutional change limiting presidential powers, and the establishment of a fully independent judiciary. Instead it faces the rise of political Islam in the form of the Muslim Brotherhood, a provisional government hamstrung by indecision and apparently preoccupied with score-settling, and a media frenzy which is fanning the flames of mob rule on the streets.

Adding to the sense of frustration is the fact that Egypt had charted an effective course through the storms of the global economic crisis. As the country embraced the market economy and welcomed foreign investment, so GDP growth increased from 4.5 per cent in 2004 to 7.2 per cent in 2008, before continuing to grow at an average of five per cent from 2008 to 2010. While his counterparts around the world were reeling, Mubarak was one of the few leaders whose macroeconomic

strategies earned him praise rather than opprobrium. The problem was that his ruling elite had no intention of sharing the wealth – GDP may have been on the rise, but the lot of the average Egyptian was not.

Of course, Libya need not suffer the same fate, and has a number of advantages over its North African neighbour. The National Transition Council has stressed cooperation rather than coercion, and has international

The fear is that the rebels will find themselves without a common cause once Gaddafi has been hunted down.

support from a coalition which includes Arab countries as well as the US and European powers. Most state structures remain largely intact: police forces have been retained and administrators kept in place to ensure the continued running of essential services. And there will be oil money, once foreign workers are allowed back in to assess the damage done to facilities by weeks of exposure to armed rebels, looters and government forces.

But while their country is unlikely to suffer the sectarian violence which has plagued Iraq, for example, Libyans cannot take for granted that the toppling of their dictator will guarantee prosperity or even peace. Quite apart from the fact that fighting is still ongoing at strongholds loyal to Gaddafi, the new government then faces the delicate task of disbanding heavily-armed brigades of rebels and restoring security to a country riven with regional factions. The most effective way to do that will be through economic growth: job offers and opportunities for the disenfranchised peoples of Misrata and Benghazi.

History tells us that the hard work begins now for Libya. The fear is that the rebels will find themselves without a common cause once Gaddafi has been hunted down. But the country cannot afford to prioritise political bloodletting above economic regeneration: Egypt's myriad woes suggest that time is not on Libya's side, any more than it proved to be on the side of the 'mad dog' of the Middle East. ☒

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Code of misconduct

'Transparency' was a recurring refrain during the Murdochs' parliamentary testimony in July, yet many questions on the phone hacking scandal remain unanswered. As global corporate governance laws strengthen, *IBA Global Insight* asks how accountable and transparent multinationals – and the lawyers who advise them – really are.

REBECCA LOWE



It's only when the tide goes out that you discover who is swimming naked,' Warren Buffett famously observed. Now, following one of the biggest scandals to hit the media world, the Murdoch empire seems highly at risk of exposing a slew of skinny dippers among its ranks, from editors and investigators to politicians and lawyers.

Described by some as Britain's Watergate, the phone-hacking saga does not look like going away any time soon. Rupert and James, certainly, must be worried about their future at the company. Despite their protestations of innocence and ignorance during the Commons Culture, Media and Sport Committee questioning in July, the pair seemed scantily clad beneath the waterline. They did not know about widespread phone hacking; they did

not know about bribery of police officers; they did not know about legal bills being paid for former royal correspondent Clive Goodman and private investigator Glenn Mulcaire, both of whom have served prison terms for unlawful phone interception.

With the hang-dog dolour of a Shar Pei puppy, Murdoch senior offset responsibility onto those he 'trusted': 'They let me down and behaved disgracefully. They betrayed the company and they betrayed me and it's for them to pay.'

Yet who pays may not ultimately be for Murdoch to decide. Under the US Foreign Corrupt Practices Act (FCPA), his avowed ignorance is no excuse; News Corporation as a corporate entity could find itself culpable for bribes paid to UK police officers simply

for failing to maintain an adequate system of internal accounts and records, risking a US\$25m fine. Had the UK Bribery Act been retrospective, the company would almost certainly have fallen foul of its corporate provisions too, which require companies to have 'adequate procedures' in place to prevent overseas bribery.

The company's internal auditing system is just part of the story, however. With its hybrid CEO/chairman structure, dual voting share system and cosy clique of none-too-independent directors, it is clear that accountability is not News Corp's forte. Investors may well be wondering whether a family fiefdom lauded over by an octogenarian czar with minimal oversight is the most efficient way to run a business – especially a czar who blames everyone but himself for a scandal that threatens to engulf his entire empire.

Indeed, whether News Corp is fit for purpose is a question no doubt being asked by law firm Harbottle & Lewis, which found itself projected brusquely into the limelight after Murdoch accused it of making a 'major mistake' when it found no evidence of widespread phone hacking at News of the World in 2007. Released from its shackles of client confidentiality, Harbottle fought back, making clear that its remit was limited solely to Goodman's employment dispute and not intended to cover wider instances of criminality.

Few would deny Harbottle have a case for disgruntlement, and there is nothing to suggest the firm did anything untoward. Yet the issue is far from black and white. For some, unease surrounds the role of lawyers where large multinational clients are concerned, and valid questions remain to be asked. Namely, are counsel always bound by the confines of their remit, even if excessively restrictive? Should a contract be terminated if there is evidence of suspicious activity or criminality beyond this remit? And should the board of directors ever be approached in such a situation?

In short, where is the line between good client relations and legal ethics – and does any clear line truly exist?

Corrosive corruption

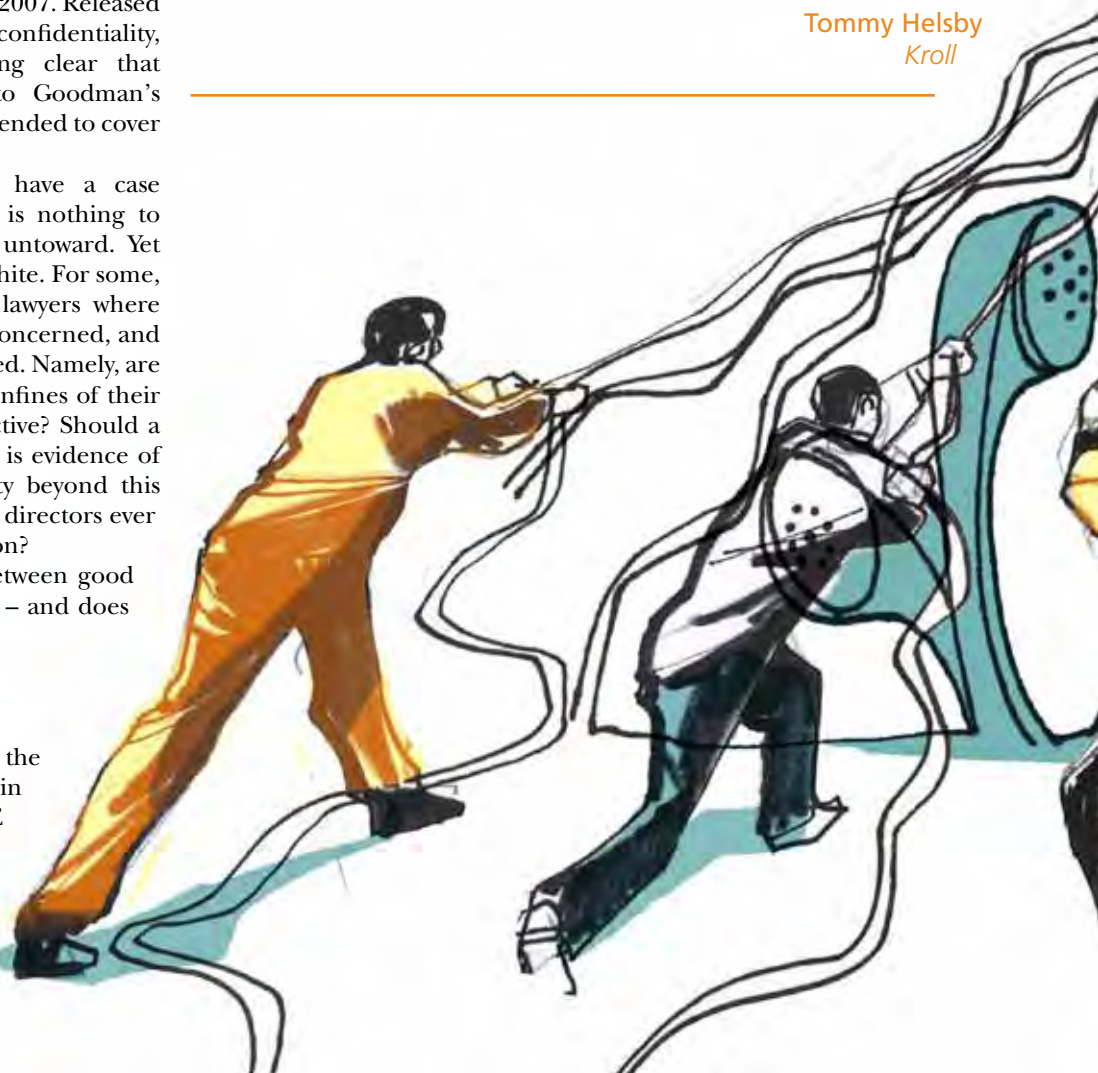
If News Corp does find itself on the wrong side of the FCPA, it will be in fairly prestigious company. BAE Systems, Halliburton, Daimler AG and Siemens are just a few of the corporations forced to pay hundreds of millions of dollars in settlements and penalties for alleged corruption in recent years.

The Act, which makes the bribery of foreign officials by both US citizens and corporations unlawful, may have been around since 1977, but it is only now that it is really finding its feet. From 1998 to 2000 there were six enforcement actions under the FCPA; from 2008 to 2010 there were 91.

With the UK Bribery Act coming into force this July, making any company that 'carries on a business or part of a business' in the UK liable for overseas corruption by its employees, it is perhaps understandable that the corporate world is rushing out to buy itself bathing trunks. Add the OECD Anti-Bribery Convention, which entered into force in 1999, and the United Nations Convention Against Corruption, which did so in 2005, and it suddenly seems the world is closing in on 'white-collar' corporate criminality.

'Ten years ago, even five years ago, compliance was a backwater. Now the position has transformed.'

Tommy Helsby
Kroll



'Ten years ago, even five years ago, compliance was a backwater,' says Tommy Helsby, Eurasia chairman at Kroll. 'It was very much: if you can, do; if you can't, teach; and if you can't even teach, become a compliance officer. Now the position has transformed.'

Freshfields partner Paul Lomas, who specialises in commercial and financial services litigation, believes the business world is experiencing a 'sea-change' in anti-corruption enforcement. 'When a company as reputable as Siemens has to pay US\$1.4bn, it makes everyone sit up and think. Couple with this the fact that business is internationalising, and you have business driving you to risky areas while regulators force you into a more conservative area. It's changing the way clients conduct their business.'

Bribery, once viewed in some regions with a wry smile and shake of the head, is swiftly becoming a global pariah. Whereas other regulatory measures, such as the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, are seen by many Americans as unnecessarily restrictive – and indeed have split the political sphere to near breaking point – the FCPA has had hardly a negative word said against it. Corruption is corrosive, it has finally been agreed among consumers and corporates alike, undermining development

'If transparency and accountability are missing you will eventually get big problems.'

Matt Orsagh
CFA Institute

and economic growth. For evidence, one need look no further than the tattered finances of Greece, where each person paid an average of US\$1,830 in bribes in 2009 for public services, according to a study by Transparency International (TI).

'Every region has committed to corruption being rooted out,' says Neill Stansbury, co-founder of the Global Infrastructure Anti-Corruption Centre and former head of TI UK's anti-corruption initiative in the international construction industry. 'You can no longer say it's a cultural or economic issue; it is purely seen as a criminal issue.'

Yet some feel the corporate world needs to go further. Good governance, they say, is not concerned with the lower common denominator of legality, but with an ethical 'best practice' regime that cuts across jurisdictions. As chair of the TI Business

Advisory Board and former PwC global managing partner, Jermyn Brooks has had feet in both camps and feels strongly on the matter. 'It is not just an issue of legal compliance, it is an issue of compliance with a set of principles that are applicable everywhere you operate. You have to have a set of standards that apply if you're going to be measured to a high level wherever you do business.'

With government regulation forcing change from above and the Facebook generation driving transparency from below, companies may find themselves subject to a pincer attack where there is no escape but compliance. Some multinationals are already ahead of the curve, busy developing multi-stakeholder approaches to a diverse range of corporate governance issues, from sustainability and corruption to investor rights.

Whether this means the beginning of the end for corporate bribery is perhaps another matter. The 2002 Enterprise Act has not seen an end to cartels, after all, and until cases begin to hit the courts the deterrent effect remains tantalisingly in the abstract. Yet the signs are hopeful. Brazil has ratified the OECD Anti-Bribery Convention, while Russia is due to join imminently; China and India have both signed up to the UN Anti-Corruption Convention; and in the Middle East, crooked dictators continue to be deposed by angry civilians whose patience has worn thin.

'It will take a long time to wipe out,' says Lomas. 'But if you cut the big, hi-tech civil engineering companies out of the game because the risk is no longer worth it, you start to create two markets: a clean market for global business and a dirtier market for domestic businesses. That is already a lot of progress.'

Keith Oliver, senior partner and head of commercial litigation and fraud at Peters & Peters, has a slightly more cynical view, however. 'You can have tightly controlled corporate behaviour in certain parts of the world – in the UK, the US, certain parts of Europe. But the suggestion it has to be uniform throughout the world is a fallacy. You are not going to change human behaviour overnight.'

Indeed, should corporate bigwigs suddenly retract their horns and grow halos, it is as yet unclear whether enforcement can live up to rhetoric. In the UK the budget of the Serious Fraud Office (SFO), responsible for overseeing the UK Bribery Act, has fallen 26 per cent since 2008–9 and is due to drop another 25 per cent to £30m by 2014–15. On top of this are 20 per cent budget cuts to the police. The plan, according to former SFO director Robert Wardle, is to get companies to self-report, leaving the government to go in

‘and beat up the odd one as an example’. But the idea, he admits, has limitations.

‘You have to have a system whereby self-reporting can be made to work. Whether there are the resources is a concern. At the end of the day, investigations are time-consuming and difficult. It will be a very nasty balancing act.’

Tone at the top

For Wardle, the Murdoch case could act as a ‘wake-up call’ for the UK to realise corruption is a domestic as well as an overseas concern. He admits that when he became director at the SFO in 2003, soon after the Anti-terrorism, Crime and Security Act had been updated to comply with the OECD Anti-Bribery Convention, he and his colleagues shared such naivety. They believed there would be ‘very, very few’ bribery cases to investigate, and even went as far as telling the Treasury to stop bolstering their resources. By the time Wardle left in 2008, there were over 50 cases on the books.

The SFO is currently assisting the US with their FCPA investigation into the phone-hacking scandal. Whether News Corp escapes prosecution will depend not only on whether those high up the chain had knowledge of police bribery, but also on whether their internal audit controls were sound and the books were clean.

‘There is something called Tone at the Top,’ says Richard LeBlanc, US law professor at York University and specialist in corporate governance. ‘Good boards have separate sessions with the external auditor without the CEO, and they ask about the internal controls over the material business risks of the company, including information technology. They would want evidence the code of conduct has been complied with, and whether there are adequate whistleblowing procedures.’

Yet audit systems are one thing; a transparent regime that extends right to the pinnacle of the corporate hierarchy is another. For the past six years, research company The Corporate Library has given News Corp an F grade on governance, on a scale of A to F. At first glance, three significant problems are apparent: Murdoch is both CEO and chairman of the board, meaning the directors owe their position to him; he owns almost 40 per cent of the class B shares, which are the only ones with voting power; and the board itself has the dubious distinction of containing a hat-trick of Murdochs – Rupert, James and Lachlan – alongside four current and two former News Corp employees. Of the seven other directors, Natalie Bancroft comes from the family that owns Dow Jones, which News Corp purchased in 2007, and two others – Thomas Perkins and

Shareholders bring corporate misconduct cases against News Corp

News Corporation is facing a costly lawsuit from three major shareholders alleging widespread corporate misconduct at the company.

The complaint, lodged in the Delaware courts, was filed by Amalgamated Bank, the Central Laborers Pension Fund and the New Orleans Employees Retirement System. Filed in September, it updated a claim filed in March, which objected to News Corp’s US\$615m acquisition of Shine, a television production company created by Rupert Murdoch’s daughter Elisabeth Murdoch.

The investors suggest Rupert Murdoch has been running his ‘own personal fiefdom’. They are seeking compensation for scandals that they believe have damaged the reputation and value of the company. Alongside the phone-hacking scandal at *News of the World*, the complaint includes allegations of wrongdoing at News Corp’s advertising arm News America Marketing (NAM), and at NDS, a company that manufactures satellite TV smart cards and which was until recently controlled by News Corp.

Lawyer Jay Eisenhofer, representing the claimants, says: ‘These cases establish a pattern of misconduct that extends far beyond the UK subsidiary. It demonstrates a corporate culture that allows this sort of misconduct to take place over a very long period of time.’

News Corp is yet to file a response to the suit and declined to comment when approached by *IBA Global Insight*.

NDS, which had James Murdoch on the board when the allegations first came to light, was alleged to have illegally extracted coded software from competitors’ cards. In court documents, Amalgamated Bank says NDS posted one of the codes on the internet, allowing hackers to break into broadcasts and inflict more than US\$1bn in damages on its rival.

NAM has reached settlements worth over US\$600m with three separate competitors. In a trial involving advertising company Floorgraphics, evidence was presented that NAM had broken into its secure computer systems at least 11 times between October 2003 and January 2004.

The investors also criticise the board for ‘improperly authorising’ a ‘Buyback’ scheme that could increase Rupert Murdoch’s control of the company’s voting shares to over 50 per cent ‘at no expense to himself’. He currently controls 40 per cent.

Kenneth Cowley – have both recently resigned.

A look at some of the most notorious scandals of recent years – Enron, Worldcom, Parmalat – reveals that a high concentration of power under one man is asking for trouble. ‘It is the perfect storm,’ says LeBlanc. ‘Do you think Murdoch would not have been fired if he had been the CEO of a widely held company with an independent board?’

Due to various ethical codes, in the UK it is rare to have a dual CEO and chairman role. In the US, LeBlanc estimates, around 50 per cent of companies have the roles combined. Changing such a structure seems unlikely to happen overnight, if at all – though many US companies have started employing a ‘lead director’, widely viewed as a compromise between the two systems, who chairs executive

sessions without the CEO present.

Dual share structures are more commonplace in Europe, and equally difficult to reform. If shares are sold on the basis the investor will have no control, it constitutes a transfer of value to suddenly endow those shares with voting rights. 'Attempts to flatten those shares have usually run into human rights problems because they are an expropriation,' says Lomas. 'And you can't expropriate people's property without compensation.'

Ultimately, where corporate governance is concerned, it may have to be investors who take the bulls by the horns and hold management to account. 'Think of all the blow-ups of the last ten years, from Enron to the financial crisis,' says Matt Orsagh, director of Capital Markets Policy at CFA Institute. 'Most of these arose from some kind of system where accountability was missing, whether that is a board not standing up to management, the board not understanding a company's risk profile or misaligned incentive structures etc. If you are an investor you want to understand those risks. If transparency and accountability are missing you will eventually get big problems.'

Legal ethics

If corporations are being told to take responsibility for their actions and put principle alongside profit, what about the lawyers who advise them? After all, they are at the centre of the compliance system, and perhaps know better than most where the grey areas of law and ethics lie.

'We often see lawyers "doing the minimum" in order to comply with regulation, whether it is in disclosure or compliance,' says Orsagh. 'This leads to disclosures that don't give the investors what they need, or

disclosures that are written in lawyer-speak and are obtuse to the average investor.'

Stansbury goes further. For him, lawyers have a duty not only to stakeholders but to society more generally. 'Lawyers should start playing a more vocal leadership role in raising their ethical standards. Ten years ago, very few UK lawyers paid any attention to the damage caused by overseas bribery by UK companies. On the negative side, I am sure that many lawyers played a part in assisting companies draft agency agreements that concealed bribes.'

Pressure on lawyers to bill more hours and bring in more clients is partly to blame, Stansbury believes, as it has helped create a 'corruption incentive' to overcharge, advise a client to go to court unnecessarily or avoid asking the difficult questions.

'Going out on a bit of a limb, I think there has been a drop in ethics in the legal profession in the past 30 years,' he adds. 'I'm not sure if that's true, but it's a feeling more than anything else. Lawyers have been very, very slow ethically.'

So where do Harbottle & Lewis fit in this debate?

Certainly, there is no suggestion that the firm gave misleading advice, nor acted against the Solicitors Regulation Authority Code of Conduct. As the firm points out in its stringent 24-page defence, its instructions comprised looking through five sub-folders of e-mails to see whether two News International employees (names redacted) knew

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Goodman's phone hacking and whether others were carrying out similar procedures. Following a two-week review, the firm reported that no evidence had been found.

Yet during questioning by the Home Affairs Committee in July, former Director of Public Prosecutions Lord Macdonald said he found 'blindingly obvious' evidence of bribes to police after studying the e-mails. Having been called in by solicitors acting for News Corp, Macdonald said it took him 'three to five minutes' to decide that the material had to be passed to police.

Whether a firm put in Harbottle & Lewis' position should have mentioned such extraneous material to News Corp or broken their contract with the company seems a matter of opinion. The firm declined to comment when approached by *IBA Global Insight* regarding this point. Indeed, it is quite possible they never even found such evidence, considering they were searching for something else. After all, Burton Copeland were brought in after the Mulcaire arrest in 2007 to conduct a far wider investigation, and – according to News Corp – found nothing either.

'It is hard to ask a lawyer to stand up with an X on his shirt and say, I think you should be disclosing more,' says LeBlanc. 'The client will simply fire the lawyer, internal or external, and find another. The system is not designed for that.'

Quite. Yet LeBlanc makes an interesting point regarding the nature of lawyer/client relations. Whereas ten years ago the Sarbanes-Oxley Act stipulated that the client of external auditors was not management, but the audit committee, and in 2010 Dodd-Frank outlined that compensation consultants' clients were not the CEO but a compensation committee, the exact nature of a lawyer's client remains to be clarified. 'Perhaps the client of independent counsel should be a committee of the board of directors. So if you become aware of wrongdoing you are obliged to go to them.'

Of course, for most lawyers this is a moot point. They are adamant their advice is good and honest; bad advice inevitably results in bad outcomes, not to mention possible charges of negligence. 'The legal world is not a campaigning organisation – that is the role of NGOs and activist groups', says Lomas.

Yet the idea of lawyers as potential crusaders persists. As former chair of the American Bar Association (ABA) Section on International Law and current vice-president of the World Justice Project (WJP), James Silkenat is a strong believer that lawyers have a responsibility to stand up and be counted. 'A variety of organisations – the International Bar Association, ABA, WJP, Law Society – have all played a role in keeping lawyers sensitised to what their special role in society is,' he says. 'I don't really see lawyers by and large as part of the problem; I probably see them as part of the solution.'

Problem or solution, when it comes to lawyers and their clients, it is being made ever more difficult to get away with underhand activity. And it may be high time for those who have spent years eagerly kowtowing to the emperor – whether Murdoch or equivalent – to finally turn around and admit he is clad in little more than a birthday suit. ☒

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Nicola Bonucci

Director for Legal Affairs, OECD

The OECD's mission is no less than to improve the economic and social wellbeing of people around the world. Eschewing a more lucrative career in private practice, Nicola Bonucci has been at the forefront of the organisation's efforts for nearly 20 years. This wide-ranging interview, conducted by Todd Benjamin, covers issues including responses to the financial crisis, corporate governance issues and the ongoing fight against corruption.

Todd Benjamin: First of all, I want to ask you, because you are the Director for Legal Affairs, how does that really tie into economic policy?

Nicola Bonucci: Well, yes, I'm a lawyer in an economic organisation, but I think the answer is twofold. First, law and economics are, in fact very closely linked, and more and more, there is a use of legal instruments, even to start or to instigate economic policies. Let me give you a couple of examples.

One area in which we are actively involved is anti-bribery. The OECD negotiated an anti-bribery convention in 1997, which is the first and unique supply side convention, and we are very heavily involved in that.

The secondary aim in which we are heavily involved nowadays is exchange of information, tax matters. You have treaties; you have exchange of information instruments. Again, there is a strong legal component, even though, clearly, at the end of the day, the outcome is an economic outcome.

TB: Here's something I find interesting, because you first joined the OECD in 1993. Before that,

you were with the UN's Food and Agricultural Organization, so you have never worked in the private sector. You make US\$125,000 a year. It's tax free, so that's plenty to live on, yet if you were in private practice, given your expertise in areas like corruption and bribery, you could be making easily US\$1m a year. What is it about this type of work, or public service work, that you find so interesting; and why is it that you're still committed to it?

NB: I think that's an excellent question. I think there are a number of reasons, but let me give you two, one which is the politically correct reason and one which is a maybe less politically correct reason. The politically correct reason is because I love public service. I believe that this is the only way, more and more, to make the agenda of the world moving. I mean, we can see every day that everything is interconnected. Everybody is interconnected. Every country is interconnected. And this idea that you could solve the solution on your own at your local level doesn't work. This is my main motivation.

There could be, I accept also, some part of maybe ego. It's very exciting to be there and



to be, you know, with the key decision-maker people trying to move an international agenda. It can be very frustrating also though, but it is very exciting.

TB: You mention the word frustration. Is your biggest frustration working in a multi-country approach?

NB: When you work in an international organisation, you have two parameters which are extremely different from working in the private sector; the speed of the decision-making and the result of the decision-making. The speed of the decision-making is naturally, necessarily longer, because I have at the end of the day almost 35 bosses. I have the Secretary General, but also each and every member country. And most of the decisions in the OECD are taken by consensus, and to reach consensus you need more time.

The second point is indeed the quality of the decision-making, which is sometimes the product of the consensus. And you can go back to my original idea; you can come with something which you know intimately well from a legal point of view is the ideal solution, but because of political reality, you will adjust to the limit of what is achievable.

TB: You are working in a global reality. We have globalisation; a lot needs to be decided among many countries, yet oftentimes, there are compromises which aren't effective, because you have to compromise even with small countries who want a voice. So is this really an effective way to have decisions made?

NB: This is an international debate in international law. It's very interesting to note that the organisation, the OECD, has been always working on the basis of consensus, even at the time of the OEEC, the predecessor organisation. And in my view, it's a bit of how much you front load and how much

you back load. I think the consensus is a lot of front loading, but then once you get a real consensus, you achieve a much greater degree of empowerment and acceptance of the consensus. If you go through more from a mechanism of decision-making, or even unilateral decision, yes, you can impose a unilateral decision, but how effective will it be? I'm not sure that consensus is less effective than a qualified majority, for example.

TB: We've been talking around it, but the bottom line is that you have peer reviews that are undertaken by the OECD. Your Secretary General, Angel Gurría, has described them as 'the genetic code of the organisation'. Could you explain exactly, without getting into too much detail, how this peer review process works; is it effective, and in which ways has it been most effective?

NB: The peer review processes are not done by the OECD per se, they are done by the member countries, and that's why it's peer. So how it happens is very simple. You have a policy which is assessed by your peers – all the other member countries. And the other member countries will decide that, for example, on this particular part of the policy they agree with you, and on this other part of the policy they have strong reservations, or they have suggestions.

What I think is great in the peer review process is that it is a way to ensure a coordinated approach, but which is done without not... it's the power of conviction and not the power of imposition.

Now, how effective it is. The effectiveness depends on two parameters: first, on the level of acceptance of the conclusions by the country which is assessed and we don't impose solutions, but we recommend, our members recommend.

The second is it's based very much on how much your arguments are based, and what is important in the peer review is that they are

'I think what we have learned first and foremost is that no crisis is identical to the previous one.'



based on experiences of other countries, on the fact that what you are trying today was tried before and didn't work, and those are the reasons. So in my view, if you look at an area like anti-bribery, the peer review process has been extremely effective to a level which to my surprise is even greater than I would have hoped.

There are other areas in which maybe it's less so, but at the end of the day, what is important is the fact that you have a process in which you are tested in front of your peers, and it is the judgment, the collective judgment of your peers.

TB: Let me give you a quote from your Secretary General again, Mr Gurría, and again, it's a bit long, but I think it's a very important quote. It says, 'OECD evidence-based analysis and recommendations serve as a way to support and leverage policy changes and rule-making at home, so in a sense, a support group. But formulating and adopting the best possible policies and international instruments is not enough, as we have learnt from this crisis', a very important point. One of the major challenges for international standard setting is ensuring compliance. It's one thing to formulate policy, it's one thing to do analysis; it's another thing to get compliance. Given your role, and since a lot of your recommendations are not legally binding, how effective can you really be as an organisation?

NB: The question of the legally binding nature of the OECD is not unique to the OECD, it is a question which is faced by all the other international organisations. Two points on that, Todd.

First, it is not strictly true that not all our rules are really legally binding, as I said. The OECD Anti-Bribery Convention is a legally binding instrument. We have the Codes of Liberalisation which are very important instruments in terms of international investment which are also legally binding. But you are right; most of our legal notes are not legally binding. They are what we call soft law.

Now the law can be soft, but the monitoring and the implementation of

the recommendations is not soft, and we go back to what I was saying. In the peer review process, the monitoring, the follow-up, ensures a level of understanding and acceptance and implementation which is probably much higher than the usual average in other international organisations.

TB: A lot has changed since you joined the OECD in 1993. You've seen several crises since you joined, be it the Swedish crisis, the Asian crisis in 1997/1998, the Russian default crisis, the dot.com boom and bust; and of course, the severest financial crisis that we're still living through now. What have you learned through all these crises, and what do you think as an organisation that you've learned; and as a result, how you've evolved?

NB: I think there have been two kinds of challenges. Yes, you are right. The OECD I joined in 1993 is radically different from the OECD of 2011, and we have expanded considerably. In 15 years, there have been ten additional members out of 34, so percentage-wise, it is a huge enlargement. We are much more diverse than we were, and I think one of the lessons learned by the crisis is that you need to encapsulate a more diverse position in order to have a more diverse analysis of what the situation is.

I think what we have learned first and foremost is that no crisis is identical to the previous one. I don't remember if it was Confucius who said, basically experience is a lamp that we have in our back, and it is true. We can see what the previous mistakes were, but not necessarily anticipate what will be the future. And the forms of the crisis have changed.

What we also have seen and learnt is that the economic balance has changed. When I joined the organisation in 1993, OECD member countries were representing more than 80 per cent of the world trade; they are now representing barely more than 60 per cent of the world trade; and if we look at the forecasts, 50 per cent in less than ten years' time. So the world has become much more diverse than before, and the organisation is trying to meet



this new challenge.

TB: But looking at it objectively from the outside, you look at the OECD, and you look at some of its members, key members like the United States, huge debt crisis. Other countries, you know, Portugal, Ireland, Greece, Italy, Spain, right at the heart of the crisis that we're having here in Europe. Given those crises in those countries, given that you give this analysis, how much credibility really does the OECD have when you have countries that have these sorts of problems?

NB: I think, Todd, this is a very valid question, but let's not focus too much on the snapshot picture. One has to look at economics in the medium/long term, and one has to look at, for example, the history of the organisation. When we had established the OECD, we had members like Spain and Portugal in the early '60s, I can tell you, they were everything but rich countries. We had Turkey, which until a few years ago could certainly not be characterised as a rich country. What the OECD has achieved is to bring up those countries, and the economic model of the OECD, the development model of the OECD, has proved to be successful for 50 years. We are now facing a real situation of crisis; I agree with you.

TB: It hasn't proved to be successful.

NB: Yes, it has proved to be successful for 50 years. Now the reason...

TB: Excuse me. How can you say that given the crisis these countries are in?

NB: Because you cannot discard what has been achieved in the 45 previous years. If you look at the level of development of Spain, as I said in 1965, and you compare it to now, even with the crisis you cannot say that Spain has not been

successful, or you cannot say that Portugal has not been successful.

Now there is a specific situation of countries, and in particular for OECD countries in terms of debt margin, you are right. The question is, and the difficulty that we are facing today is that we are facing in fact two crises. One is

the level of debt, and the other one is the level of growth. To solve those, it's very simple. You need to grow more. The difficulty is how to achieve that without jeopardising and creating further debt, and this is where it becomes very tricky for the OECD countries in particular to play with those two parameters.

But clearly, when you look at the macroeconomic situation and when you look at the social situation which is very important also in our countries, I think that one

of the main challenges, I know it's not the one that people are focusing on though today but it is maybe the main challenge that we should be focusing on, is the level of unemployment. If you raise the level of employment in OECD countries, you start to generate growth, to generate wealth, to generate expenses, to boost consumption, and to reduce the level of debt.

Now the question is how do we get back to the level of employment that we had before the crisis, and this is a real difficulty, and to be honest, I'm not sure we have a magical recipe. If I had, I would not make \$1m, I would make \$100m, and I would leave the OECD and join the private sector.

TB: A few moments ago, you were mentioning how the OECD has evolved over the years since you have joined in 1993 in terms of the number of countries and the trade that's represented, but when I look at the roster at the OECD, and I realise it came out of the ruins of World War II, there's still a heavy emphasis on Europe and under-representation of Asia and other continents in the OECD. If

Even China and India are approaching us. China and India are asking for our expertise in environmental areas, for example.'



I look at the Middle East, there are currently no members except Israel. So it doesn't seem to me very representative of the way that the economies are moving where there's a lot of emphasis on big countries like China, Brazil, India, Indonesia, none of whom are members of the OECD.

NB: No, I accept that. I accept that the OECD is... well, let's agree on something. The OECD will never be a universal organisation. I don't think it has a vocation to become universal. If we were to become universal, then we probably would become less useful and relevant. The question is how to get, indeed, a sample of countries which represents the variety of views and development model. And you are totally right, I think, and it is absolutely recognised by the Secretary General that we should become more open.

Now vis-a-vis the big countries, the big five countries that you mentioned, we have set up a programme which we call the Enhanced Engagement Programme in 2007. Those countries, yes, they are not members of the OECD at large, but they are more and more involved in OECD activities. A country like Brazil is a party to the Anti-Bribery Convention. It has adhered to the Guidelines for Multinational Enterprises. It has adhered to the corporate governance guidelines.

South Africa, ditto on the Anti-Bribery Convention. Even China and India are approaching us. China and India are asking for our expertise in the environmental area, for example. We have done an environmental deal with China and we'll probably soon be doing something for India. China and India are very interested in our green growth projects. So I think short of membership, there is a very close relationship between India and China.

But I think what we should also focus our attention in the future as OECD is not so much what we call the emerging countries, which have indeed emerged in fact already, but the future emerging countries. You know, let's try to see where are the Chinas, Indias, Brazils of the next ten years. And this is one of the interesting parts of our work, and we have some tools for that. We have a body which is called

the Development Centre, which includes a number of emerging markets like Vietnam, like Colombia, like some of the Caucasian countries, which are very interesting in terms of economic growth and development.

TB: Let me ask you another question about China, or a China-specific question. If it wanted to accede to the OECD, and it hasn't indicated it does at this point, what would your requirements be on China in terms of human rights and corporate governance?

NB: Let me take the easiest part of the question first, the corporate governance. In terms of corporate governance, it's very clear we have the legal instruments which are not binding but very important, which are the principles of corporate governance, including on state-owned enterprises. And in fact, we have done a lot of work, and the idea is that, if I can summarise, all enterprises should be governed according to a similar model and same model, be they state owned or partially state owned. And I think this is an important part of what we call the OECD... a key of the OECD background.

In terms of human rights, it's a bit more tricky, because we don't have legal instruments in human rights. We have the Guidelines for Multinational Enterprises, which have been amended just recently to include a full part on human rights, but it is also true that we are not an organisation which has as its core functions human rights.

On the other hand, when you look at the OECD accession process, we will be looking in areas like protection of investment; are the foreign investors well treated, or are they treated equally than domestic investors? We will be looking at issues in the environment of transparency of stakeholder possibility to enter in public debates, public consultations. All those aspects are a partial response to your question on human rights.



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... And two steps back

Indian liberalisation has progressed quickly in most areas resulting in one of the world's fastest growing economies, but the legal sector has not kept up.

PHIL TAYLOR

It all seemed so hopeful in 1991. India was liberalising and had promised to restructure its economy as part of an IMF bailout package. Since then, India's success story has become well known. Its GDP growth peaked at nine per cent in 2007, and is averaging 7.5 per cent; the country has moved steadily up the Index of Economic Freedom ranking; several Indian corporations have become significant global businesses, with one, Tata, even taking over well-loved British motoring icon Jaguar. But while economic progress has been rapid with a clear direction, the same cannot be said for legal sector reform.

Early in the 1990s, there was considerable excitement among large law firms who were keen to expand into new markets. Ashurst set up a liaison office in New Delhi in 1994, with the Reserve Bank of India issuing it a licence. But things soon started to go wrong for the English firm and two US pioneers, Chadbourne & Parke and White & Case. 'The legal advice we received from a top Indian law firm at that time was that we could convert into a branch office in six months to a year,' says Richard Gubbins, who heads Ashurst's India practice, but is, nevertheless, based in London. 'But no sooner had we been given a licence than

we were petitioned against by a lawyers' collective, who were trying to close down our liaison offices.'

Slow motion

A writ was filed in 1995 (*Lawyers Collective v Reserve Bank of India, Chadbourne, Ashurst, White & Case, and Others*). The case eventually reached the Bombay High Court, which delivered its ruling in 2009 (not a misprint – the case did indeed take 14 years to reach closure), stating that the Bank had never had the authority to give the three firms their licences, and clarifying that the practice of law includes non-litigious matters. As the legal website Bar & Bench points out, the ruling did not change anything but did effectively restate the law to foreign firms: those not enrolled under the 1961 Advocates Act may not practise law in India. The door had never really been opened.

No sooner had the High Court ruled against the authority of the Reserve Bank of India than a new petition was filed in the Chennai High Court by an individual named A K Balaji. This one names 31 global law firms and other parties including an outsourcing company (see box: *Outsourcing: a new front is opened*). Balaji starts by submitting that 'the

legal profession in the country is governed by the Advocates Act, 1961 and the rules framed thereunder by the Bar Council of India' and that section 29 of the Act allows only properly registered Advocates to practise law in India.

Meanwhile, Bar Council of India chairman Gopal Subramaniam has given no indication of his willingness to let foreign firms in, and the government seems more disposed to focus on vote-winning reforms to the notoriously slow court system. This has left a bad taste in the mouths of some foreign practitioners. 'To be honest, I'm disillusioned with how long it has taken for India to liberalise its legal market,' Gubbins says. 'The backdrop is that there's quite a hostile environment to foreign law firms advising their clients in India.'

Open hostility

The loudest voices in the debate tend to belong to those with a negative view of liberalisation, such as Lalit Bhasin, head of the Society of Indian Law Firms (SILF) and founder of Bhasin & Co. Speaking to *IBA Global Insight*, he echoes Balaji's stance by basing his argument on the current law. 'We've taken a consistent stand keeping in view the law in India as it stands today; the law does not permit any non-Indian to practise any form of law or engage in any practice of law in India,' he says. 'The law can be changed by Parliament, not by lawyers talking.'

According to Balaji's petition, foreign lawyers also break the law when they fly in to speak with their Indian clients (even on foreign law matters). He states: 'Moreover, the advocates from various foreign law firms are often visiting India and conducting seminars in various parts of our country. They are entering in to India through visitor's visa [*sic*] but the actual intention of their visit is to indirectly market and earn money out of clients from India by way of seminars.'

International arbitration has been attacked, too. Balaji disapproves of foreign firms 'conducting arbitration in Indian Hotels'; meanwhile a 2009 civil suit filed by the Association of Indian Lawyers seeks a perpetual injunction against the London Court of International Arbitration in India to remove the words 'London Court' from its name as this gives a false impression of it being a UK court of law.

Bhasin feels his argument is a strong one because it is based mainly on deference to the rule of law. But no pro-liberalisation advocate would dispute the legal status of foreign lawyers at present. Instead, they say,

Outsourcing: a new front is opened

For many, India is synonymous with outsourcing. A country with a population of over 1 billion and a large, well-educated workforce with good English language skills is well-placed to serve the needs of multinational companies wanting to save money. The newest arrivals in the sector are legal process outsourcing (LPO) companies, which began by servicing in-house legal departments. 'Companies are not so willing to pay fees for work that need not be done by qualified lawyers in the first place,' says Ganesh Natarajan, chief executive and co-founder of Mindcrest, a Chicago-headquartered legal services company with operations in several Indian cities. 'They have outsourced significant pieces of other functions, so now it's the turn of the legal departments.'

Law firms' historic antipathy toward outsourcing began to change in late 2008 when the sudden economic downturn caused clients to increase their demands for lower legal costs. LPO companies can certainly provide them a useful service as they are particularly experienced in carrying out volume work. Mindcrest, for example, is often called on to review loan documentation for legal completeness, look through contracts as part of a due diligence exercise, or carry out document reviews in the litigation context.

There is no shortage of staff for LPO companies (see the statistics in the main article), which leaves them with a luxury of numbers; Natarajan says he need only shortlist between 10 and 15 per cent of all applicants in order to find sufficiently talented individuals. He sees the LPO industry as providing a new career option to those graduates who are unable to break into the tight circles of traditional Indian firms. 'With us, they have a career in the legal business, but not as a lawyer,' he says.

The expansion of the LPO market serving Western firms is also leading to an increased demand for Western legal education. Nicole Shroff, admissions counsellor at St Francis School of Law (an online law school which allows overseas students to earn a JD and sit for the California Bar), says the college has seen 'a huge uptick' in the number of Indian applicants it receives. 'As the LPO market has increased, the need to educate LPO attorneys has also increased because the clients of LPO firms want attorneys who are subject to the ethical standards concomitant with being admitted to a US Bar,' she says.

Even outsourcing companies have not found themselves immune from the ire of opponents of liberalisation. Integreon, which has operations in Mumbai and New Delhi, was also named in A K Balaji's 2010 writ, which states:

'[S]ome of the international law firms has their office in India and practices Indian law by calling themselves as LPO. They are running a law firm in India without obtaining any prior permission from Indian government and the concern authorities ... This is complete violation of our country's... laws... rules & regulations... This kind of activities of foreign law firms have to be found and blacklisted.' [*sic*]

This vehement, if rather inaccurate, attack should perhaps not unduly worry outsourcing providers. Sources with knowledge of the lawsuit say that Balaji was motivated by a desire to keep the legal liberalisation issue bogged down in the courts. After the Bombay High Court ruling in *Lawyers Collective v Reserve Bank of India and Others*, some opponents of liberalisation sensed that the discussion could quickly become a political one that could be settled during the courts of international trade negotiations. Reasoning that nothing could be done if the matter was before the courts (India takes *sub judice* very seriously), the 2010 writ was filed to move the debate back out of the political arena.

It would seem politically unwise for the government to pursue an industry that is creating a significant number of jobs in India, and analysts think it is very unlikely that the LPO industry will be forced to shut down as a result of the present lawsuit. The government will also be considering the effect that the ongoing debate is having on India's reputation; but whether it will be strong enough ever to push through the necessary legislative changes in the face of such vehement opposition remains to be seen.

'The law does not permit any non-Indian to practise any form of law or engage in any practice of law in India'

Lalit Bhasin
Society of Indian Law Firms

the debate should be focused on whether and how the law should be changed. Gubbins' colleague Ronnie King, who heads Ashurst's international arbitration group, points out that the 1961 Advocates Act and other related regulations seem out of date for a country that is now so internationally active. 'The thing missing in the development process is a push by anyone in the political scene to change their statutes,' says King. 'There probably needs to be a legislative change in order to allow liberalisation to take place, but there doesn't seem to be the momentum to do that.'

When presented with this rejoinder, opponents of liberalisation present some well-tested arguments. One is that Indian law firms are handicapped by strict Bar Council rules on marketing, and another that Indian partnership laws are inadequate. Jonathan Brayne, a partner of Allen & Overy in London and chairman of the firm's India group, regards these as fair concerns but calls the arguments based on them 'tactical', to be differentiated from big picture philosophical and economic reasoning. He says that such technicalities could be overcome relatively easily once the key stakeholders have bought into the overall benefits of liberalisation.

Anand Prasad, co-founder of Trilegal, agrees, saying: 'If the political will is there, these impediments can disappear in two weeks.'

A further objection is that the way of life for an honest, hard-working population will change dramatically if big firms are allowed to enter the market (just as might happen if a retail chain were allowed to set up in a small town full of family-run grocery stores). Bhasin, for example, complains that Indian accountancy firms were 'wiped out' by the entry of the international Big Four.

Martin Harman, a director of the UK India Business Council who has been involved in joint committee negotiations with India for several years, dismisses this objection. 'That is entirely wrong because the majority of

[Indian] lawyers earn their living from areas such as general litigation or conveyancing, into which international firms have no interest in entering,' he says. 'We're happy to make that part of the negotiations, but it doesn't suit those in the vanguard to allow that message to get through to... the lawyers. They see deregulation as a threat to their livelihood, whereas 95 per cent would not be affected and the other five per cent would find that competition would improve their practices.'

Unheard voices

Harman's comment brings up another, far more substantial, point in the debate. The anti-liberalisation camp says that Indian lawyers do not want change at all, and claims that groups such as Silf represent the majority in voicing this opinion. 'My view is the predominant view,' says Bhasin. 'Within [Silf] there are people who have good reasons to say that we should help foreign firms come to India – we respect their views – but I'm giving as president of Silf the predominant view.'

But this claim disguises an important fact: the Indian legal profession is large, but is largely voiceless. Silf represents (as its name suggests) Indian law firms rather than individual lawyers who, according to one specialist, 'don't even know what is happening inside it'.

'The people who are quietly wishing the situation to change most are the young able lawyers who are having to leave India to make careers because they don't have connections to penetrate the partnerships of ... family law firms,' says King. 'There is a very specific Indian interest group of young lawyers who are being kept out in the cold while the regime remains as it is at the moment.'

Many commentators agree that liberalisation is likely to benefit individual Indian lawyers greatly. Writing in *Reconnecting Britain and India: ideas for an enhanced partnership* (published in June 2011 by Jo Johnson, a UK Member of Parliament), Brayne draws comparisons with Japan. There, the number of



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registered local lawyers increased from 14,000 to 28,500 in the decade after liberalisation in 2000. The number of lawyers in Tokyo's largest firm also increased sharply over the same period, from 50 to 480: perhaps India should expect benefits for its law firms, too. For Bhasin, this argument is nothing more than a red herring. 'Indian lawyers have a sufficient market now,' he argues. 'The law students who complete their studies immediately get good opening in these

and are either operating globally or have plans to do so soon. Both sides of the debate agree that the market should decide what happens, but there is disagreement on just what that market wants.

The pro-liberalisation camp reasons that expanding Indian companies need access to high-quality legal advice from international law firms. 'There is a degree of frustration that corporates can't get access to the expertise they need. This is genuinely holding back progress,' says Harman.

Prasad adds, '[Liberalisation] brings in competition, newer ways of thinking, newer ways of practising law, and a new culture in terms of how firms are owned and managed and deliver services to clients. Opening up the market will also enhance the quality of services that clients receive.'

But Bhasin does not seem to recognise this. He feels that Indian companies can access all the advice they need from domestic firms such as his.

'We already have excellent relationships with foreign firms, excellent mutual relationships which do not amount to any formalisation of reciprocity,' he says. 'This has worked to the satisfaction of us and the clients.'

For Sumesh Sawheny, a partner of Clifford Chance's India group, this argument is a false one. 'Then why create a regulatory barrier?' he asks. 'Open the market and

'The Indian legal profession is large, but is largely voiceless'

quality law firms – not just in fly-by-night operators. We can match the competence of any foreign law firm; the opportunities are already here.'

Statistics seem to suggest otherwise. The country produces around 100,000 law graduates each year, while even India's biggest law firm employs less than 500 lawyers and in-house legal departments remain relatively small.

Breaking down barriers

There is a third stakeholder in the liberalisation issue: Indian companies, many of which have grown rapidly in recent years

Best friends... for a while

Seeking ways of capitalising on the potential of the Indian market, many global law firms have chosen to form so-called best-friend alliances with local firms. Non-exclusive relationships concluded over the past few years include Allen & Overy and Trilegal, Clifford Chance and AZB Partners, Clyde & Co and Clasis Law, and more recently Ashurst and the newly-formed Indian Law Partners.

Some of these friendships have thrived, while others have cooled off. To take one example, Clifford Chance abandoned its practically exclusive arrangement with AZB in January 2011. According to Clifford Chance partner Sumesh Sawheny, the uncertainty over India's stance toward foreign firms played some part in the decision. 'When we entered into the relationship there were certain expectations that India would liberalise in 18 months to two years, and therefore we'd be able to transport the best friend arrangement into something more, in one way or the other,' he says. 'This sort of arrangement can only have a limited shelf life. When it was becoming apparent that liberalisation was not likely to happen very soon, we both felt it would be better for our firms as well as for our clients [to] loosen the ties of the relationship.'

Clifford Chance's new strategy is to operate independently and invest in growing its India expertise outside of the country. The firm now employs more than 40 Indian lawyers worldwide.

By contrast, in February 2011 Allen & Overy and Trilegal announced that their relationship would be continuing as a permanent one. A&O partner Jonathan Brayne says that the mutually beneficial arrangement was never made through a desire to get referrals from Trilegal, but instead to find a way of providing clients with 'the same kind of integrated service experience they get from A&O's offices in, say, Germany or New York.'

Clyde & Co, meanwhile, has had an interesting experience. Its original best-friend arrangement was formed with ALMT Legal in 2009. Five partners of ALMT left in April 2011 to form their own firm (along with a Clyde & Co partner), ending the arrangement. Not to be deterred, Clyde then made friends with the new firm, Clasis Law, only to lose a partner to the start-up a few months later.

let the clients decide. We strongly believe that deregulation will bring many benefits to Indian businesses as well as positive advantages to the profession domestically.'

It is easier to understand the position of those who are against liberalisation when it is seen against the backdrop of the Indian legal services market: an arena dominated by a few, long-established and often family-owned firms. As in any sector of any market, those in a strong position are keen to stay there.

'A group that will lose out over time if liberalisation occurs is the oligarchic family structure which controls some of these firms,' says King. 'It's really only a handful of people in a handful of firms – a model which does not exist in any other major economy of the world.'

In some ways, this discussion of Indian firms' abilities is irrelevant. Most foreign lawyers would not deny that Indian firms can provide high-quality advice, and stress that they do not seek to compete directly by practising Indian law. They say they are pressing for an opening of the market in order to offer their clients lower cost foreign-law advice on their doorsteps.

Bhasin dismisses this as 'absurd', suggesting that firms that are pushing for Indian liberalisation should instead pursue 'a better relationship' and 'need to have

'There is a very specific Indian interest group of young lawyers who are being kept out in the cold while the regime remains as it is at the moment'

Ronnie King
Ashurst

a better understanding and coordination without trying to uproot anyone'.

'We have respect for the UK system, and have learnt from them, but this approach doesn't fit in anywhere,' he states. 'We don't want the East India Company to come back this century through another route.'

Many of the obstacles in the way of liberalisation are very real (although more than surmountable given sufficient resources and political will). However, it is clear that the debate involves emotion as well as logic. Faced with some deeply-held opinions, the pro-liberalisation camp must tread carefully, bearing in mind India's history, if the dream of an open market is ever to become a reality. ☒

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Brazil's pricy and problematic World Cup preparation

Despite the fanfare, the country is sliding ever deeper into the political and financial difficulties that all too often engulf countries hosting major sporting events.

BRIAN NICHOLSON

Brazil recently celebrated one thousand days until the 2014 FIFA World Cup kick-off with a scintillating display of political footwork that burnished the country's recent progress, while failing to hide some serious structural problems that hold things back.

There was, of course, the customary fanfare, with political grandstanding and government assurances that everything would be ready on the day. Football legends Pelé and Ronaldo showed up at different – some might say rival – events on 15 September to inaugurate digital countdown clocks. President Dilma Rousseff visited construction work at a World Cup stadium in Belo Horizonte but skipped a gala dinner with Ricardo Teixeira, president of the Brazilian Football Confederation and the World Cup Local Organising Committee. Relations between the two appear increasingly icy.

First, the good news. Construction or renovation has started at all 12 World Cup stadiums. Nine should be ready by December 2012; the rest a year later. However, the projected total stadium cost has risen substantially to R\$6.4 bn, some US\$3.7 bn at mid-September rates, with proffered explanations ranging from planning delays, inflation and project upgrades to specification changes by FIFA.

Contrary to initial suggestions by Teixeira and the government, this is virtually all public money, something that's hardly a surprise for sports analysts who study the experience of previous World Cups.

Lance, Brazil's leading sports newspaper, marked the thousand-day celebrations by reprinting an editorial from five years ago. Entitled 'Teixeira is bluffing Brazil', it warned against believing promises that World Cup stadiums would be

privately financed: 'Teixeira has told anyone who'll listen that he only wants the government to invest in infrastructure, and that the new stadiums... will be built with private money,' the paper wrote back in 2006 when Brazil was still a candidate to host the event. Once the country was formally chosen and the government committed to financial guarantees, Lance argued, it would become clear that 'there will be no investors and the government will have to bankroll the stadiums.'

In October 2007, days before Brazil was officially chosen, Sports Minister Orlando Silva still argued that 'football stadiums, arenas and competition venues – all this could be done with private investment.'

Fast forward two years, to June of 2009: 'I have heard that state governments might be interested in building or renovating stadiums,' Silva said. He remained emphatic that no federal money would be used, but accepted that the federally-run Brazilian Development Bank (BNDES) might lend for this purpose.

Today it's clear that at least 95 per cent of stadium construction and renovation costs will be public, in the form of federal loans to state governments via the BNDES, state and municipal tax breaks, and direct funding from state coffers. A few stadiums will raise reasonable cash from naming rights and future ticket sales, but the possibility of all the loans being repaid from such revenues looks very slim. Most stadium costs will therefore end up lost within state-level public debt – effectively, put on the credit card.

If Brazil's stadium investment were fully written off over the 64-match competition, it would average about US\$58 million per World Cup match, or around US\$1,000 per match spectator.

Of course, venues subsequently used by top-line teams could enjoy years of reasonable revenue. But five of the 12 host cities don't even have first division teams, because World Cup matches were spread around the country for political reasons.

The Brazilian Court of Audit (TCU) last year warned that at least four 'white elephant' stadiums were unlikely to pay their upkeep after the tournament. A glaring example is Brasília, the federal capital, where a new 70,000-seat arena is being totally financed by the Federal District government. The latest reported cost was R\$670 million, some US\$390 million. Brasiliense, the city's top team, last year attracted average crowds of 3,300 and now plays in the third division.

Brushing aside such killjoy accounting quibbles – Brazil is hardly the only country with a tradition of cost over-runs and sticking the bill to the taxpayer – there's little doubt that Brazil will wow the world with fabulous TV images of colourful stadiums packed with joyous fans. But how those fans will get there is another matter. A government report coinciding with the thousand-day hoopla showed that of the 13 World Cup-related airport upgrading projects, totalling US\$3.7 billion, five had yet to start work. Of the 47 planned urban mobility projects, totalling US\$7 billion, only nine were under way.

Projects like subway extensions, bus rapid transit systems and traffic improvements have long been touted as the event's great legacy. But now Planning Minister Miriam Belchior says they aren't really essential: 'We can always resolve traffic problems by decreeing public holidays on match days.'

Infrastructure projects have long been plagued by suggestions of political kick-backs, part of the 'politics as usual' system that helps ensure government majorities in a Congress with 22 parties. The transport minister resigned under a cloud in July – one of five ministers to fall since

January, mainly after allegations of misusing public funds – and Rousseff fired dozens of transportation bureaucrats. While there's no indication World Cup projects were directly connected, the whole sector suffered uncertainty and delay.

Airport improvements, which Belchior accepted were essential for the Cup, are another sad example of Brazil's difficulty in modernising public-sector management. Major fields are run by Infraero, an agency dating from the 1964–1985 military dictatorship. Air travel has soared with economic growth and the burgeoning lower middle class, but Infraero has struggled woefully to meet the challenge. Peak-time travel is a nightmare. Long-

'A few stadiums will raise reasonable cash from naming rights and future ticket sales, but the possibility of all the loans being repaid from such revenues looks very slim. Most stadium costs will therefore end up lost within state-level public debt – effectively, put on the credit card.'

discussed plans for private investment got off the ground in August with the concession auction of a second-tier airport in the Northeast.

Some airports are building 'provisional' terminals because there's no time for permanent expansion, but the Prosecutor General's office challenged some expansion contracts, alleging they were improperly awarded without tender. Using an 'urgency' justification was unacceptable, it said, since Brazil was selected for the World Cup in 2007.

More political and legal wrangling loomed over the draft General World Cup Law, which Rousseff finally sent to Congress in September. Among the contentious provisions: non-sponsoring TV channels would receive three minutes of match video for news programmes, and anyone over 60 would be allowed to buy match tickets for half price. These respect Brazilian law, but clash with FIFA requirements. Everything indicates that the countdown to the World Cup could be as interesting as the competition itself. ☒

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