



ILA—Founded 1873

# Newsletter

## President's Message

By Ruth Wedgwood

### The ILA's Tradition

In the work of the International Law Association (the "ILA") and its American Branch ("ABILA"), one can feel the thrill of the chase – as part of a complicated and crucial enterprise of discerning and proposing international legal standards that are idealistic and practical – suited to the growth of free enterprise, protective of human rights, cognizant of the need to conserve our common interests in the globe, while taking on board the claims and felt necessities of local political actors. The ILA and its American cousin have two claims to uniqueness that underlie the group's great authority in contemporary debates about the path of international law.

First, it's hard to reinvent *a century* of tradition. The ILA has been pounding away at a changing portfolio of work since 1873, numbering among its members a world famous roster of judges, scholars, practitioners, critics, and draftsmen of towering distinction. It has been a "who's who" of international law. The influence of the ILA's work – over the full span of 134 years, from before decolonization to the achievement of post-war independence by peoples of the South – is extraordinary to behold.

And second, the ILA remains the central private forum for crafting dynamic international law rules in a truly *international* setting. Though many of its leaders have served their governments as advisors in

*(Continued on page 2)*

## INTERNATIONAL LAW WEEKEND 2010 "A GRAND SUCCESS"

By Rachel A. Smith

International Law Weekend (ILW) 2010 was "a grand success" according to John Noyes, the outgoing President of the American Branch of the International Law Association. Over 400 people attended the annual conference, including lawyers in private practice, law students, academics, U.N. officials, NGO representatives, diplomats and other government officials. ILW 2010 was held in New York City from October 21-23, and was presented by the American Branch of the International Law Association (ABILA), the International Law Students Association (ILSA), and the Leitner Center of Fordham Law School. Attendees enjoyed a wide range of panels addressing topics related to the theme of "International Law and Institutions: Advancing Justice, Security and Prosperity."



Panel at ILW 2010

ILW 2010 was organized by Co-Chairs Professor Elizabeth Burleson of the University of South Dakota Law School, Hanna Dreifeldt Lainé of the United Nations Office of Legal Affairs, Vincent J. Vitkowsky, a partner at Edwards Angell Palmer & Dodge LLP, and Jill Schmeider Hereau, the Program Coordinator of ILSA.

On Friday evening, the Permanent Mission of Finland to the United Nations hosted a reception for ILW attendees. The reception was "incredibly popular," said Will Patterson, Ex-



Nathaniel Dutt, Editor of the ILSA Journal of International and Comparative Law (left), and Will Patterson, ILSA's Executive Director (right)

ecutive Director of the International Law Students Association. Dr. Janne Taala, Deputy Permanent Representative of the Mission, spoke about the significance of international law to Finland and Finland's contributions to the international rule of law. Newly elected American Branch President Ruth Wedgwood recalled Finland's support for the International Law Association in organizing the biennial conference in 1996, and expressed, on behalf of the American Branch, her gratitude to the Finnish Mission for hosting the reception. She also noted the many Finnish diplomats who have contributed to international peacemaking, including Finnish President Martti Ahtisaari, who successfully mediated an end to the fighting between the Free Aceh Movement and the Indonesian Government, and chaired the negotiations on the future

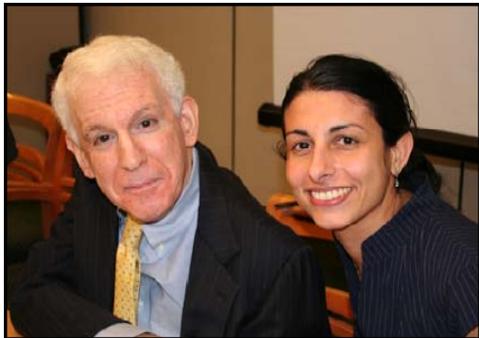
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## INTERNATIONAL LAW WEEKEND 2010 "A GRAND SUCCESS" (CONT'D)

(Continued from page 1)

status of Kosovo, leading to its independence.

One of the highlights of the weekend was a keynote Saturday luncheon address by



*ABILA Hon. Vice President Charles Siegal and Executive Committee Member Catherine Amifar*

David D. Caron, President of the American Society of International Law and C. William Maxeiner Distinguished Professor of Law at the University of California, Berkeley School of Law. The address was entitled "Of Discontinuities: Climate Change and the Law" and surveyed climate change and its impact on the world's oceans, which has been a focus of Professor Caron's research for over twenty years. Caron pointed out that climate change could be considered a discontinuity in normal patterns by some, but it is not a simple discontinuity and can be a disaster: "Depending on the magnitude of the change, climate change will be a grave discontinuity in time and in reach." Impacts of climate change cited by Caron included: sea level rise and its effect on boundaries; the warming of the oceans and fish migration; and ocean acidification. Caron concluded by emphasizing the need to acknowledge the impact of climate change and to identify realistic objectives, including how the law will play a role in achieving them. The keynote address will be printed in the next issue of *Proceedings of the American Branch of the International Law Association*.

A new addition to ILW in 2010 was the First Annual ILW Student Career Fair. The event began with the Pathways to Careers in International Law panel, which over 200 people attended. The panel was followed by breakout sessions on Immigration Law, Practicing International Law at NGOs and International Organizations, and International Litigation and Arbitration. At each of these sessions, practitioners spoke about their formative experiences and gave tips to students on getting "a foot in the door." ABILA Executive Committee member Professor Paul Dubinsky played a key role in establishing and organizing the Career Fair, adding a new and welcome dimension to ILW.

The planning of ILW 2011 is now underway. From Thursday, October 20 through Saturday, October 22, 2011, the American Branch of the International Law Association and the International Law Students Association will present the annual International Law Weekend in New York, in conjunction with the 90th annual meeting of the ABILA. Proceedings will be held at the Association of the Bar of the City of New York and at Fordham Law School. The overall theme of ILW 2011 is "International Law and National Politics." Proposals for ILW 2011 panels are being received by co-chairs Professor Martin Flaherty ([mflaherty17@yahoo.com](mailto:mflaherty17@yahoo.com)) of Fordham Law School, Sahra Diamant ([diamant@un.org](mailto:diamant@un.org)) of the United Nations Office of Legal Affairs, and Jill Schmeider Hereau ([jshereau@ilsa.org](mailto:jshereau@ilsa.org)) of the International Law Students Association.

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## President's Message (Cont'd)

(Continued from page 1)

diplomatic and legal forums, the ILA retains its private voice of independence and reflection in seeking to shape rules and doctrines in international law that all countries can hew to, in a process to which all societies have access.

For American lawyers, the ILA is a first cousin to the ALI – the venerable American Law Institute which has tried to update rules of torts, contracts, agency, property, criminal law, and civil procedure through consultations among the three estates of judges, scholars, and practitioners. Indeed, the American Law Institute is itself now flirting with the thought of once more taking up international law topics. This extraordinary development was announced at an appropriate forum – in a signally important keynote address delivered by former ALI president Michael Traynor at the ABILA "International Law Weekend West" conference – an enormously successful event organized at Southwestern Law School by ILA member Robert Lutz. ABILA and ALI have interests in common that may warrant close collaboration.

### Great People

That brings the topic back to its center, which is the ABILA's extraordinary collection of people. It is a great privilege to follow after John Noyes as Branch President and seek to build on his amazing work in the husbandry and growth of the ABILA. John has had an attention to detail and effectiveness that is characteristic of the finest organizational leaders, and he is an enormously nice person to boot, who has cared about the finances, work product, and good cheer of the ABILA in all its functions. John will, I am so happy to note, continue as Chairman of the Executive Committee of ABILA. Charles Siegal is also well known to everyone as the outgoing Chairman of the Executive Committee who has lent not only his own brilliance as a lawyer to the ABILA,

(Continued on page 8)

## ILA COMMITTEE ACTIVITIES

### INTERNATIONAL PROTECTION OF CONSUMERS

By Louise Ellen Teitz (Committee Member)

The International Protection of Consumers Committee, which officially was approved as an ILA Committee in November 2008, met in The Hague to consider its Discussion Report, which is available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1030>. This new Committee, with limited Branches currently represented, had not had in-person meetings of the entire Committee. The Committee's mandate includes review of model laws and treaties, as well as national legislation, that concern consumer redress, especially in the context of conflict of laws and jurisdiction. In the last year and a half the Committee has addressed two issues: (1) the impact of the financial crisis on consumers; and (2) the issue of consumer redress in crossborder transactions. The Committee decided to focus more on the consumer redress issue, especially since both the Chair, Professor Claudia Lima Marques (Brazil), and the Rapporteur, Professor Diego Fernandez Arroyo (Argentina), have been involved with ongoing work at the Organization of American States as part of CIDIP VII on consumer redress.

There are three major approaches/proposals for consumer redress currently under consideration at the OAS. Brazil's initial proposal focuses on choice of law and requires the use of the "law most favorable to the consumer;" Canada's proposal includes jurisdiction as well; and the U.S. proposal focuses on mechanisms for redress, rather than choice of law. Two of the American Branch members, David Stewart and Louise Ellen Teitz, have worked on the U.S. proposals at the OAS.

The U.S. proposals for Model Laws include small claims procedures, online dispute resolution (ODR), and chargeback mechanisms. This varied approach to consumer redress can also be seen in the approaches embraced by different Committee mem-

bers. There will be a panel at International Law Weekend 2010 in New York, to discuss some of these issues and the OAS proposals, on Friday, October 22, at 9:00 a.m.; the panel will include Professor Lima Marques, as well as representatives from the U.S. State Department and the Federal Trade Commission.

In addition to continuing to study the choice of law and jurisdiction issues regionally, the International Protection of Consumers Committee will also consider the potential for ODR in the consumer context. This area will also be the focus of a new Working Group at UNCITRAL, which will meet in December in Vienna. The Committee was pleased to see that UNCITRAL has included consumer protection in its agenda.

### RECOGNITION/NON-RECOGNITION

By Christopher J. Borgen (Committee Member)

The Committee on Recognition/Non-Recognition in International Law had its inaugural meeting at ILA 2010 in The Hague. In a morning session, Committee Chair Professor Wladislaw Czapliniski of Poland and Committee Secretary Professor Aziz Tuffi Saliba of Brazil led a discussion among the Committee members about defining the work of the Committee in the coming years. The goal is the production of a report that will (a) assess current state practice concerning recognition and non-recognition of states and governments (and possibly other entities), and (b) consider the issue of recognition in potentially illegal situations. The Committee is particularly interested in whether state practice since the end of the Cold War has led to a change in the law of recognition.

The American Branch of the ILA has three representatives on the Committee: Professor Brad Roth of Wayne State, and Professors Peggy McGuinness and Chris Borgen, both of St. John's. The first substantive task for Committee members will be for the member(s) of each state represented on the

Committee to prepare a paper addressing that Committee member's state practice concerning the recognition of states. We have four questions as basic guides:

- Does the dichotomy between declaratory and constitutive doctrines persist?
- Are there certain statehood criteria that are widely or unanimously required?
- Are there certain criteria that should be required?
- Is recognition a political or a legal matter?

In addition to addressing these four questions, papers should describe the administrative/ judicial/ parliamentary practice of the respective countries. This will be a step towards the final report, which will attempt to be pluralistic, reflecting different views. In order to be as comprehensive as possible, the Committee is seeking additional members from a wide range of geographic and jurisprudential backgrounds.

The open working session on the afternoon of Monday August 16 was chaired by Professor Pavel Sturma of the Czech Republic. Professors Czapliniski and Tuffi Saliba discussed the expected work of the Committee and solicited comments and advice from the audience. Professor Roth presented a paper concerning the relationship of effective control to recognition. The Committee will consider the suggestions made over the course of the open session in its ongoing work.

A full Committee report concerning the activities up to and including ILA 2010 is being prepared for the ILA by Professor Tuffi Saliba and will be available on the ILA website. It is envisaged that the final report of the Committee would be completed for the 2014 ILA biennial conference in Kyoto.

*(Continued on page 5)*

# International Law Weekend-West at Southwestern Law School Tackles “Future Directions of International Law”

By Robert E. Lutz

With a cast of academics from over 20 top “western” law schools, practitioners from over two-dozen law firms, and an overflow audience of 200 registrants, the Southwestern Journal of International Law hosted “International Law Weekend-West” at Southwestern Law School on Saturday, February 26, 2011. The theme of the conference, conceived and organized by Southwestern Professor Robert E. Lutz and conducted in conjunction with the American Branch of the International Law Association’s (ABILA) International Law Weekend-West, was “2021: International Law Ten Years from Now.” Inspired in part by the fact that Southwestern Law School is celebrating its 100th anniversary, this topic enabled those assembled to take stock of the past and focus on the future of international law. Through 12 separate panels, the symposium tackled current and challenging topics about the future of international law in a number of private and public areas that included: international litigation, international human rights, international intellectual property; international trade law, international environmental law, international entertainment and media law; international dispute resolution law, international criminal law, international cultural law; and international financial law and institutions, international legal profession, and international investment law.

The Editor-in-Chief of the Southwestern Journal of International Law, Michael Joy, and ABILA representatives, Professors John Noyes (Chair, Executive Committee) and Ruth Wedgwood (President), along with Bob Lutz, opened the conference by welcoming registrants and introducing

them to the theme and schedule for the conference. It was also noted that a collection of articles from participants on the “2021” theme will be published in the next issue of the Southwestern Journal of International Law.



*Keynote Speaker Michael Traynor and Prof. Robert Lutz fielding questions from the audience*

In the keynote address on “The Future of the Foreign Relations Law of the United States”, special guest Michael Traynor, President Emeritus of the American Law Institute (ALI) and currently Co-chair of the ABA Commission on Ethics 20/20, delivered a speech that one conference attendee described as similar to Elihu Root’s historic 1923 work to propose the formation of the American Law Institute. Traynor explored the possible legal issues and the prospects of a new ALI “Restatement of Foreign Relations Law of the United States” (RFL), last revised in 1987, and noted crucial lawyer-initiated events in the early 1940s which influenced the preparation of the United Nations Charter: the Statement of Essential Human Rights (initiated by the ALI) and the Future of International Law Project (on which Louis B. Sohn participated, later one of the Reporters of the RFL). Traynor concluded that:

“As an idealistic ten-year-old, I observed the formation of the United Nations in San Francisco.... As a still idealistic seventy-six-year-old, it would be heartening indeed to observe, and perhaps even participate in, the formation of a project promising a still beleaguered world unifying principles of foreign relations law, starting with our country.”



*Panel on International Cultural Law, featuring (from left) Prof. Alison Dundes Renteln, Prof. Robert K. Paterson, Prof. James A. R. Nafziger and Alexandra Daraby*

Given the success of this venture, talk of an annual ILW-West of this formerly biennial event was heard during the conference. Whatever the future of ILW-West, the blockbuster production of this year’s “Weekend” at Southwestern on Feb. 26th—benefiting from prior successful ILW-Wests over the past decade at Pepperdine, Loyola, Santa Clara and Willamette—has made the west coast spring experience a tradition that should not be missed.

## ILA COMMITTEE ACTIVITIES (CONT'D)

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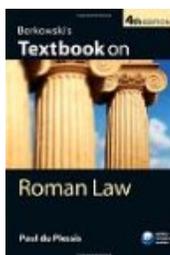
### Study Group on the Role of Soft-Law Instruments in International Investment Law

By Andrea Bjorklund (Study Group Member)

The ILA Study Group on the Role of Soft-Law Instruments in International Investment Law held both an open meeting and a closed meeting at ILA biennial Conference in The Hague in August 2010. During the open meeting, Professor Andrea Bjorklund of the University of California, Davis, School of Law and Professor August Reinisch of the University of Vienna School of Law presented an overview of the project. The mandate for the group is “to study the development of soft law instruments in international investment law and the feasibility of a ‘codification’ of the present state of this field of international economic law.” Professor Bjorklund then presented an outline of her comparative study of the types of soft-law instruments that have been used both municipally and internationally with a view to identifying those characteristics most likely to prove workable for a soft-law instrument on foreign investment law. Professor Kate Miles of the University of Sydney presented an assessment of the uses to which soft-law instruments had been put in international environmental law. Professor Reinisch then presented a sample codification of the legality principle of non-discrimination in expropriation cases. The Study Group held a closed meeting as well, at which the members discussed their upcoming meeting in London (tentatively scheduled for early November 2010) and their plans to work toward the publication of a book encompassing the contributions of the Group’s members.

### Borkowski’s Textbook on Roman Law (4th edition)

Paul du Plessis  
Oxford University Press, 2010  
Pp. 460 (Paperback, US \$71.50), available through [www.oup.com](http://www.oup.com)  
ISBN 9780199574889



\*Reviewed by Paul B. Stephan, University of Virginia School of Law

Every modern legal system bears the influence of Roman law, and the majority of legal systems regard it as foundational. In England, the forebear of all common-law systems, Roman law is a required subject in most, if not all, undergraduate legal courses. Scotland, of course, is one of the nations that base its law on the Roman model. This text is designed for an introductory class, offered to Anglophone students bent on learning about fundamental legal methods grounded in history. The book’s value, however, extends well beyond its usefulness as a teaching device.

The textbook does not purport to be an encyclopedic research resource, much less a controversial or revisionist attempt to remake a scholarly field. Rather, it is an excellent introduction to a subject about which U.S. lawyers, in particular, need to know more. Those who have studied Roman law in an earlier life might not want this book in their library. But for most U.S. lawyers, the textbook provides a helpful, indeed necessary introduction to a critical topic.

The common law world departs from that of the Roman-law-based civilians, not so much at the level of detail, as in its organizational structure. U.S.-trained lawyers take the division of private law into contracts, torts and

## BOOK REVIEWS

property as part of the natural order. Civilians, by contrast, focus directly on legal subjects, both natural and creatures of the law, as bearers of rights and duties. Civilians also do not see as sharp a distinction between legal interests created by bargaining and those imposed implacably by the law. Instead of seeing distinct duties created by the law of contracts and imposed by the law of torts, civilians simply recognize obligations. Much follows from these different schemas. And behind the civil law’s structure lies the legal method developed over the course of a millennium in Rome and then Constantinople. No lawyer engaged in a transaction or dispute in which one or more side resides in a civil-law jurisdiction can hope to deal with the matter without some appreciation of this way of thinking.

The textbook provides a helpful point of entry for such a lawyer. It contains a succinct historical sketch of the development of Roman law from the Seven Tablets to Justinian’s Codex, an overview of the Roman legal system as it operated during its heyday, and detailed discussion of the law of persons, property, and obligations. It ends with an excellent essay on Roman law’s impact on European law. It is clearly written, contains full citations to the secondary literature in English, and fairly deals with historical gaps and controversies.

The current, fourth edition of this textbook was authored by Paul du Plessis, a senior lecturer at the University of Edinburgh, who gradually has assumed responsibility for a text originally written by Andrew Borkowski of the University of Bristol. In the academic world, the production of basic texts for the instruction of students is an underappreciated task. The authors are to be congratulated for doing their job well.

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To submit a book review, contact our Book Review Editor, Tiffany Basciano, at [tbascia1@jhu.edu](mailto:tbascia1@jhu.edu).

## BOOK REVIEWS (Cont'd)

### **Making Transnational Law Work in the Global Economy, Essays in Honor of Detlev Vagts**

Edited by Pieter H. F. Bekker, Rudolf

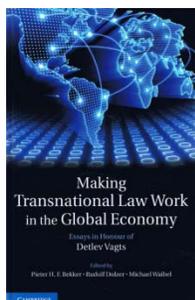
Dolzer, Michael Waibel

Cambridge University Press, 2010

Pp. 718 (Hardback, £100.00), available

through [www.cambridge.org](http://www.cambridge.org)

ISBN 9780521192521



\*Reviewed by Patrick Schaefer, Inter-American Development Bank, Office of the Secretariat

Professor Harold Koh, in the foreword to this edition of collected essays, credits Professor Detlev Vagts with inaugurating the study of the transnational legal process, or, “the theory and practice of how public and private actors interact in a variety of public and private, domestic and international *fora* to make, interpret, internalize, and enforce rules of transnational law.” In the chapters that follow, transnational legal scholars, both established and emerging, offer a series of insightful and forward looking essays in the areas of general international law, transnational economic law, and international dispute resolution that serve to demonstrate the practical importance of transnational legal theory in order to confront and remedy the common challenges incapable of being addressed solely by the tools of classical international law.

In the first section of the book, the essays are devoted to the theoretical challenges that transnational legal thought has posed to traditional assumptions of international legal theory. For example, with respect to

the dynamic relationship between transnational, supranational, and domestic law in the European Union, Professors Jan Wouters and Andreas Paulus each offer timely observations into the difficulties that the EU institutions have had in dealing with ‘external’ principles of public international law and the consequences of being unable to deal with the environmental, business and security problems arising between not only member states, but between the EU and third-party states as well. Professor Jost Delbrück then examines the broader, global context of the relationship between the development of contemporary transnational law and its impact on traditional concepts of state sovereignty, noting that, at least in the economic realm, the state has lost its “omni-competence” and exclusive authority over its territory, which were once “the core attributes of the traditional sovereign state.” Daniel Kalderimis continues the discussion by arguing that public international law has evolved beyond its traditional limits imposed by state sovereignty into a decentralized system of treaty regimes supplemented by customary law, yet still under a meta-constitutional law of the entire international system informed by classic international law.

The second section of the book discusses the development and role of transnational economic law, for example, in resolving issues of international creditor protection, violations of human rights by transnational corporations, as well as the ‘regime’ built through the accumulation of international investment laws. Professor Olivier de Schutter continues the trend of examining the reach of sovereign power with respect to regulating the activities of transnational corporations by proposing that assuring compliance with human rights would be more easily discharged by the corporations’ home states exercising a greater degree of extraterritorial jurisdiction. Achieving this goal would be guided, in part, by the adoption of a multi-lateral instrument allocating respective duties between the respective states. Professor Jeswald Salacuse, in his article, examines international investment law, a “vitaly important” aspect of transnational

law, through the lens of international relations theory. Using criteria associated with regime theory, Salacuse cites certain threats to the continuing “effectiveness and robustness” of the regime’s benefits. In this section, Professor Michael Waibel also addresses the current state of international creditor protection, especially under modern investment treaties. While he reaches the conclusion that creditor protection is much less discussed than international shareholder protection, the importance of his essay lies in the discussion of the term ‘creditor,’ its meaning, and how that meaning has been shaped by domestic, foreign, and international nuances.

The final section of the book concerns the development of transnational legal theory in the context of dispute resolution and the role and standards of lawyering in such instances. Here, two articles stand out for their historical analysis of transnational law and the importance it has to current theories of conflict resolution, whether public or private. In his article describing the ‘diffusion’ of law, Professor Pieter Bekker identifies and demonstrates how the ICJ is the locus, *par excellence*, of the development of transnational justice. He gives a practical description of how the decisions are informed by the rulings of other courts, the statutes of other states, and the writings of legal academics. In the commercial sphere, Professor Jan Dalhuisen makes the case that more expansive powers of arbitrators, found in the transnational commercial and legal order itself, and not merely in contract, are necessary to achieve the required transition from a domestic, statist, and static perception of private law to a dynamic, transnational, and responsive law that is attuned to present day business realities.

The above mentioned essays are but highlights of the excellent scholarship that this tribute to Professor Detlev Vagts has produced. Despite the impressive efforts of those engaged in the study of international law as a transnational phenomena, the barriers to its wider acceptance, namely the adherence to classical theories of state sovereignty, have not yet been overcome. Professor Vagts and

(Continued on page 7)

## BOOK REVIEWS (Cont'd)

(Continued from page 6)

those who wrote in his honor here demonstrate that engaging in the study of transnational law is, however, far from a mere academic exercise, but rather a necessary response to the challenges our contemporary world poses to commerce, to the environment, and most importantly to human rights. These essays represent a substantial contribution towards improving that response.

### Blackstone's Guide to the Bribery Act 2010

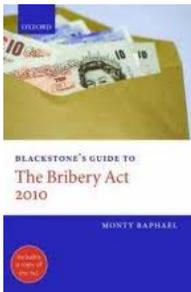
Monty Raphael

Oxford University Press, 2010

Pp. 250 (Paperback, \$90.00)

available through [www.oup.com](http://www.oup.com)

ISBN 9780199579785



\*Reviewed by Prof. Bruce Winfield Bean, Michigan State University Law School

Oxford University Press has published a timely book explaining the United Kingdom's controversial Bribery Act 2010. This Act received Royal Assent in April 2010 but does not become effective until July 1, 2011. The author of *Blackstone's Guide to the Bribery Act 2010*, Monty Raphael, is Special Counsel to his former law firm, a visiting professor, and a director of the anti-corruption NGO Transparency International UK Limited, among other honors. Given his five decades of experience in white-collar crime, Raphael is the ideal English practitioner to explain this state-of-the-art anti-corruption law. To understand the significance of the Bribery Act consider first the U.S. Foreign Corrupt Practices Act ("FCPA"), the mother of all international anti-bribery laws.

The FCPA was both the first attempt to address international business corruption and a surprising offshoot of Richard Nixon's Watergate fiasco. For 20 years, only American companies and a handful of major multinational enterprises with U.S. connections faced the prospect of civil and criminal prosecution for bribing foreign government officials to obtain or retain business. By 1997, after two decades of incessant U.S. prodding, the Organization for Economic Cooperation and Development ("OECD") completed work on its anti-bribery convention. The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions came into effect in 1999 and obligated signatories to enact legislation criminalizing bribery of foreign government officials.

An original party to the OECD Convention, the UK had anti-bribery legislation dating back to 1889. The OECD early on recommended that Parliament enact new legislation to fully comply with the Convention. Years of Parliamentary and Law Commission studies ensued. A draft corruption bill was introduced and debated, but no law emerged. The notorious BAE bribery scandal changed this.

In connection with a long-term contract to supply 122 military aircraft to Saudi Arabia, BAE Systems plc paid bribes of between \$1 and \$2 billion. Notwithstanding explicit corroboration of this bribery, Tony Blair's government, citing anti-terrorism grounds, terminated the Serious Fraud Office investigation of BAE with no enforcement action. Transparency International as well as the OECD Working Group on Bribery severely criticized the UK for this, and for its reluctance to modernize its anti-bribery laws. A 2008 OECD Working Group report stated: "Overall, the Group is disappointed and seriously concerned with the unsatisfactory implementation of the Convention by the UK."

Domestic and international criticism of the free pass given to BAE for this violation of existing UK law led to the Bribery Act 2010. The Act is a complete restatement of all UK

bribery law. It creates the criminal offenses of giving or receiving a bribe within the UK and creates the further offense of bribing a foreign public official for the purpose of obtaining or retaining business or securing a business advantage. The Act does not address the receipt of such a bribe by a foreign official.

Monty Raphael explains the operative provisions of the Bribery Act in clear terms and, for most of the Act, there are no surprises for those familiar with enforcement of the FCPA. Most importantly, Raphael applies his vast experience to an analysis of three of the controversial provisions of the Act of concern to practitioners already comfortable with the steps required to implement an effective FCPA compliance program. Raphael focuses on (i) including business meals and entertainment, or "hospitality," in the definition of bribery, (ii) not excepting from the definition of bribery small "grease" or facilitation payments, and (iii) the offense of "failing to prevent bribery." Facilitation payments and hospitality can be accommodated under the FCPA, but how should one proceed under the Bribery Act?

In every jurisdiction on the planet, ordinary business often involves some type of hospitality. In addition, a small payment to speed the performance of a non-discretionary administrative act (such as the issuance of a visa or vehicle registration) is a regular feature of doing business in less developed nations. Raphael can offer no practical suggestions for complying with the Act's blanket ban on facilitation payments and hospitality. He does note Parliamentary statements such as "It is unlikely that reasonable hospitality to foreign officials will attract the interest or action of enforcement authorities" and "Prosecutorial discretion will be used to manage such payments." From these statements, it is obvious that Parliament knows such payments will continue and expects those subject to the Act to take their chances.

An even more troubling aspect of the Act is Section 7, which creates the criminal offense of "failing to prevent bribery." For companies subject to the Act, any bribe, including a facili-

(Continued on page 8)

## BOOK REVIEWS (Cont'd)

(Continued from page 7)

tation payment or hospitality, results, without more, in liability for that company. Parliament offers one affirmative defense to this strict liability crime. To escape the possibility of the unlimited fines the Act authorizes, a company already "guilty" under Section 7 because a bribe was paid may seek to establish that, despite the offending bribe, the company had "adequate procedures" designed to prevent bribes. Monty Raphael's discussion of this indefensible aspect of the Bribery Act raises innumerable questions. This is surely all he could do.

Section 9 of the Act provides that 90 days prior to declaring the Act effective, the Government must provide "guidance" on the procedures companies subject to the Bribery Act "can put in place to prevent persons associated with them from bribing ...." This Guidance was finally released on March 30, 2011. Although the Guidance is not prescriptive, it acknowledges that "no bribery prevention regime will be capable of preventing bribery at all times" and acquiesces in "reasonable" hospitality. As to facilitation payments, the Guidance unhelpfully declares prosecutors will act only when this is "in the public interest."

Several other troublesome aspects of the Bribery Act are raised in Raphael's excellent *Guide*. These include that Section 7 liability applies to a bribe by any person "associated with" the company. Such a person is one who performs any service for the company. Section 7's overbroad reach ensnares "any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom." We await judicial interpretation of the Act to learn the implications of Parliament's elimination of the element "corruptly" from the definitions of Bribery Act offenses and of prospects for a challenge to Section 7's presumption of guilt under Article 6(2) of the European Charter of Human Rights, which affirms the presumption of innocence.

Monty Raphael has written an outstanding exegesis of the Bribery Act. For practitioners familiar with how U.S. prosecutors have pushed, and pierced, the envelope of FCPA law, however, it appears Parliament and the Guidance place a great deal of confidence in "a sensible application of prosecutorial discretion." Even if we accept that UK prosecutors, unlike their U.S. counterparts, have not yet used high profile trials to advance their careers, Raphael points out that there are now 49 separate, sometimes competing agencies with authority to enforce bribery offenses. And five highly placed officials at the Serious Fraud Office have recently left SFO for compliance and defense related work at London law firms and one has left for Goldman Sachs.

With the release of the Guidance, practitioners have until July 1, 2011 to review their compliance programs. Because the Act is prospective only, it will likely be many months before we shall be able to judge whether the Act will actually live up to its billing as the world's most draconian, most aggressive anti-bribery legislation. In the meantime, those of us genuinely interested in lessening the impact of bribery in international business transactions will rely upon Monty Raphael's exemplary explication of the intricacies of Bribery Act 2010.

(Continued from page 2)

but also extraordinary support from his law firm, Munger, Tolles & Olson – one of the Branch's law firm supporters – including administrative guru Seana Cuevas. Charles still casts a concerned and watchful eye over all aspects of the organization. IT genius Mark Cuevas adds his talents to our website, [www.ila-americanbranch.org](http://www.ila-americanbranch.org).

### International Law Weekend

A major educational commitment of the American Branch continues to be its design and sponsorship of the world-famous "International Law Weekend" in New York City each October. This was my introduction to the ABILA years ago, and I can attest from the experience of two years chairing the meeting at the Association of the Bar of the City of New York (the Weekend's former venue before we moved to Fordham) that the event draws a myriad of law students and practitioners to hear panels and discussions on private and public international law. And miraculously, in this age of recession, it remains free to any law or graduate student, as well as to members of the ABILA. Last year's organizers – Elizabeth Burleson, then of South Dakota Law School, Hanna Dreifeldt Laine of the United Nations Office of Legal Affairs, Jill Schmieder Hereau of the International Law Students Association, and Vincent J. Vitkovsky of Edwards Angell Palmer & Dodge LLP – did a truly splendid job, featuring Professor David Caron, the new President of the American Society of International Law, as a luncheon speaker, and numerous other luminaries on the panels. The rooms of Fordham Law School – our current venue for this "must" event of the fall season – were jam-packed.

This year's organizers for ILW 2011 are meeting this daunting challenge, and once again the informal tri-partite partnership of academia, the International Law Students Association, and the United Nations Office of Legal Affairs is spinning up a great event, under the care of Martin Flaherty of Fordham, Jill Hereau of ILSA, and Sarah Diamant

(Continued on page 9)

## President's Message (Cont'd)

(Continued from page 8)  
of the U.N.

The creation of a West Coast presence – through a biennial International Law Weekend West – has now become well-established, with last year's event organized and led by Professor Robert Lutz of Southwestern Law School. For those who haven't taken an architectural tour of Los Angeles, this venue happens to be in a passionately beautiful building – one of the most extraordinary examples of Art Deco architecture anywhere in the United States.

And the vast midlands of the United States have now claimed prominence as well, with the new tradition of International Law Weekend – Midwest, to be staged this year at Case Western Reserve University – School of Law through the widely admired entrepreneurial energy of Professor Michael Scharf on September 9, 2011.

Not least, the impressive work of the American Branch in its reports and conferences is made available to a wider audience through the publication of biennial ILA Proceedings. The latest edition for 2009-2010 was prepared by the indefatigable and meticulous Jeffery Atik of Loyola Law School.

### London's International Committees

One can stop to notice another fact of how the organization has grown – namely, the American Branch has a record number of its own members now serving on the key London committees of the International Law Association, as well as the international headquarters leadership of the ILA.

New members can ordinarily be proposed for a Headquarters committee only when there is a renewal of the committee mandate or a new committee is formed – but there are also exceptions to every rule. If an ABILA member has a keen interest in a committee, he or she should contact your humble servant to see if something can be worked out. One of the best launching

pads for this is, of course, prior service on the American Branch's coordinate committees, which analyze many of the same topics and can feed their work into London's deliberations.

American members who are taking part in the international committees and London leadership of the ILA include the many members noted below.

- Former ABILA president Cynthia Lichtenstein now serves as Vice-Chair of the Executive Council of the International Law Association in London. In addition to the Branch's current members on the Council, James Nafziger (Willamette) has been "coopted" to the Council to help plan for the 2014 Biennial.
- ABILA members who are serving as chairs or officers of London's international committees include Jim Nafziger as chair of the ILA Cultural Heritage Law committee, Barbara Stark (Hofstra) as chair of the International Family Law committee, Siegfried Wiessner (St. Thomas) as chair of the Rights of Indigenous Peoples committee, Edward Fleischman (Linklaters) as co-chair of the International Securities Regulation committee, and Christina Cerna (Inter-American Commission on Human Rights) as chair of the Human Rights Committee.
- In addition, ABILA member Thomas Baxter, Jr. (general counsel of the Federal Reserve Bank of New York) serves as vice-chair of the ILA International Monetary Law committee, with David Gross (vice president of the Federal Reserve Bank of New York) as rapporteur, while Coalter Lathrop (Sovereign Geographic) is the rapporteur of the ILA committee on Baselines in the Law of the Sea.
- ABILA members Charles Brower (White and Case), Philip O'Neill (Edwards Angell Palmer & Dodge LLP) and Louise Ellen Teitz (Roger Williams) continue their service as members of London's committee on Commercial Arbitration, bolstered by Ved Nanda (University of Denver), Paul Dubinsky (Wayne State), and Andrea Bjorklund (University of California at Davis) as new alternates. ABILA members Barbara Green (Allianz Global Investors) and Cynthia Lichtenstein (Boston College) serve as members of the ILA International Securities Regulation committee.
- Marjory Fields (Beldock Levine & Hoffman) and Mary Coombs (Miami) have been appointed as members of the ILA's newly-constituted Feminism and International Law committee (where there is still room for an alternate and perhaps room for some American attitudes).
- Rochelle Dreyfuss (NYU) and Jane Ginsburg (Columbia) – who have finished their service as co-rapporteurs on the American Law Institute's Restatement of the Law of Intellectual Property – have joined the ILA committee on Intellectual Property and Private International Law, along with members Aaron Fellmeth (Arizona State) and Marketa Trimble (University of Nevada-Las Vegas), and alternates Wendy Gordon (Boston University) and Sherri L. Burr (University of New Mexico).
- Linda Silberman (NYU) serves on the ILA Committee on Civil Litigation and the Interests of the Public, while James Nafziger (Willamette) and Luke Lee (U.N. Group of Experts on Cooperation to Avert New Flows of Refugees) serve on the Commit-

(Continued on page 10)

## President's Message (Cont'd)

(Continued from page 9)

tee for Reparation for Victims of Armed Conflict.

- Barbara K. Woodward (author of "Global Civil Society in International Lawmaking and Governance") serves on the Committee on Non-State Actors, while the Committee on Baselines under the Law of the Sea is well assisted by U.S. members Coalter Lathrop (Sovereign Geographic), George Walker (Wake Forest), Michael Reed (Justice Department ret.), Captain J. Ashley Roach (U.S. Navy and State Department Office of the Legal Adviser ret.), and ABILA Executive Committee Chairman John Noyes.
- The ILA Committee on International Monetary Law has a full complement of eight American members: Lee Buchheit (Cleary Gottlieb), James Freis (U.S. Department of Treasury), Sean Hagan (General Counsel, International Monetary Fund), Cynthia Lichtenstein (Boston College), Andre Newberg (European Bank of Development and Reconstruction, and Ernest Patrikis (White & Case), while David Stewart (Georgetown), James Nehf (Indiana), and Louise Ellen Teitz (Roger Williams) serve on the International Protection of Consumers committee.
- The Committee on International Trade Law boasts of members such as John Jackson (Georgetown), Joel Trachtman (Tufts - Fletcher), Gary Horlick (Georgetown), and Fred Abbott (Florida State), while the Committee on Recognition and Non-Recognition is graced by Peggy McGuinness (St. John's) and Christopher Borgen (St. John's), along with Brad Roth (Wayne State).

- The Committee on the Rights of Indigenous Peoples is informed by American members Lorie Graham (Suffolk), Jon Van Dyke (Hawaii), and Dalee Dorough (Alaska, and UN Permanent Forum on Indigenous Issues). The International Human Rights Law Committee is bolstered by members John Cerone (New England College of Law), Mark Janis (University of Connecticut), and Charles Siegal (Munger, Tolles & Olson).
- The Climate Change committee boasts the membership of Daniel Bodansky (Arizona State), Elizabeth Burleson (Pace), William C.G. Burns (Middlebury College's Monterey Institute of International Studies), and Hari Osofsky (Washington and Lee), with alternates Maxine Burkett (Hawaii) and Anita Halvorsen (Colorado).
- Charles Siegal (Munger Tolles and Olson) and Daniel Joyner (Alabama) serve on the ILA Committee on Nuclear Weapons, Non-Proliferation and Contemporary International Law, while Carl Christol (Southern California), Joanne Gabrynowicz (Mississippi), Jonathan F. Galloway (Lake Forest College ret.), Rafael Moro Aguilar (OrbSpace), and Frans von der Dunk (Nebraska), round out the Committee on Space Law.
- The Committee on the Use of Force includes members Mary Ellen O'Connell (Notre Dame, and immediate past chair of the committee), Sean Murphy (George Washington), and Ruth Wedgwood (Johns Hopkins SAIS).

In addition, former U.N. Assistant Secretary General Larry Johnson, an American branch member, has been appointed by London as ILA liaison to the United Nations in New York and Geneva, to keep ILA headquarters and the American branch up-to-date on the key developments that deserve our comment.

Many other American Branch members serve with great distinction on the ILA-London's several Study Groups and the Teaching of International Law Interest Group (the latter open to all interested American Branch members). These are listed at [http://www.ila-hq.org/en/committees/study\\_groups.cfm](http://www.ila-hq.org/en/committees/study_groups.cfm).

One can see from this roster – in and of itself – that as a law reform and scholarly society, the American Branch of the ILA has a great claim to being truly international in scope. It also helps to bring together leading voices in key fields of the law, to meet and talk with colleagues from around the world.

### ABILA's American Committees

And then, equally important for the development of international law in the United States, is the ABILA's own handsome roster of 24 American branch-level committees, in a legal studies and law reform program that has been led with great vigor by past chairs such as Leila Sadat (Washington University), Valerie Epps (Northeastern University) and Philip Moremen (Seton Hall), and is now under the energetic management of Andrea Bjorklund (University of California, Davis). The current leadership includes:

- Accountability of International Organizations – chaired by Mathew Parish (Akin Gump) and Osmat Jefferson (Cambia)
- Arms Control and Disarmament – chaired by Leopoldo Lovelace (California State Polytechnic)
- Bilateral Investment Treaties and Dispute Resolution chaired by Roberto J. Aguirre Luzi (King and Spaulding) and Norman Gregory Young (California State Polytechnic)
- Commercial Dispute Resolution – chaired by David P. Stewart (Georgetown) and Louise Ellen Teitz (Roger Williams)

(Continued on page 11)

## President's Message (Cont'd)

(Continued from page 10)

- Extraterritorial Jurisdiction – chaired by Anibal Sabater (Fulbright and Jaworski)
- Feminism and International Law – chaired by Janie Chuang (American) and Christina Ocha (Indiana)
- Formation of Rules of Customary International Law – chaired by Brian Lepard (Nebraska) and Fernando Teson (Florida State)
- International Commercial Law – chaired by Houston Lowry (Brown & Welsh)
- International Criminal Court – chaired by Jennifer Trahan (New York University)
- International Disability Law – chaired by Steven Hill (U.S. Mission to the United Nations)
- International Environmental Law – chaired by William C. G. Burns (Monterey Institute) and Gunther Handl (Tulane)
- International Human Rights Law – chaired by Scott Horton (Columbia)
- International Humanitarian Law – chaired by David Kaye (UCLA)
- International Intellectual Property Law – chaired by Aaron Fellmeth (Arizona State)
- International Judicial Integrity – chaired by Lawrence W. Newman (Baker and McKenzie)
- International Monetary Law and Extraterritorial Jurisdiction – chaired by James Lynch (Sobel & Co.)
- Intergovernmental Settlement of Disputes – chaired by Pieter H.F. Bekker (Dewey and LeBoeuf)
- International Trade Law (chair vacant)
- Islamic Law – chaired by Robert Michael (Pace)
- Law of the Sea – chaired by George Walker (Wake Forest)
- Space Law – chaired by Henry Hertzfeld (Elliott School, George Washington University) and Jonathan F. Galloway (Lake Forest College ret.)
- Teaching of International Law – chaired by Mark Wojcik (John Marshall)
- United Nations Law – chaired by John Carey (editor of U.N. Law Reports)
- Use of Force – chaired by James Kraska (U.S. Naval War College)

No one can doubt that this is a vast array of talent – and perhaps we can work to gain even more public attention for our new committee reports (which are published at <http://www.ila-americanbranch.org/BranchComm.aspx> and in the Branch's biennial *Proceedings*), by sending releases to interested news organizations and legal publications, as well as to reporters who cover those fields.

### Biennial International Meetings

The last biennial meeting in The Hague was enjoyed by many members, and was brilliantly organized by Nico Schrijver of the Dutch Branch of the ILA. Our great friend Nico had a large presence in American law through his former chairmanship of the Academic Council on United Nations Studies ("ACUNS"). The next biennial of the ILA will be in August 2012, in Sofia, Bulgaria – known as the "pearl" of the Black Sea, an

urban area whose elegant architecture has survived, in substantial part, from before the Second World War.

The Japanese Branch was scheduled to put on the 2014 biennial meeting in Tokyo. Because of that beautiful country's recent challenge of reconstruction after terrible earthquakes, the Japanese Branch has decided that it should delay its sponsorship of the biennial meeting. The American Branch has been asked to consider stepping into the breach – moving up its biennial in Washington, D.C. from 2016 to 2014. We're currently considering whether that is feasible, in friendly conversations with the American Society of International Law as a potential partner.

The importance of the Biennial ILA Meetings is in part as a showcase for the views and voices of scholars and practitioners from around the world on difficult and timely topics. But the biennials also serve as the crucible for the final drafting of the ILA's authoritative reports. Though much of the work of the international committees can be carried out between biennials in the age of "email", the search for compromise language and a dispositive *mot juste* is still often best advanced amidst the fellowship of a committee of experts in the same field.

And of course, the collegiality and fellowship sustained in the Biennials among ILA members from so many different countries around the world is one way to reinforce the confidence that international law can be a successful common project, with members able to transcend any narrow national parochialism.

### The ILA American Branch and its Future

To support the American Branch in its financial and intellectually vigorous future, we may need to work at building a **larger membership amidst the practicing bar**. With the specialization of law practice, leaders at the bar possess an extraordinary knowledge of where a field of practice is headed, and what problems of doctrine, institutions, and

(Continued on page 12)

## President's Message (Cont'd)

(Continued from page 11)

ethics it will face. Some critics observe that the American legal academy has become far removed from the concerns of the practicing bar – Chief Justice John Roberts has shared his worries to that effect – and there is no better place for that interaction than the ABILA and ILA.

In addition, the future of the Branch depends in part the ability to draw upon the resources and institutional support of **larger law firms and international corporations** that have a generous sense of their own role in the international community. We already have several law firm partners, including Debevoise & Plimpton, Brown & Welsh, and Munger, Tolles & Olson – see [http://www.ila-americanbranch.org/Law\\_Firm\\_Supporters.aspx](http://www.ila-americanbranch.org/Law_Firm_Supporters.aspx) -- for whose support the American Branch is immensely grateful. And not least, many

members of the professorial legal academy take part in practice on an occasional basis, and will surely find these contacts enjoyable and rewarding.

In addition, it may be useful to partner with **other organizations** in new events – where the Branch may not have the financial wherewithal to serve as an underwriting sponsor, but can lend its vast array of talent and connections to leaders at the bar in major American cities. The Branch encourages and actively cosponsors such events.

We certainly should make our expertise and members available to the **American Law Institute** in its consideration of a future program of work in International Law. The intellectual and authoritative influence of the ALI's tradition of Restatements among American federal and state court judges, as well as judges abroad, makes it important to assure that on international law topics, the ALI has the benefit of ABILA

and ILA studies – and a cross-membership that will call these to the ALI's attention in its work.

And in the tradition of intellectuals taking a role in American public affairs, all our members may want to consider **writing on legal issues of public moment for popular publications as well as in scholarship**. Branch committees (with coordination of the director of studies) can issue shorter forms of analysis, including newspaper op-eds and opinion pieces. In addition, the Branch can cosponsor non-partisan public events that analyze issues of current moment, so long as law is a major aspect of the analysis.

So please think of this as your own organization, inviting energetic ideas for new ventures, and fellowship with an extraordinary group of people.

American Branch of the  
International Law Association  
c/o Charles D. Siegal, Esq.  
Munger, Tolles & Olson LLP  
355 S. Grand Ave., 35th Fl  
Los Angeles, CA 90071-1560