

**British Institute of International and Comparative Law**  
**ANNUAL CONFERENCE 2009**  
**5 June 2009**

**Summary**

**Keynote Address**

The Conference, held at Goodenough College in central London, began with a welcome address from Professor Robert McCorquodale, Director of the British Institute of International and Comparative Law and The Rt Hon Lord Bingham of Cornhill KG, President and Chairman.

The welcome address was followed by the Keynote Address delivered by **Paul Skinner**, former Chairman, Rio Tinto. Paul Skinner is the former Chairman of Rio Tinto (2003-2009), one of the world's leading mining and exploration corporations. As a lawyer who has worked in the energy sector for many years, he presented a unique perspective on business and international law resulting from his combined legal and business knowledge. He commented on the diversities of lawyers and businessmen, stating that lawyers were generally risk-averse and complex individuals which can often be at odds with businessmen who embrace risk and look for solutions rather than seek out problems. He believes that the two need to work together to bridge the gap between law and business. Mr Skinner further commented on the need to balance business demands with environmental responsibilities and believed that multi-national businesses are becoming increasingly more responsible.

**Session 1, Panel 1**

**Cartel Enforcement in a Globalised World: Extraterritoriality and Extradition**

The members of the panel were **John Hardy QC**, of 3 Raymond Buildings, London, **Julian Joshua**, Howrey LLP, Brussels and **Peter Whelan** of the British Institute of International and Comparative Law. The session was chaired by **Professor Alan Riley**, City University, London.

The panellists came prepared with a list of 12 questions to discuss relating to cartel enforcement in today's increasingly globalized economy. Professor Riley posed questions to the panel and they provided their thoughts in turn. The discussion covered several topics including whether criminal sanctions should be attributed to individual executives engaged in price fixing, whether the recession should be used as a justification for crisis cartels and whether the Commission should be more lenient in light of the fact that companies are struggling to make ends meet under the enormous market collapse.

## Session 1, Panel 2

### Business and Human Rights

The members of the panel were **Richard Dion**, Policy and External Relations Advisor from Shell International BV, **Sif Thorgeirsson** from Business and Human Rights Resource Centre in London, **Kristin Hausler** from the British Institute of International and Comparative Law and **Professor Penelope Simons** from the University of Ottawa. The panel was chaired by **Rae Lindsay** from Clifford Chance LLP.

Richard Dion presented Shell's policies concerning sustainability, human rights issues and other CSR-related policies. Ms Thorgeirsson presented the Corporate Legal Accountability Portal which can be found on the website of the Business and Human Rights Resource Centre. The Portal contains profiles of lawsuits in which companies are accused of human rights abuses. Kristin Hausler presented a paper on business and indigenous land rights. She stressed the importance of recognising the diversity and vulnerability of the indigenous people as well as their different concept of land ownership. Professor Simons presented various perspectives on human rights considerations by business, on corporate impunity, governance gaps and imposing human-rights related obligations on companies.

## Session 2, Panel 1

### Business and Damages Actions: Accountability of TNCs and the Role of Damages Actions

The panel was composed of **Matthew Handley**, Cohen Milstein Sellers & Toll, Washington DC, **Richard Meeran**, Leigh Day & Co, London, **Yann Queinnec**, Director of Sherpa, France and **Professor Leif Wenar**, King's College London. It was chaired by **Alexander Layton QC**, 20 Essex Street and Chairman of the Board of Trustees, British Institute of International and Comparative law.

Professor Wenar began by discussing the relatively typical phenomenon of resources being located in poor countries whose inhabitants are often unable to assert the property rights they have under international law to protect their natural resources and benefit from them because such countries are prone to repressive governments and civil strife. He then stated that consequently, firms that buy resources from repressive regimes are receiving stolen goods and passing them on to consumers. Mr Meeran discussed the subject matter in light of *Lubbe v Cape PLC* (South African asbestos miners) and *Ngcobo v Thor Chemicals* (South African mercury poisoning victims) in order to highlight their importance in terms of victim redress and accountability and deterrence. Mr Handley discussed recent developments in the ability to hold TNCs accountable in US courts for wrongful conduct that occurs outside the US in light of trends in two areas: the ability to include non-US victims in US class actions and instances in which TNC defendants opt to remain in the US for litigation rather than seek dismissal based on *forum non conveniens*. Mr Queinnec discussed two cases, one concerning the misappropriation of public assets involving the son of the president of

Equatorial Guinea, and the other involving Areva and claims of elevated health problems linked to an Areva majority-owned mining company.

## **Session 2, Panel 2**

### **Business, Conflict and Development**

**Qingxiu Bu** from Queen's University in Belfast, **Jeffrey Commission** from the London office of Freshfields Bruckhaus Deringer LLP, **Rahim Mooloo** and **Alex Khachaturian** from the Washington DC office of White & Case LLP and **Professor Anita Ramasastry** from the University of Washington School of Law in Washington DC. The panel was chaired by **Paul Watchman**, Chief Executive of QWC in London.

Mr Bu spoke about China's new approach to corporate social responsibility (CSR) in the Democratic Republic of Congo. He referred to growing concerns arising out of a policy of non-interference with the host State's politics on the one hand and problems with transparency, corruption, workers' rights and human rights in the host State on the other. Qingxiu Bu analysed the Chinese interests of achieving energy security, maintaining global competitiveness and national image competing against its need for more CSR. He stressed the growing importance of the CSR considerations for Chinese investors in countries such as the DRC. Jeffrey Commission spoke about allegations of fraud in investment treaty arbitrations in light of the most important cases and publications on the topic and analysed the standard of proof applied by investment tribunals and to the reflection of concerns over corruption and fraud in the texts of modern bilateral investment treaties. Rahim Mooloo and Alex Khachaturian spoke about investing in a post-conflict environment. The speakers analysed the security and other considerations that investors must take into account, as well as the benefits such investments can bring for a post-conflict State as well as for an investor. Professor Ramasastry addressed the issue of business and the armed conflicts. She stressed that corporations can be held liable for human rights violations committed in connection with armed conflicts not only pursuant to international law but also on the basis of domestic laws of the home or host States.

## **Session 3, Panel 1**

### **Business and International Crimes**

The members of this panel were Dr Ingrid Elliott, Herbert Smith LLP, London, Prosecutor's Office of Bosnia and Herzegovina, Gabriël Oosthuizen, International Criminal Law Services Foundation, The Netherlands and Professor Celia Wells, University of Bristol. It was chaired by Jeremy Carver CBE, Clifford Chance LLP, London.

After Mr Oosthuizen presented an overview of the issues surrounding attempts to secure criminal responsibility for corporate actors and relevant examples, Professor Wells discussed more broadly issues of corporate criminal liability and evaluated specific models used to address such issues. Dr Elliott concluded by providing insight into criminal liability for

companies and their officials under joint criminal enterprise theory which does not strictly require a decisive contribution by the participant in order to assign liability. She concluded with a discussion of examples of the theory as applied to recent cases in the United States under the Alien Tort Claims Act.

### **Session 3, Panel 2**

#### **Business, Investment and International Law**

The members of the panel were: **Professor Peter Muchlinski** from the School of Oriental and African Studies, University of London, **Professor M. Sornarajah** from the National University of Singapore, **Sylvia Noury** from Freshfields Bruckhaus Deringer LLP in London and **Tolga R Yalkin** from Oxford Pro Bono Publico at the Faculty of Law at the University of Oxford.

The panel was chaired by **Sir Frank Berman KCMG QC** from Essex Court Chambers. Professor Muchlinski presented a paper concerning the international corporate social responsibility (ICSR) and international law. He stressed the role of investors' legitimate expectations and a need to consider the environment into which the investor is entering in order to invest. Professor Sornarajah spoke about the retreat of neo-liberalism in investment treaty arbitration. He explored the trends in the approaches of the investment tribunals in the past concerning the expansion of investment and investment protection and contrasted it with the current trends of retreat from neo-liberal tendencies and the recent retreat to protectionism and less enthusiasm towards the neo-liberal investment promotion and protection model even among the developed countries. Ms Noury's presentation explored the topic of remedies against States in investor-State arbitration and asked the question whether these remedies have more bark than bite. Mr Yalkin analysed investor's legitimate expectations as understood by arbitration panels resolving investor-state treaty disputes. He proposed a definition of the term based on a test as to whether such expectations existed, whether they have been violated by the host State and whether damages should be awarded to the investor as a result.

The sessions were well attended and generated interesting discussion which was continued at the Reception which followed the conference.