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Soo-Jeong Ahn

Albert Y. Yu Chang

Manish Dhingra

J. Robert Force

Ajay Verma

See next page for additional authors

Soo-Jeong Ahn, Albert Y. Yu Chang, Manish Dhingra, J. Robert Force, Ajay Verma, Manjit Gill, William A. Herbert, Timothy J. O'Brien, Hee Chul Kang, Ann Zoltani, Lori J. Williams, Steve Saunders, Pamela A. Fuller, Raymond Kang, Chang Hyeon Ko, Kyung-Geun Lee, and Sang-Hoon Lee

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This article highlights selected developments during 2008 in Cambodia, the Cook Islands, India, Japan, Malaysia, New Zealand, the Philippines, South Korea, and Thailand.[1]

I. Cambodia*

On July 27, 2008, Cambodia held its fourth national election under the present constitutional monarchy established during the United Nations Transitional Authority in Cambodia (UNTAC) period. The ruling Cambodian People's Party solidified its rule, increasing the number of seats held in the National Assembly. Prime Minister Hun Sen was re-elected by the Cambodian People's Party for another five year term. Despite the election and the focus of nearly all government officials and civil servants on the campaign and electoral process during the first half of the year, several legal reform milestones were reached in Cambodia in 2008.

A. Civil Code

The 2007 Civil Code, drafted with assistance from the Government of Japan,[2] was promulgated on December 8, 2007, and is expected to have a broad effect on other significant existing legislation, in particular the 2001 Land Law.[3] With over 1,300 articles, the

1. A more detailed version of this article is available on the ABA Asia/Pacific Law Committee's homepage: http://www.abanet.org/dch/committee.cfm?com=IC810000.

* This section was authored by J. Robert Force, who is licensed in the State of California and is a legal adviser in private practice in Phnom Penh, Cambodia.

2. Civil Code [C. Civ.] (Cambodia). This Code was promulgated on December 8, 2007. The translation relied upon was provided by the JICA Project Office in the Ministry of Justice of Cambodia and was translated from Japanese, effective October 13, 2006. Official English translations from the original Khmer version are not yet available.

3. Land Law [Land L.] (Cambodia). This Law was promulgated on September 30, 2001, and defines states of title, ownership, transfer of ownership, leases, and other land rights.

Civil Code is one of the most extensive and far-reaching bodies of law to be enacted in Cambodia. Transitional and implementing legislation and regulations have yet to be approved, and therefore the interpretation of the Civil Code and timing of implementation is uncertain. Other laws, including the Commercial Contracts Law, are presently being drafted and may affect implementation and interpretation of the Civil Code. Among the areas covered by the Civil Code are definitions of natural[4] and juristic persons,[5] and provisions on leases,[6] torts,[7] family, marriage,[8] and succession.[9] Some of these provisions may be supplemented by subsequent legislation, such as legislation concerning commercial leases, which is expected to be addressed by the Commercial Contracts Law.

B. Law on Combating Money Laundering and Terrorist Financing

As Cambodia further integrates into the globalized economy and as its banking sector continues to grow, the Law on Combating Money Laundering and Terrorist Financing is intended to prevent Cambodia from becoming a haven for concealing proceeds of illegal activities and financing illegal and terrorist activities.[10] The law establishes a Financial Intelligence Unit, under the supervision of the National Bank of Cambodia, to which suspicious financial activity is to be reported.[11] The Financial Intelligence Unit will evaluate and investigate suspicious transactions and where relevant, refer them to a competent authority.[12] It will also cooperate with similar entities in foreign jurisdictions in exchanging information.[13]

Persons obligated to report suspicious activities are broadly defined, ranging from banks, real estate agents, and money exchangers to the post office, lawyers, casinos, and non-governmental organizations.[14] Anonymous accounts, or accounts identified solely by numbers or false names, are prohibited.[15] The law defines means for identifying customers' identities,[16] the duty and means of identifying[17] and reporting suspicious transactions and activities,[18] and the functions of the Financial Intelligence Unit.[19]

4. Civil Code, bk. 1, ch. 1.
5. *Id.* bk. 1, ch. 2.
6. *Id.* bk. 5, ch. 5.
7. *Id.* bk. 5, ch. 16.
8. *Id.* bk. 7.
9. *Id.* bk. 8.
10. Law on Combating Money Laundering and Terrorist Financing, with late amendments (Cambodia). This law was enacted on June 24, 2007.
11. *See id.* arts. 4, 19.
12. *Id.* art. 21.
13. *Id.* art. 25.
14. *Id.* art. 4.
15. *Id.* art. 7.
16. *Id.* art. 8.
17. *Id.* art. 10.
18. *Id.* art. 12.
19. *Id.* art. 21.

C. Law on Insolvency

On December 8, 2007, the National Assembly adopted the Law on Insolvency as part of Cambodia's obligations from joining the World Trade Organization in 2004. The new law provides an important procedure for dealing with the insolvency of entities and persons domiciled, or with assets, in Cambodia.[20] Given the often informal way of conducting business in Cambodia, the Law on Insolvency further integrates Cambodia into the global commercial environment. The law provides for commencing insolvency proceedings,[21] appointment of an administrator of the debtor's assets,[22] and liquidation and satisfaction of claims.[23] The law does not apply to any debtor or creditor covered by the Law on Banking and Financial Institutions, Law on Insurance, or the Law on Non-Government Securities, unless provided for in those laws.[24]

Proceedings may be opened only if the aggregate debt is in excess of five million riels,[25] and the debtor has failed to pay its minimum obligation after thirty days.[26] Interestingly, a petition to open insolvency proceedings may be filed by the public prosecutor in addition to the debtor and creditor.[27] Until an insolvency court has been established, insolvency proceedings will be administered by the courts of Cambodia.

D. Sub-Decree 114 on the Mortgage and Transfer of the Rights over a Long Term Lease or an Economic Land Concession

Sub-Decree 114 on the Mortgage and Transfer of Rights over a Long Term Lease or an Economic Land Concession was signed by Prime Minister Hun Sen on August 29, 2007, and was first implemented in early 2008.[28] Under the 2001 Land Law, foreigners may not own land in Cambodia,[29] and a long-term lease or economic land concession offers an alternative that enables foreign investors to have land use rights otherwise not available.

Although some foreign investors enter into joint ventures with Cambodian citizens or entities in order to acquire certain land ownership rights,[30] many foreign investors choose to enter into long-term leases or economic land concessions. A long-term lease is one that has a term of fifteen years or longer.[31] An economic land concession is a contract right granted by the government to an entity for the purposes of agricultural or industrial-agricultural exploitation of state private land.[32]

20. Insolvency Law [Insolvency L.], ch. 2, art. 6 (Cambodia).
21. *Id.*
22. *Id.* ch. 4, art. 21.
23. *Id.* ch. 7, arts. 56-58.
24. *Id.* ch. 2, art. 6.
25. *Id.* art. 7(1). Five million Cambodian riels is approximately $1,250.
26. *Id.* art. 9.
27. *Id.* art. 8.
28. Sub-Decree 114 on The Mortgage and Transfer of the Rights Over a Long-Term Lease or an Economic Land Concession [Sub-Decree 114] (Cambodia).
29. Article 8 of the Land Law provides that only natural persons or legal entities of Khmer nationality may own land in Cambodia. Land L., ch. 1, art. 8 (Cambodia).
30. *Id.* art 9. Enterprises registered in Cambodia may own land if 51 percent or more of the shares are owned by a Cambodian citizen or Cambodian entity.
31. *Id.* ch. 7, pt. 4, art. 106.
32. *Id.* ch. 5, arts. 48-49.

Recognizing that foreign and other investors were seeking to have a form of security for their long-term leases and economic land concessions, given that ownership of land is not available to foreigners, Sub-Decree 114 was drafted, in part, to provide a mechanism for registration of a long-term lease or economic land concession on the certificate of title for the property being leased. It also creates a procedure for registration of mortgages by the lessee or concessionaire on a certificate of economic land concession or certificate of long-term lease, which are issued at the time the economic land concession or long-term lease is registered on the certificate of title.[33]

Economic land concessions are granted over land that is owned by the government and available for private exploitation, i.e., private state land.[34] Land owned by the government is categorized as either public state land or private state land. Public state land is not available for concessions and consists of property such as forests, rivers, natural lakes, beaches, public infrastructure, public schools, and government buildings.[35] Economic land concessions vary in length, but typically have terms of either seventy or ninety-nine years with a renewal period of similar length. Economic land concessions are normally granted by the Ministry of Agriculture, Forestry and Fisheries, but other Ministries can also hold trusteeship over state private land. If the land does not have a certificate of title issued by the Ministry of Land Management, Urban Planning, and Construction, the economic land concession must be signed by the Ministry of Economy and Finance.[36] Formerly, the relevant provincial or municipal governor was authorized to grant economic land concessions with a total investment under ten million Cambodian riels[37] and a total land area of less than one thousand hectares.[38] This authorization was revoked in 2008, and only the relevant trustee ministry can grant economic land concessions.[39]

Upon application by the lessee or concessionaire, the economic land concession or long-term lease is registered directly on the land title certificate at the Ministry of Land Management, Urban Planning and Construction, and the Ministry is required to issue a certificate of long-term lease or certificate of economic land concession.[40] The practical effects of registration are that it provides public notice of the lease to third parties, the right to obtain a mortgage over the lease or concession,[41] inheritance rights to the heirs or successors of the lessee or concessionaire,[42] and maintains leasehold rights where the land is transferred to another owner.

As most state private land is not titled, the implementation of Sub-Decree 114 for economic land concessions is still in transition as the relevant officials determine procedures for issuing titles over state private land in order to register economic land concessions on the certificate of title.

33. Economic land concessions are governed by Sub-Decree 146 ANK/BK, enacted on December 27, 2005. Sub-Decree on Economic Land Concessions 146 ANK/BK [Sub-Decree 146] (2005) (Cambodia).

34. *Id.* art. 4.

35. Land L., ch. 2, art. 15 (Cambodia).

36. Sub-Decree 114, art. 5 (Cambodia).

37. Currently, one U.S. dollar trades for approximately 4,000 Cambodian riels.

38. Sub-Decree 146, art. 29.

39. Sub-Decree 131 on Sub-Decree on Adjustment to Economic Land Concessions [Sub-Decree 131] (Cambodia). Sub-Decree 131 was enacted on September 15, 2008. *Id.*

40. Sub-Decree 114, art. 6.

41. *Id.* art 7.

42. *Id.* art 8.

E. Prakas on Financial Lease, No. B7.08-088

The Prakas on Financial Lease was issued by the National Bank of Cambodia on May 30, 2008, and authorizes commercial banks and specialized banks to engage in the business of financial leasing for movable property.[43] Non-banks may not engage in financial leasing on a regular basis.[44] A financial lease agreement is defined as "an agreement in which the lessor purchases movable property selected by the lessee from the supplier, leases this movable property to the lessee and authorizes the lessee to periodically pay the lease payment."[45] The supplier is defined as "a person, natural or legal, from whom a lessor acquires movable property to be leased to a lessee. The lessor's acquisition could be by purchase, lease, and assignment of a right to purchase or lease, including assignment of right from the lessee."[46]

The Prakas provides alternative means of acquiring the use of movable property, such as vehicles and other equipment, in an economy that remains largely cash-based. The Financial Leasing Law is presently being drafted. It is not yet known how the Financial Leasing Law provisions will affect the Prakas on Financial Lease, nor when the National Assembly will promulgate it.

F. Other Developments

Three new educational institutions were established for the legal profession in 2008. A training center was established by Sub-Decree 130 on the Establishment of Training Center for the Lawyer Profession to train of law students, interns, and further the education of lawyers who are already members of the Bar Association of the Kingdom of Cambodia.[47] A school for training notary publics[48] and a school for training bailiffs[49] were both established by sub-decree on August 18, 2008. Education of legal professionals is a priority in Cambodia, where the legal profession was destroyed under the Khmer Rouge.

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43. Nat'l Bank of Cambodia, Prakas on Financial Lease No. B7.08-088 Prokor, art. 1 (2008). The authorization to banks is made pursuant to Article 2.1 of the Law on Banking and Financial Institutions promulgated on November 18, 1999, by Royal Kram NS/RKM/1199/13.

44. Prakas on Financial Lease, *supra* note 43, art. 5.

45. *Id.* art 3.

46. *Id.*

47. Sub-Decree 130 on the Establishment of Training Center for the Lawyer Profession [Sub-Decree 130] (2008) (Cambodia). This sub-decree was issued by the Council of Ministers on September 11, 2008.

48. Sub-Decree 117 on the Establishment of Royal School of Notaries of the Royal Academy of Judicial Profession [Sub-Decree 117] (2008) (Cambodia). This sub-decree was issued by the Council of Ministers on August 18, 2008.

49. Sub-Decree 116 on the Establishment of Royal School of Bailiffs of the Royal Academy of Judicial Profession [Sub-Decree 116] (2008) (Cambodia). This sub-decree was issued by the Council of Ministers on August 18, 2008.

II. The Cook Islands*

A. Official Information Act 2008

The Cook Island's legislature passed a new freedom of information law in February 2008.[50] The Official Information Act 2008 will come into force on February 11, 2009.[51] The national ombudsman whose office is tasked with administering the Act requested the one-year delay.[52] It is expected that government officials and heads of ministries will utilize the additional time to familiarize themselves with the law and update their recordkeeping systems.[53] This marks the first time that a Pacific island country has enacted freedom of information legislation.[54]

By enacting this law, the legislature sought to achieve three main goals.[55] First, the law attemps to allow the public to have greater access to government information.[56] Second, this legislation seeks to provide persons proper access to official information that relates to them.[57] Third, the law is designed to protect official information in a manner consistent with the public interest and the preservation of personal privacy.[58]

With regard to protecting official information, if the Act does not specifically require otherwise, "information shall be made available unless there is good reason for withholding it."[59] A provision within the Act identifies five conclusive reasons for withholding information.[60] Information may be withheld if its release would: (1) prejudice the security or international relations of the Cook Islands, (2) prejudice entrusting information to the Government of the Cook Islands on a basis of confidence, (3) prejudice the maintenance of the law, (4) endanger the safety of any person, or (5) damage the economy of the Cook Islands.[61]

III. India*

In 2008, the Indian economy continued to grow at an enviable annual rate of about 9 percent. To further liberalize the economy, the Government of India has been periodically amending and implementing various statutory and regulatory policies. Some of the

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* This section was authored by Lori J. Williams, an attorney in private practice in Charleston, South Carolina. She recently returned from practicing law overseas. She is the former Acting Attorney General for the Federated States of Micronesia and former legal counsel for the FSM Banking and Insurance Board.

50. *See Cook Islands Government Introduces Freedom of Information Legislation*, Radio New Zealand Int'l, Feb. 12, 2008, *available at* http://www.rnzi.com/pages/news.php?op=read&id=37977 [hereinafter *Freedom of Information*].

51. *Id. See also* Official Information Act 2008 (Cook Islands), *available at* http://www.paclii.org/cgi-bin/sinodisp/ck/legis/num_act/oia2008197/oia2008197.html.

52. *See Freedom of Information*, *supra* note 50.

53. *Id.*

54. *Freedom of Information*, *supra* note 50.

55. Official Information Act 2008, pt. 1, ¶ 4.

56. *Id.* ¶ 4(a).

57. *Id.* ¶ 4(b).

58. *Id.* ¶ 4(c).

59. *Id.* ¶ 5.

60. *Id.* ¶ 6.

61. *Id.*

* Ajay Verma, LL.B. (Delhi), LL.M. (Tulane), authored this section.

measures undertaken during 2008 include guidelines affecting foreign investment in credit information companies,[62] commodity exchanges,[63] industrial parks,[64] the civil aviation sector,[65] petroleum and natural gas,[66] and the mining of titanium bearing minerals and ores.[67]

A. Companies Bill, 2008

The Government introduced the Companies Bill, 2008 in the Parliament to replace the existing Companies Act, 1956.[68] The Bill notes that Indian companies are mobilizing substantial resources and "emerging internationally as efficient providers of a wide range of goods and services while increasing employment opportunities at home."[69] The Companies Bill, 2008 "seeks to enable the corporate sector in India to operate in a regulatory environment of best international practices that fosters entrepreneurship, investment and growth"[70] and, inter alia, provides for:

- Regulation of corporate entities from incorporation to liquidation and winding up, in a single, comprehensive, legal framework;
- Availability of a "new entity in the form of One-Person Company (OPC) while empowering [the] Government to provide a simpler compliance regime for small companies";
- Implementation of a new e-governance regime for processes including filing and stakeholder access to corporate data around the clock over the internet;
- Facilitation of joint ventures, relaxation of restrictions to permit a maximum of 100 partners in entities such as partnerships and banking companies, and elimination of the ceiling regarding professions regulated by the Special Acts;
- Regulation of every company such that it must have at least one director resident in India and strengthening the requirement for independent directors;

62. Press Release, Gov't of India, Ministry of Commerce & Indus., Guidelines for Foreign Investment in Credit Information Companies (Mar. 12, 2008) *available at* http://siadipp.nic.in/policy/changes/pn1_2008.pdf.

63. Press Release, Gov't of India, Ministry of Commerce & Indus., Guidelines for Foreign Investment in Commodity Exchanges (Mar. 12, 2008), *available at* http://siadipp.nic.in/policy/changes/pn2_2008.pdf.

64. Press Release, Gov't of India, Ministry of Commerce & Indus., Guidelines for Foreign Direct Investment (FDI) in Industrial Parks (Mar. 12, 2008), *available at* http://siadipp.nic.in/policy/changes/pn3_2008.pdf.

65. Press Release, Gov't of India, Ministry of Commerce & Indus., FDI Policy for the Civil Aviation Sector (Mar. 12, 2008), *available at* http://siadipp.nic.in/policy/changes/pn4_2008.pdf.

66. Press Release, Gov't of India, Ministry of Commerce & Indus., Rationalisation of FDI Policy for the Petroleum & Natural Gas Sector (Mar. 12, 2008), *available at* http://siadipp.nic.in/policy/changes/pn5_2008.pdf.

67. Press Release, Gov't of India, Ministry of Commerce & Indus., FDI Policy for Mining of Titanium Bearing Minerals and Ores (Mar. 12, 2008), *available at* http://siadipp.nic.in/policy/changes/pn6_2008.pdf. Because space does not permit full discussion of these important changes in this year in review article, readers are urged to consult the larger web version on the ABA Asia/Pacific Law Committee's homepage: http://www.abanet.org/dch/committee.cfm?com=IC810000.

68. Press Release, Gov't of India, Press Information Bureau, Companies Bill, 2008 (Aug. 29, 2008), *available at* http://pib.nic.in/release/release.asp?relid=42061&kwd [hereinafter Press Release on Companies Bill]. The text of the Act can be accessed at http://www.asiancentre.org/The percent20Company percent20Bill percent202008.pdf.

69. Press Release on Companies Bill, *supra* note 68.

70. *Id.*

- "Statutory recognition to audit, remuneration, and stakeholder's grievances committees of the board, and [recognition] of the Chief Executive Officer (CEO), Chief Financial Officer (CFO), and Company Secretary as Key Managerial Personnel (KMP)";
- Availability of a "single forum for approval of mergers and acquisitions," as well as the establishment in certain situations of the "concept of deemed approval";
- Availability of a right of action for shareholders associations and groups when the company engages in fraudulent conduct, as well as for "investor protection activities and class action suits";
- A revision of the regulatory framework for insolvency and the attendant steps that requires "the process to be completed in a time-bound manner";
- Consolidation of various rehabilitation, liquidation, and winding up fora into the National Company Law Tribunal and the National Company Law Appellate Tribunal;
- The creation of the Insolvency Fund (to replace the proposed Rehabilitation and Revival Fund of the Companies (Second Amendment) Act, 2002) to be voluntarily funded in return for the right to withdraw funds in the event of insolvency;
- The creation of special courts to handle offences under the Bill, with the National Company Law Tribunal and the appellate level tribunal handling company matters including mergers and reductions in capital.[71]

B. Foreign Direct Investment

The Government issued a press release in which it provided a consolidated summary of its Foreign Direct Investment (FDI) policy and the regulations applicable to various sectors and activities after incorporating policy changes through March 31, 2008. This press release noted that foreign direct investment is prohibited in certain sectors[72] and limited in others.[73] In sectors and activities that are not prohibited or limited, however, FDI may be permitted up to 100 percent on the automatic route subject to any applicable sector rules.[74] The policy requires prior government approval for FDI where provisions of Press Note 1 (2005 series) issued by the Government of India are implicated, or where the company proposes to use more than 24 percent foreign equity to manufacture "items reserved for the Small Scale sector."[75]

71. *Id.*

72. Foreign direct investment is prohibited in these sectors: [1] Retail Trading (except single brand product retailing)[; 2] Atomic Energy[; 3] Lottery Business[; 4] Gambling and Betting[; 5] Business of chit fund[; 6] Nidhi Company[; 7] Trading in Transferable Development Rights (TDRs)[; and 8] Activity/sector not opened to private sector investment." Press Release, Gov't of India, Ministry of Commerce & Indus., Press Note No. 7, Consolidated Policy on Foreign Direct Investment (Mar. 12, 2008), *available at* http://siadipp.nic.in/policy/changes/pn7_2008.pdf.

73. The FDI-limited sectors are set forth in charts in the web version of this article. *See* Manish Dhingra, Title Goes Here, http://www.abanet.org/dch/committee.cfm?com=IC810000.

74. *Id.* at 10.

75. *Id.*

C. Intellectual Property Law*

1. *Filing of TM Application Does Not Arise Cause of Action for Passing Off*

In an important ruling,[76] the Supreme Court of India held that the "mere filing of an application for registration of a trade mark does not constitute a part of cause of action in a suit for passing off."[77] Petitioner manufacturers and sellers of banana chips adopted the trademark A-ONE in 1986 and applied to register the mark in December 1999. The respondent also filed three trademark applications in January 2000 before the Trade Mark Registry, seeking registration of the mark A-ONE throughout India and alleging use since 1995. The banana chip manufacturers sought an injunction in the appellate court, seeking to restrain respondent from passing off his goods using the trade mark A-ONE. They claimed that when the respondent filed a trade mark application at the Trade Mark Registry at Chennai, a threat was communicated regarding the use of the trade mark in Chennai, and it was immaterial whether there was actual use or not and the appellants would be entitled to an injunction (being a prohibitive remedy) against the said mark.[78] The appellate court denied the injunction, and the Division Bench of the Appellate Court upheld that decision. The supreme court held that the petitioners could not file the suit in the appellate court "seeking an injunction to restrain the respondent from passing off his goods using the trade mark A-ONE, based only on the claims made in the trade mark application of the respondent filed before the Trade Mark Registry, since the necessary requirements of an action for passing off [were] absent."[79]

2. *The Supreme Court Explains Provisions Regarding Non-Use of Trademarks and Their Removal from Register*[80]

The Supreme Court clarified the law regarding non-use of a trademark and removal from the register. Appellant Toshiba, one of the largest manufacturers of heavy electrical apparatus in Japan, adopted the mark TOSHIBA. Respondent Tosiba Appliances, an Indian company, claimed its business consisted of dealing into various electrical appliances and "marketing auto irons, toasters, washing machines, extension cords, table lamps," and other items under the trademark TOSIBA since 1975.[81]

Toshiba submitted that it had "acquired about 35 trademarks registrations in India. The [trademark] period of seven years expired in 1978."[82] Toshiba contended that upon expiration of the mark, the mark "became conclusive of its validity in terms of Section 32"

* This section was authored by Manish Dhingra, the Managing Partner at the New Delhi law firm Dhingra & Singh. Manish may be reached at mdhingra@dslegal.com.

76. K. Narayanan & Anr v. S. Murali, Nos. 4480-4481 of 2002 (India Aug. 5, 2008), *available at* http://judis.nic.in/supremecourt/imgs.aspx [hereinafter *K. Narayana*].

77. Posting of Swaraj Paul Barooah to SpicyIP, http://spicyipindia.blogspot.com/2008/09/mere-filing-does-not-constitute-cause.html (Sept. 4, 2008, 4:37 PM).

78. *K. Narayana*, *supra* 76, ¶ 16.

79. *Id.* ¶ 29.

80. Kabushiki Kaisha Toshiba v. Tosiba Appliances Co., (2008) No. 3639 (India S.C.), *available at* http://judis.nic.in/supremecourt/chejudis.asp.

81. *Id.* ¶ 6.

82. *Id.* ¶ 8.

of the Trademarks Act, 1958.[83] The registration was extended from time to time, and the mark stands registered until 2016. On the premise that Tosiba had been using a deceptively similar trade name to that used by the appellant, appellant served a notice upon respondents. Accordingly, proceedings took place before the Deputy Registrar of Trade Marks whereby respondents sought removal of appellant's trademark from the register for non-use under Sections 46 and 56 of the Act. The Deputy Registrar of Trade Marks partially allowed the application for rectification filed by the respondent. The Division Bench of the Appellate Court upheld "the order of the Deputy Registrar so far as the application related to Section 46(1)(a) of the Act but rejected the plea as regards Section 46(1)(b) thereof."[84] Hence, the appeal to the Supreme Court.

The Supreme Court said "the distinction between Clause (a) and Clause (b) is that if the period specified in Clause (b) has elapsed and during that period there has been no bona fide use of the trademark, the fact that the registered proprietor had a bona fide intention to use the trademark, at the date of the application for registration becomes immaterial and the trademark is liable to be removed from the Register unless his case falls under Section 46(3), while under Clause (a) where there had been a bona fide intention to use the trademark in respect of which registration was sought, merely because the trademark had not been used for a period shorter than five years from the date of its registration will not entitle any person to have that trade mark taken off the Register."[85]

The Supreme Court commented that because no evidence was placed on record to depict Toshiba's intent to abandon the use of the trademark and because of evidence to the contrary—an advertisement in 1985, renewal of registration every seven years, and maintaining service centers to render services to those who imported the said washing machines, by appellants–the appellate court should have held that appellants intended bona fide use of the trademark not only when they filed an application for registration, but also continuously thereafter.[86] The court also noted that the respondent had not been manufacturing washing machines or spin dryers and had no intention to manufacture those goods.

3. *The Supreme Court Explains the Doctrine of Acquiescence in IP Cases*

The Supreme Court has explained how the doctrine of acquiescence should be interpreted in intellectual property cases. The court held that "conduct of the person aggrieved in filing the application for rectification would be relevant."[87]

Khoday Distilleries Limited, a manufacturer of whisky under the trademark "Peter Scot," which it applied for in May 1968, had the trademark registered circa 1971 without any opposition from the respondent Scotch Whisky Association (SWA). When SWA came to know of Khoday's mark around September 1974, they filed an application for rectification of the trademark in April 1986, which was decided in their favor.

83. *Id.*

84. *Id.*

85. American Home Products Co. v. Mac. Labs. Pvt. Ltd., A.I.R. 1986 S.C. 137.

86. *Id.* ¶ 34 (iiii)(1).

87. Khoday Distilleries Ltd. v. Scotch Whisky Ass'n, (2008) No. 4179, 11 (India S.C.), *available at* http://judis.nic.in/supremecourt/imgs.aspx.

The defense of acquiescence/delay raised by Khoday was rejected by the Registrar on the ground that because the plea of deceptive element in the impugned mark was neither displaced nor rebutted by evidence by Khoday, the pleas of delay and acquiescence could not be allowed in Khoday's favor, and the impugned registration contravenes Section 11 of the Trademark Act.

An appeal was perfected by Khoday before the appellate court with regard to Section 109(2) of the Act. Khoday's appeal argued that SWA had prior knowledge of the infringement and delayed its application for rectification by fourteen years such that an acquiescence on part of SWA amounted to a waiver. The principles of passing off were also elucidated, and Khoday opined that their actions did not fall in that ambit. Hence the appeal to Supreme Court by Khoday.

The Supreme Court opined that the appellate court "committed a serious error insofar as it failed to take into consideration" the arguments vouched by Khoday and the contents of Khoday's label.[88] Taking into consideration the averments of SWA and various provisions of the Act, the Supreme Court stated that the principle consideration revolved around the delay in filing a rectification application and whether SWA had misdirected the lower courts in law.

The court, while allowing the appeal, observed that under Section 56 of the Act, an aggrieved person can file an application for rectification, and the tribunals make such order as it may think fit. It may not be correct to "contend that under no circumstances the delay or acquiescence or waiver or any other principle analogous thereto would apply."[89] So, "when discretionary jurisdiction has been conferred on a statutory authority, the same although would be required to be considered on objective criteria but as a legal principle it cannot be said that the delay leading to acquiescence or waiver or abandonment will have no role to play."[90] Therefore, in determining whether delay, acquiescence, or waiver plays a role, the "conduct of the person aggrieved in filing the application for rectification would be relevant."[91]

The court further held that since Khoday's trademark had been in existence for more than seven years, it would be presumed to be valid, unless the use of such trademark would be likely to deceive or cause confusion in public. "We are concerned with the class of buyer who [is] supposed to know the value of money, the quality and content of Scotch Whisky. They are supposed to be aware of the difference of the process of manufacture, the place of manufacture and their origin. . . .[The lower courts], therefore, failed to notice the distinction, which is real and otherwise borne out from the precedents operating in the field," the Court ruled.[92]

88. *Id.* at 4.
89. *Id.* at 10.
90. *Id.* at 10-11.
91. *Id.* at 11.
92. *Id.* at 31-32.

4. *The Supreme Court Reviews "Compulsory License" Provisions in Copyright Act*

In an important ruling concerning "compulsory license" for copyrights, the supreme court resorted to "purposive construction" of Section 31 of the Copyright Act, 1957 keeping in mind International Covenants and Treaties to which India is a signatory.[93]

Respondent Super Cassette Industries Limited (SCI), a leading music company, holds copyrights for a series of songs, including some from film scores. Appellant Entertainment Network (India) Limited (ENIL) is a leading FM radio broadcaster who broadcast songs for which SCI holds a copyright without permission. After prolonged litigation between the parties and conflicting appellate decisions, the Indian Supreme Court decided to interpret Section 31.

In applying its purposive construction and attempting to give effect to the legislative intent behind the statute, the Court held that a copyright holder may be found to have refused to allow communication of a copyrighted work, in accordance with Section 31(b), if the offered license terms are unreasonable, not just if there is an overt refusal.[94] Additionally, if the Copyright Board grants a compulsory license to one broadcaster, it is not precluded from granting subsequent licenses to other applicants. As the Court stated, "[t]he right [granted by the statute] is to approach the Board when it considers that the terms of offer for grant of license are unreasonable."[95] If the Board determines that the refusal was unreasonable, it may direct the Registrar of Copyright to grant a license. The Board must also determine just compensation. Although "compensation" and "royalty" are not generally interchangeable, the legislature clearly did not intend to prevent the Board from granting periodic payments in return for the right to use copyrighted material.[96]

D. Arbitration Law*

1. *Indian Companies Cannot Seek International Commercial Arbitration*

In a landmark judgment,[97] the supreme court ruled that "two Indian companies locked in a dispute cannot seek international commercial arbitration (ICA) defined under the Indian Arbitration and Conciliation Act, 1996 (the "Act") as it tantamount [sic] to condoning the home country's law." The court held that the incorporation in India was sufficient to determine the nationality of a company. The decision clarifies that in the event of any domestic arbitration, arbitration tribunals must determine the dispute in accordance with the substantive law of India in force at that time and cannot use the law of any other country.

Both petitioner and respondent were companies incorporated under the Indian Companies Act, 1956. When disputes arose between the two, they could not agree upon a com-

93. Entertainment Network (India) Ltd. v. Super Cassette Indus. Ltd., (2005) No. 5114 (India S.C.), *available at* http://judis.nic.in/supremecourt/chejudis.asp.

94. *Id.* at 73.

95. *Id.* at 74.

96. *Id.* at 79-80.

* This section on arbitration law was authored by Manish Dhingra.

97. TDM Infrastructure Private Ltd. v. UE Development India Private Ltd., (2008) Arbitration Application No. 2 (India S.C.), *available at* http://judis.nic.in/supremecourt/chejudis.asp

mon arbitrator, and respondent asked the Supreme Court to appoint an arbitrator pursuant to Sections 11(5) and 11(9) of the Act by stating that since the control and management of petitioner was in Malaysia, the dispute was an ICA as per Section 2(1)(f)(iii). After perusing the Act, the court held that even if the control and management of a company is outside India, merely having the entity registered in India makes it a domestic company and in the event of a dispute such a company cannot take recourse to foreign law as the governing law where the opposite party is also an Indian national or entity: "[o]nce it is held that both the companies are incorporated in India", clause (ii)[98] of Section 2(1)(f) will apply and not clause (iii).[99]

IV. Japan

A. Fearing Foreign Takeovers, Japanese Firms Fortify Their Defenses*

In the last decade, Japan's national legislature has passed sweeping, almost revolutionary, amendments to Japan's rigid, Germanic-style, corporate, securities, and tax laws. Japan's new laws are aimed at: (1) liberalizing the mechanics of corporate restructuring by deregulating financing methods and sanctioning a host of sophisticated financial instruments and (2) bolstering investor confidence by mandating better corporate governance and accounting transparency. Penalties for securities fraud and insider trading have been raised, and rules governing the fairness of takeover bids have been implemented, although many would argue that the takeover playing field still needs leveling.[100]

The statutory reforms and ambitious government initiatives were passed in hopes they would serve as effective catalysts for change—attracting much needed foreign investment and freeing Japan's institutions from a morass of irrational regulations and cozy relationships that have proved crippling in Japan's recent past.[101] For decades following World War II, Japanese companies were insulated from free-market valuations and market discipline by a *keiretsu* structure in which the majority of their shares were ensconced in long-standing webs of cross-shareholding arrangements with loyal affiliates. Indeed, this *keiretsu* system, in which virtually no company was allowed to fail, was the hallmark of Japanese corporate governance system in the 1970s, 1980s, and early 1990s.[102] Once the legal reforms were adopted, many hoped that Japanese companies would turn to more market-oriented forms of corporate governance and that their protective cross-shareholding ties would disintegrate.

To a significant extent, these legal reforms have worked. In the post-bubble economy, while the float of Japanese shares increased, the value of shares held in cross-shareholding relationships dropped to a new low of just 11.1 percent of Japan's market capitalization in

98. Clause (ii) reads, "a body corporate which is incorporated in any country other than India." *Id.* at 7.
99. *Id.* at 13-14.
* This section was authored by Pamela A. Fuller, J.D., LL.M. (Tax Law) of New York, New York.
100. *See* discussion *infra* Part IV.A.5 and accompanying text regarding the newly revised ministry-sponsored corporate takeover guidelines.
101. *See* Edward J. Lincoln, Arthritic Japan: The Slow Pace of Economic Reform (2001).
102. The practice of cross-shareholding peaked in 1987, according to data released by Nomura Securities Financial & Economic Research Center. *See Japan Firms Seize on Court Ruling to Further Cross Shareholdings*, Nikkei, July 30, 2007.

2006, down from a high of 33 percent in 1991.[103] Moreover, foreign ownership of shares in Japanese firms soared to 28 percent in 2006, up from just 4 percent in 1988.[104]

But in 2008, there is new evidence that Japan is resuming its old bulwark-building behaviors, sometimes in secret deals.[105] In the fiscal year ending March 2008, the value of shares held in cross-shareholding relationships inched up to over 12 percent of market capitalization, exceeding 2006 and 2007 levels.[106] Meanwhile, a growing number of Japanese companies have been opting for a cheaper and more direct anti-takeover weapon—the "poison pill"—stock acquisition rights that typically dilute the voting power of an unwanted suitor if exercised.[107] At the general shareholders' meetings held in June 2008,[108] 213 Japanese companies submitted resolutions to adopt or fortify existing corporate takeover defenses. All 213 resolutions passed, many by an overwhelming margin. Of the 213 resolutions, only seventy-four were special resolutions requiring a two-thirds majority vote of the shareholders; the remaining proposals needed approval by only a simple majority of a quorum of shareholders.[109] As of April 2008, approximately 634 Japanese companies, or 16 percent, had poison pills in place, up from just 2 percent in 2004.[110] The trend amongst Japanese companies of adopting anti-takeover defenses appears likely to continue.[111]

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103. *See* Andrew Morse & Sebastian Moffett, *Japan's Companies Gird for Attack*, WALL ST. J., Apr. 30, 2008, at A1 (citing data released by Nomura Holdings, Inc.).

104. *See id.*

105. Japanese companies are not required to disclose, nor do they disclose, all their cross-shareholding relationships in their securities reports, which can hurt investor confidence and engender suspicion. *See Japan Firms Seize on Court Ruling to Further Cross-Shareholdings, supra* note 102 (quoting University of Tokyo Economics Professor Noriyuki Yanagawa).

106. *See Japan's Companies Gird for Attack, supra* note 103; *Analysis: Cross-Shareholding Beginning to Reemerge in Corporate Japan*, NIKKEI, Oct. 1, 2007; *Cross-holdings Used to Forge Bonds, Avert TOBs*, NIKKEI , Aug. 6, 2007 (citing long-term securities data compiled by The Nikkei Weekly business newspaper).

107. When the 2005 Companies Law became effective in 2006, Japanese corporate directors suddenly had a much larger and more diverse arsenal of anti-takeover weapons to choose from, including golden shares with special veto rights and poison pills. *See* Kaisha ho [2005 Companies Law], Law No. 86 of 2005. For an overview of the sweeping 2005 Companies Law, see Pamela A. Fuller, *International Legal Developments in Review: 2005, Regional & Comparative Law—Asia and Pacific Law—Japan*, 40 INT'L LAW 515-23 (2006), and in the same volume, Pamela Ann Fuller, *International Legal Developments in Review: 2005, Corporate - International Mergers and Acquisitions — Japan*, 40 INT'L LAW. 311, 325-28 (2006).

108. Annual shareholders' meetings in Japan have traditionally all been scheduled in June, peaking around the last week of the month.

109. *See 74 Firms to Seek Takeover Defenses Via Special Resolutions*, NIKKEI, June 11, 2008; *Market Scramble: Do Takeover Defenses Protect Corporate Value?*, Nikkei, July 10, 2008.

110. *See Japan's Companies Gird for Attack, supra* note 103 (citing data released by Swiss investment bank, UBS, AG).

111. Even sectors of the government have announced plans to institute corporate takeover defenses. The holding company successor to Japan Post—the world's largest government-owned savings bank—has announced that when its banking and insurance subsidiaries go public in 2010 as part of Japan Post's privatization plan, the two firms plan to issue equity warrants, to be held in trust for existing shareholders. If a hostile suitor launches a bid, the convertible instruments will be available, if needed, to dilute the unfriendly bidder's voting ratio to prevent it from gaining control over the companies. *See Takeover Defenses Eyed at Japan Post Bank, Japan Post Insurance*, NIKKEI, Nov. 7, 2008.

1. *Behind the Rush to Arms*

Many Japanese firms now fit the profile of a classic takeover target: their shares are increasingly liquid, their market capitalizations are relatively low as compared to their foreign counterparts, their products are often successful, and their stocks *trade at less than their book value*, indicating they may be worth more to a prospective corporate raider if they were broken up and sold off in pieces. This slice-and-dice brand of capitalism scares many Japanese corporate managers and directors who traditionally have been valued for their long-term strategic planning and vision, rather than their ability to generate short-term profits, and who, until recently, were accustomed to lifetime employment. Because Japan's labor market is relatively inflexible, managers have a greater reason to fear take-overs and a stronger incentive to entrench themselves. Hype over possible negative effects of legalizing cross-border triangular mergers, coupled with several recent high-profile takeover attempts, have exacerbated these sentiments.

2. *Japan Supreme Court Permits First-Ever Exercise of Poison Pill*

Recent litigation evincing the effectiveness of poison pills appears to be encouraging Japanese boards to adopt them. A poison pill defense prevented Steel Partners Japan Strategic Fund (Offshore), L.P.—one of the most active investment funds in Japan—from gaining control of a venerable mid-cap Japanese corporation, Bull Dog Sauce Company, Limited, the famous 105-year-old maker of Japanese-style Worcestershire sauce and other condiments. By May 2007, the New York-based strategic fund had amassed a 10.52 percent stake in Bull Dog and launched an unsolicited tender offer for the shares it did not own. Three weeks later, Bull Dog's board announced it would seek an extraordinary shareholder resolution to issue stock acquisition rights (SARs) to all Bull Dog shareholders to dilute Steel Partners' ownership. Because Steel Partners was already Bull Dog's biggest shareholder, the poison pill had a special feature: all Bull Dog shareholders would receive three SARs for every one share they owned in Bull Dog as of July 11—essentially a four-to-one stock split. All SARs would be convertible into more Bull Dog stock, except for the SARs issued to the hostile bidder, Steel Partners, which could only be converted to cash. An overwhelming majority of Bull Dog's shareholders—88.7 percent—voted to approve the Bull Dog board's defensive plan, which was substantially more than the two-thirds majority needed to pass the resolution.

As expected, Steel Partners filed a request for an injunction to block the poison pill's exercise, arguing that the target's board of directors had violated its fiduciary duties to its shareholders and that the stock rights plan violated a fundamental tenet of Japanese corporate law requiring all shareholders to be treated equally. Affirming the lower district court's refusal to issue an injunction, the Tokyo High Court articulated a broad standard for evaluating the validity of poison pills. In its opinion,[112] the high court stressed that Steel Partners had reaped huge profits on its past unsuccessful takeover bids for Sotoh Corporation in 2003 and Myojo Foods Corporation in 2006, and then characterized Steel Partners as an "abusive acquirer" that routinely prioritizes the short-to-medium-term

112. Steel Partners Japan Strategic Fund, L.P. v. Bull Dog Sauce K.K., 1271 KIN'YU, SHOJI HANREI 17 (Koto Saibansho [Tokyo High Court], July 9, 2007). The full text of the Tokyo High Court's opinion is available in Japanese at http://www.courts.go.jp/hanrei/pdf/20070718104214.pdf.

profits it can extract from a company above the objective of enhancing that company's long-term growth and development. Echoing Delaware takeover jurisprudence, the Tokyo High Court stated that although equal treatment of shareholders is a key tenet of Japan's corporate law, discriminatory actions towards a particular shareholder are allowable under Japanese law if those actions are *necessary, appropriate, and reasonable* methods to counter abusive actions by the particular shareholder being discriminated against.[113]

The Japan Supreme Court affirmed,[114] but on narrower grounds, holding that the principle of shareholder equality was not violated and that the shareholders' prior approval of the plan's implementation must be given great weight except in instances where the procedures at shareholder meetings misrepresent the facts or lack fairness. The supreme court did not specify what level of shareholder approval was needed to validate a poison pill but emphasized that the intent of the shareholders should be regarded as vital in determining whether the poison pill's exercise was reasonable and proportional to the takeover threat.

3. *Steel Partners is Compensated in its Failed Takeover Bid*

Steel Partners' tender offer failed to attain the investment fund's desired level of control. By September 1, 2007, most Bull Dog shareholders had converted their equity warrants to additional stock, reducing Steel Partners' stake in Bull Dog's voting stock from 10.52 percent to just 3.52 percent.[115] In that same month, Bull Dog announced that it expected to incur a group net operating loss of 980 million yen for the year ending March 31, 2008, because of the approximately 2.1 billion yen in expenses it incurred in paying cash for the stock warrants issued to Steel Partners.[116] Thus, despite its failed tender offer, Steel Partners netted a profit of approximately 1.3 billion yen under Bull Dog's stock rights plan when it converted its warrants to cash,[117] prompting critics and regulators to characterize the courts' approval of Bull Dog's poison pill as "institutionalized greenmail."[118]

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113. *See id.*

114. Steel Partners Japan Strategic Fund, L.P. v. Bull Dog Sauce, K.K., Appeal from Injunction against Issuance of Warrants, 1441 SAIBANSHO JIHO 313 (Saiko Saibansho [Japan Supreme Court], Aug. 7, 2007). The full text of the Japan Supreme Court's opinion is available in Japanese at http://www.courts.go.jp/hanreii/pdf/20070927142919.pdf.

115. *Steel Partners' Bull-Dog Stake Falls to 3.52% on Takeover Defense*, NIKKEI ,Aug. 17, 2007(in estimating Steel Partners' percentage holdings in Bull Dog, it relied on information gathered by a U.S. investment firm filing with the Kanto Local Finance Bureau).

116. *Analysis: Should General Shareholders have Final Say?*, NIKKEI FIN. DAILY, Aug. 8, 2007.

117. *See Steel Partners Japan Profit Plummets*, NIKKEI, Sept. 10, 2007 (reporting that Steel Partners reaped a profit of 1.3 billion yen on its investment of 1.7 billion yen in Bull Dog Sauce Corporation, but that this gain had only a nominal effect on the investment fund's 2007 profits since its Bull Dog investment amounted to only 0.3 percent of the fund's total holdings for the year).

118. Julian Pritchard, Partner, Freshfields Bruckhaus Deringer LLP, Remarks at Seminar Sponsored by the Japan Society, New York: Vulture or Doves? How Changing Japanese Laws & Shifting Perceptions Will Impact U.S. -Japan M&A (Sept. 25, 2007) (Mr. Pritchard said the judicial opinions denying Steel Partners' request for an injunction against Bull Dog's takeover defense are tantamount to "institutionalized greenmail" and will likely result in "wild share price fluctuations" of future target corporations and greater legal uncertainty as to the standards for reviewing the validity of corporate takeover defenses). In corporate takeovers, the term "greenmail" refers to payments made by the target company to buy back shares owned by a potential

4. *Analysis and Impact of Supreme Court Decision*

By assigning great weight to the target shareholders' approval of Bull Dog's poison pill, the Japan Supreme Court was ostensibly attempting to follow the ministry-sponsored Takeover Defense Guidelines issued in 2005, which state that the "ultimate test" for determining the "reasonableness" of a particular takeover defense is whether the defensive measure "enhances corporate value."[119] Incorporating U.S. takeover jurisprudence, the 2005 Guidelines emphasize that if a hostile takeover threatens to impair corporate value, then defensive measures must be proportional to the threat and not excessive. Among the key factors to consider in determining whether a defensive measure is proportional and, more specifically, whether the redemption standard for any stock rights plan is reasonable and not excessive, is whether the target's shareholders approved the redemption provisions of the stock rights plan (i.e., the poison pill) before such plan was implemented.[120] It is this factor in the 2005 Takeover Guidelines that the Japan Supreme Court stressed was met in Bull Dog's case.

The 2005 Takeover Guidelines state, however, that a related but discreet factor that should be weighed in determining whether the defensive measures are excessive or coercive is whether the target shareholders have a meaningful right at the shareholders' meeting to oust the target's incumbent directors.[121] Critics of the Japan Supreme Court's analysis in the Bull Dog case have argued that the crux of this factor—whether shareholders were given a meaningful choice—was not present in Bull Dog's exercise of its poison pill. More specifically, critics question whether courts can generally assume that typical individual shareholders have the business acumen and technical information to evaluate the long-term efficiencies of a tender offer. In Bull Dog's case, for example, it is questionable whether the target's shareholders had enough information about near-term earnings forecasts, the costs associated with implementing the poison pill defense, and other important matters to be able to give informed consent to implementing the poison pill.[122]

The Japan Supreme Court's opinion, which strongly implies that the target's shareholders have the final say on whether a poison pill should be implemented, could set a dangerous precedent in Japan. This aspect of the opinion could encourage Japanese firms to revert back to their traditional method of fending off unwanted suitors by issuing large blocks of stock to friendly, so-called "stable shareholders" who, as Japan's postwar history

acquirer at a premium over their fair market value. In exchange, the acquirer normally agrees to rescind its hostile takeover bid. See BLACK'S LAW DICTIONARY 702 (6th ed. 1990).

119. The Ministry of Economy, Trade and Industry (METI) formed a Corporate Value Study Group composed of renowned legal experts and business leaders, well versed in both Japanese corporate law and Anglo-American takeover jurisprudence, to establish the Takeover Defense Guidelines. Japan's courts have increasingly relied on METI's non-statutory Guidelines despite the fact that they fall within the category of administrative guidance and, as such, are neither technically binding on corporate boards nor an adequate basis for a shareholder lawsuit if they are breached. *See* KIGYO KACHI KENKYU KAI [CORPORATE VALUE STUDY GROUP], METI, TEKITAITEKI BAISHU BOEI SAKU (KIGYO KACHI BOEI SAKU) NO SEIBI [PREPARING DEFENSIVE MEASURES TOWARD HOSTILE TAKEOVERS (MEASURES TO DEFEND CORPORATE VALUE)] (Mar. 2005), at 8 [hereinafter 2005 METI TAKEOVER DEFENSE GUIDELINES]. An English summary of the report is available at http://www.meti.go.jp/english/information/downloadfiles/Corporate percent20Value.pdf.

120. *See id.* ¶ 4A (standards 2 and 3).

121. *See* 2005 METI TAKEOVER DEFENSE GUIDELINES, *supra* note 119, ¶ 4A (standard 2.1).

122. *See, e.g., Steel Partners Attys Question Court Emphasis on Shareholder Decision*, NIKKEI FIN. DAILY, Aug. 24, 2007.

has shown, can be relied upon for their loyalty to the target's incumbent management team and for their support of all takeover defenses, even if a change of control would most likely increase the enterprise's corporate value.

5. *New Ministry-Sponsored Guidelines for Hostile Takeover Defenses*

On June 30, 2008, the Ministry of Economy, Trade and Industry (METI) revised its original 2005 Takeover Defense Guidelines.[123] METI's 2008 report, entitled "Takeover Defense Measures in Light of Recent Environmental Changes,"[124] states that it was issued in response to takeover litigation in Japan and the rush by many Japanese firms to install takeover defenses in place of cross-shareholding ties. The 2008 Guidelines do not depart from the overarching principles espoused in the original set of guidelines—namely, that in judging the reasonableness of defensive measures, the board must demonstrate that a threat to corporate value exists (or existed at the relevant time), that defensive measures are (or were) proportionate and not excessive, and that the board is adopting (or adopted) the defensive measures independently. The 2008 Guidelines clarify particular points raised in the most recent and controversial cases—in particular, the Steel Partners-Bull Dog contest for corporate control.

The 2008 Guidelines emphasize that the purpose of corporate takeover defenses is to protect and enhance corporate value for the benefit of the shareholders by giving them enough time to evaluate the takeover bid and possibly extract better takeover terms from the incumbent board. Corporate takeovers are not to be deterred prematurely for the purpose of entrenching the incumbent board, and shareholders should not be encouraged to vote for the implementation of defensive plans before the board objectively decides whether the takeover proposal could possibly enhance corporate value for the collective benefit of the shareholders. More specifically, the 2008 Guidelines provide that:

- when the target's board is evaluating the merits of a bid, it should consider only the *shareholders'* interests—not the interests of other stakeholders, including employees, customers, subcontractors, and suppliers of Japanese corporations;[125]
- although the target's shareholders are to make the final decision on whether to approve a takeover bid, the fact that shareholders voted for a plan does not necessarily justify or cleanse a particular takeover defense if the bid did not pose a threat to corporate value, or the defense was excessive in relation to the threat. Rather, the board has a duty of care to make a thorough inquiry and initial decision on whether a takeover could be in the shareholders' best interests and to carefully and objec-

123. *See* 2005 METI TAKEOVER DEFENSE GUIDELINES, *supra* note 119.

124. METI, TAKEOVER DEFENSE MEASURES IN LIGHT OF RECENT ENVIRONMENTAL CHANGES, CORPORATE VALUE STUDY GROUP (June 30, 2008) [hereinafter 2008 REVISED TAKEOVER DEFENSE GUIDELINES]. An English summary of the 2008 Revised Takeover Defense Guidelines report is available at http://www.meti.go.jp/english/report/data/080630TakeoverDefenseMeasures.pdf.

125. This principle seems to represent a change of opinion by the Corporate Value Study Group, which, in its 2005 Guidelines, implied that in evaluating the long-term effects of a potential takeover on corporate value, the impact on employees and other stakeholders should be considered. *See* METI 2005 TAKEOVER DEFENSE GUIDELINES, *supra* note 119, at 5 (standard 1). In labeling Steel Partners an "abusive acquirer" in its attempt to gain control of Bull Dog Sauce, Ltd., the Tokyo High Court also considered the potential effects of the takeover on Bull Dog's non-equity stakeholders. *See supra* note 112 .

tively explain the factors underlying their determination, so that the shareholders are properly informed before they vote;[126]

- when evaluating a bid's merits, the target board should not necessarily invoke as defenses that the bidder intends to use the target's assets as collateral for a loan or that the bidder intends to dispose of unnecessary assets in order to pay a higher dividend;[127]
- the period during which the target board evaluates a bid should be reasonable and not extended unnecessarily;
- once the review process is completed, the target board has the duty to comprehensively explain the factors underlying the decision the board has reached, thereby assisting the shareholders in making an informed decision on whether to approve the takeover bid or implement defenses;[128] and
- cash or other financial benefits should not be granted to acquirers because of the risk such payments could harm the collective interests of the shareholders. Such payments may deprive shareholders of future dividends, are likely to eliminate an incentive for the bidder to negotiate with the target board for better terms, and may

126. *See* 2008 REVISED TAKEOVER DEFENSE GUIDELINES, *supra* note 124. This principle in the 2008 Guidelines appears to address the Japan Supreme Court's opinion in the Steel Partners-Bull Dog court case. In the opinion, the court placed great weight on the overwhelming vote of Bull Dog's shareholders in favor of implementing the poison pill in determining whether the stock rights plan itself was reasonable. *See also* discussion *infra* text accompanying note 127.

127. *See* 2008 REVISED TAKEOVER DEFENSE GUIDELINES, *supra* note 124. This element of the 2008 Takeover Defense Guidelines seems to refine statements made by the Tokyo High Court in the Livedoor court case. It is expected that this part of the Guidelines will be particularly helpful to private equity funds in the context of leveraged buy-outs and management buy-outs.

128. Clearly, the reasons why the 2008 Revised Takeover Defense Guidelines continue to stress the importance of the board obtaining *informed shareholder approval* of their defensive measures are that proxy contests are still rarely waged in Japan, and Japanese corporate boards are still comprised of senior managers who are not independent from company operations. If the Japanese directors and managers are essentially the same people, the so-called board of directors will be conflicted in carrying out its fiduciary duties to the shareholders, who ostensibly are to be protected from the negligent and fraudulent acts of the managers. *See* 2005 METI Takeover Defense Guidelines, supra note 124, ¶ 4A (Standards 2 and 3).

In form, Japan's former Commercial Code, which was largely written by Allied Occupiers just after World War II, reflected the classic Berle and Means thesis underlying Anglo-American corporate governance: the notion that widely dispersed shareholders (perceived as inevitable) cede effective control of their firm to professional managers via an agency relationship with independent directors. *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932). But the envisioned Berle-and-Means notion of a modern corporation never materialized in Japan during the half century following World War II. In spite of the Allied Occupiers' exuberant postwar attempts to create "economic democracy" in Japan by dispersing shares of Japanese companies formally held by the powerful *zaibatsu* families (which were thought to have functioned as industrial war machines), outlawing bank holding companies, and importing a U.S.-styled commercial code and securities law, critical amendments to Japan's antitrust statute facilitated the concentration of shares in cross-shareholding arrangements of affiliated companies known as horizontal *keiretsu*. *See* DAN FENNO HENDERSON, FOREIGN ENTERPRISE IN JAPAN – LAW AND POLICIES 146-174 (1973) (describing how foreign antitrust ideology conflicted with Japan's prewar history of government-directed industrial development). Thus, only now, at the beginning of the 21st century, are Japanese firms beginning to exhibit attributes characteristic of the Anglo-American model: activist shareholders, derivative lawsuits, share liquidity and floats, transactional capability, and an emerging market for corporate control that may increasingly serve to monitor manager performance. *See* Pamela A. Fuller, *Whither M&A in Japan?*, N.Y. L. J. 10, Nov. 7, 2005 (discussing how legal reforms are liberalizing Japan's M&A market and creating a fledgling market for corporate control, which is at risk of being suppressed by unbridled takeover defenses and poison pills launched by the targets' boards).

even invite future bidders who do not intend to enhance corporate value, but merely want to extract cash.[129]

B. Japan-USA Treaty on Mutual Assistance in Criminal Matters*

The Treaty between Japan and the United States of America on Mutual Legal Assistance in Criminal Matters entered into force in 2006. Use of the treaty led to criminal convictions in 2008.

This was the first bilateral mutual legal assistance treaty signed by Japan.[130] One advantage of the treaty for Japan is that it feels that requests for legal assistance from the United States will be more likely and that the central law enforcement agencies of both countries can communicate more quickly. Japan and the United States will now find it easier to take statements and testimony and obtain evidence, particularly business and bank records, and to fight fraud, anti-trust crimes, and white-collar crime, including freezing of assets or forfeiture thereof. It may be easier to locate individuals and provide information from various agencies and departments. It will also be easier to transfer individuals in custody for testimony purposes to the other jurisdiction. The hope is that the Treaty will also facilitate fighting terrorism, drug trafficking, and child exploitation.

Under the Treaty, each country designates a central authority to make and receive requests for information. For Japan, this is the Minister of Justice, the National Public Safety Commission, or any person so designated by the Minister or Commission. For the United States, the person to receive such requests is the Attorney-General or his designate. The Treaty allows the agencies to communicate directly with each other without the intervening step of having to go through diplomatic channels in the Foreign Ministry or the State Department.

This Treaty was used to expedite an investigation between law enforcement officials in Japan, the United States, and Canada during 2007, resulting in arrests of thirteen individuals in Japan for money laundering and other possible criminal activities. Of those arrested, eleven were Japanese nationals (including two minors),[131] one was a Nigerian national, and one was a Nigerian national with Japanese citizenship. Another Nigerian national escaped the country before arrest. The individuals were involved with the so-called Nigerian 419 scam and were later convicted of money laundering in Japan. Over 140 bank accounts used for money laundering that contained more than $17 million were eventually seized. Under the scheme, money was transferred from North American, Australian, British, and other victims to Japanese banks before the money was sent from Japan

129. *See* discussion *supra* Part IV.A.4, particularly note 118 and accompanying text. The Corporate Value Study Group, which authored the 2008 Revised Takeover Guidelines, is apparently referring to Bull Dog's share rights plan, which effectively rewarded Steel Partners with cash compensation at a premium price above the shares' fair market value, which makes it look like the target board was giving in to a greenmail tactic.

* This section was authored by Steve Saunders, a Lecturer in International Law at the University of Toyama, Toyama Japan.

130. Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Japan, Aug. 5, 2003, Treaty Doc. 108-12, *available at* http://www.mofa.go.jp/region/n-america/us/treaty0308.pdf.

131. The age of majority in Japan is twenty years of age.

back to accounts in Canada, the United States, and Nigeria. The leaders of the scheme were convicted in February 2008.[132]

C. Air Self-Defense Force Activities in Iraq*

In April 2008, the Nagoya High Court ruled that airlifting multinational combat troops into the Iraq War zone by Japan's Air Self-Defense Force (ASDF) was unconstitutional.[133] The court's ruling focused on Article 9 of the Japanese Constitution, which states in part that "*land, sea, and air forces as well as other war potential, will never be maintained.*"[134] The plaintiffs, a group of 1,100 Japanese citizens, argued that dispatch of the Self-Defense Forces to Iraq should be suspended.[135] Their argument was based on the premise that the Japanese Constitution guarantees a concrete right to live in a peaceful environment, and the ASDF airlifts violated that right.[136] They also argued the airlifts violated Article 9 of the Japanese Constitution.[137] They sought suspension of the airlifts and monetary damages from the government. The court issued a statement condemning use of airlifts by the United States in the Iraq war.[138] In its analysis, the court stated "'the ASDF airlift activities (to and from Iraq) run counter to Article 9 of the Constitution' and the special law established in 2003 to allow the Self-Defense Forces to provide humanitarian support for Iraqi reconstruction efforts."[139] The court further stated, "'the ASDF mission to airlift armed troops from multinational forces to Baghdad plays a part in the use of force by other countries,' thus it can be construed that Japan itself is using force, which is banned by [Article 9] of the Japanese Constitution."[140]

D. Controversy over Payment for U.S. Military Bases*

Japan entered into an agreement with the United States towards the end of 2007 that required Japan to make annual payments of 140 billion yen to the United States to help

132. *See* Posting of Miyuki to http://antifraudintl.org/showthread.php?t=15963 (Sept. 3, 2007, 7:57 AM) (Reports of the arrests were contained in various English and Japanese language news editions of the Japan Times, Yomiuri Shimbun, Asahi Shimbun, etc., a compilation is available at the provided website).

* This section was authored by Lori J. Williams. Ms. Williams is an attorney in private practice in Charleston, South Carolina. She recently returned from practicing law overseas. She is the former Acting Attorney General for the Federated States of Micronesia and former legal counsel for the FSM Banking and Insurance Board.

133. Sayuri Umeda, *Japan: High Court Calls Air Self-Defense Force Activities in Iraq Unconstitutional*, L. Libr. of Congress Global Legal Monitor, May 2, 2008, *available at* http://www.loc.gov/lawweb/servlet/lloc_news?disp3_470_text [hereinafter ASDF Activities].

134. *Id.*; Meiji Kenpo, art. 9.

135. *See High Court: ASDF Mission to Iraq Illegal*, Japan Times, Apr. 18, 2008, *available at* http://search.japantimes.co.jp/cgi-bin/nn20080418a1.html [hereinafter ASDF Mission].

136. *See* ASDF Activities, *supra* note 133.

137. *Id.*; *see also* ASDF Mission, *supra* note 135.

138. *See* ASDF Mission, *supra* note 135.

139. *Id.*

140. *Id.*

* This section was authored by Lori J. Williams. Ms. Williams is an attorney in private practice in Charleston, South Carolina. She recently returned from practicing law overseas. She is the former Acting Attorney General for the Federated States of Micronesia and former legal counsel for the FSM Banking and Insurance Board.

run U.S. military bases in Japan.[141] The agreement was to be in effect for three years starting in April 2008.[142] The agreement, initially approved by the Japanese House of Representatives, was subsequently rejected by the House of Councillors on April 25, 2008.[143] The House of Representatives responded by again approving the agreement on April 26, 2008.[144] Before this incident, Japan had not experienced a situation such as this where either the House of Representatives or the House of Councillors had disapproved an international agreement.[145] The Cabinet sought guidance from the Japanese Constitution and found that the decision of the House of Representatives prevailed under the circumstances.[146] Therefore, the agreement was implemented on April 30, 2008, and went into force on May 1, 2008.[147]

E. The Law Concerning the Distribution on Payments to Victims of Crime-Related Deposits in Financial Institutions*

At the end of 2007, Japan promulgated new legislation to assist victims of bank transfer scams.[148] The Law Concerning the Distribution in Payments to Victims of Crime-Related Deposits in Financial Institutions was enacted on December 21, 2007.[149] The law makes it easier for financial institutions to freeze accounts that contain funds belonging to crime victims.[150] The law specifically applies to crime victims who were deceived into transferring money into bank accounts because of fraud, coercion, or deception.[151] Under the new law, financial institutions are authorized to distribute the money to victims in accordance with certain established procedures.[152] Contrary to the old law, victims can now receive their money without having to file a lawsuit.[153] The new law went into force on June 21, 2008.[154]

141. *See* Sayuri Umeda, *Japan: International Relations – Controversy over Payment for U.S. Military Bases*, L. Libr. of Congress Global Legal Monitor, June 2, 20008, *available at* http://www.loc.gov/lawweb/servlet/lloc_news?disp0_583_text.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

* This section was authored by Lori J. Williams. Ms. Williams is an attorney in private practice in Charleston, South Carolina. She recently returned from practicing law overseas. She is the former Acting Attorney General for the Federated States of Micronesia and former legal counsel for the FSM Banking and Insurance Board.

148. *See* Sayuri Umeda, *Japan: Criminal law–Victims to Receive Money Deposited by Criminals*, L. Libr. of Congress Global Legal Monitor, Mar. 2, 2008, *available at* http://www.loc.gov/lawweb/servlet/lloc_news?disp3_277_text [hereinafter Victims to Receive Money].

149. *Id.* Hanzai riyô yokin kôza tô ni kakaru shikin ni yoru higai kaihuku bunpaikin no shiharai tô ni kansuru hôritsu [Law Concerning the Distribution in Payments to Victims of Crime-Related Deposits in Financial Institutions], Law No. 133 of 2007.

150. Victims to Receive Money, *supra* note 148.

151. *Id.*; *see also Scam Victims to Get ¥5 Billion*, Japan Times, June 2, 2008, *available at* http://search.japantimes.co.jp/cgi-bin/nn20080602a2.html [hereinafter Scam Victims].

152. Scam Victims, *supra* note 115.

153. *Id.*

154. *Id.*

F. CISG*

In July 2008, Japan became the seventy-first state to accede to the UN Convention on Contracts for the International Sale of Goods (CISG).[155] The Convention will enter into force for Japan in August 2009.[156]

G. New Insurance Law*

Japan's Parliament approved a bill in May 2008 to create the country's first insurance law.[157] This was the first time in over a century that Japan has made any significant changes to its insurance rules.[158] Before the law was enacted, insurance contracts were governed by provisions contained in Japan's commercial code.[159]

Enactment of the new law was due in large part to increasing complaints by policyholders.[160] Under the old law, prospective policyholders were required to inform the insurers of pertinent information, such as health conditions and history of illness, at the time of purchase.[161] Many were denied benefits because they failed to report prior illnesses to the insurer.[162] The new insurance law is intended to provide increased protection for policyholders.[163] Amongst other key changes, the law now allows policyholders to remain eligible to receive insurance money provided they remain truthful about their illness history.[164]

H. Landmark Case on the Definition of "Manager" Under Labor Law and Payment of Overtime Pay*

On January 28, 2008, the Tokyo District Court ordered McDonald's Holdings Company (Japan) Limited to pay 7.55 million yen in overtime pay and back wages to the man-

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* This section was authored by Lori J. Williams. Ms. Williams is an attorney in private practice in Charleston, South Carolina. She recently returned from practicing law overseas. She is the former Acting Attorney General for the Federated States of Micronesia and former legal counsel for the FSM Banking and Insurance Board.

155. *See* Press Release, Ministry of Foreign Affairs of Japan, Deposit of Instrument of Accession to the United Nations Convention on Contracts for the International Sale of Goods (July 2, 2008).

156. *Id.*

* This section was authored by Lori J. Williams, an attorney in private practice in Charleston, South Carolina. She recently returned from practicing law overseas. She is the former Acting Attorney General for the Federated States of Micronesia and former legal counsel for the FSM Banking and Insurance Board.

157. *See* Sayuri Umeda, *Japan: Insurance-New Insurance Law*, L. Libr. of Congress Global Legal Monitor, July 2, 2008, *available at* http://www.loc.gov/lawweb/servlet/lloc_news?disp0_528_text [hereinafter *New Insurance Law*].

158. *Id.*; *see also* Kyodo News, *Diet Enacts Overhauled Insurance Law to Increase Protection for Policyholders*, Japan Times, May 31, 2008, *available at* http://search.japantimes.co.jp/cgi-bin/nb20080531a5.html [hereinafter *Diet Enacts Overhauled Insurance Law*].

159. *See Diet Enacts Overhauled Insurance Law*, *supra* note 158.

160. *Id.*

161. *Id.*; *see also New Insurance Law*, *supra* note 157.

162. *See New Insurance Law*, *supra* note 157; *see also Diet Enacts Overhauled Insurance Law*, *supra* note 158.

163. *See Diet Enacts Overhauled Insurance Law*, *supra* note 158.

164. *Id.*

* This section was authored by William A. Herbert, J.D., LL.M (Asian and Comparative Law), a Seattle-based attorney specializing in Japan-related transactions.

ager of one of its retail outlets.[165] McDonald's appealed the ruling immediately but announced in May that it would begin paying overtime pay to all of its store managers and regional managers.[166] Several other employers, such as Seven-Eleven Japan Company, also announced that they would start paying overtime to their store managers.[167]

Under Section 41 of the Labor Standards Law, employees in supervisory or management positions are "managers" and exempt from the law that requires overtime pay for hours in excess of eight hours a day or forty hours a week.[168] McDonald's classified its restaurant managers as "manager" level employees and did not pay them any overtime. The plaintiff argued he was a "manager" in name only and entitled to overtime pay.

The court noted that being called a store "manager" is not enough for an employer to remove an employee from the requirements to pay overtime. The court looked at the plaintiff's authority, responsibilities, importance to the general operation of the corporation, duties, and whether his salary was appropriate to the position of manager or supervisor.[169]

The court concluded that the plaintiff had limited power to control the hours of operation, only limited authority to hire employees, that managerial meetings he attended at the McDonald's corporate offices amounted to one-way communication, that he was asked to record his time on a time sheet, and that the total annual pay given to the 10 percent of restaurant managers, who received a poor personnel evaluation, was less than the average of the total annual pay received by assistant managers.[170]

The Tokyo District Court concluded that the plaintiff was not a "manager" under the Labor Standards Law and that he was entitled to be paid for overtime worked during the two years leading up to his lawsuit.

I. Japan Moves to Sign the 1980 Hague Convention on Civil Aspects of International Child Abduction*

At the urging of the Canadian and U.S. governments,[171] the Justice Ministry announced that it would begin examining current Japanese law to prepare to meet the requirements of acceding to the 1980 Hague Convention on Civil Aspects of International Child Abduction.[172] The Convention requires member states to designate a central authority to

165. The case is *Nihon Makudonarudo Jiken*, Heisei 20, Wa No. 26903 (Tokyo D. Ct., Jan. 28, 2008).

166. Edwina Gibbs, *McDonald's Japan to Pay Overtime to Store Managers*, Reuters UK, May 20, 2008, *available at* http://uk.reuters.com/article/consumerProducts/idUKT29396200805 20.

167. *See Seven-Eleven to Pay Overtime to Store Managers*, Asahi Shimbun, Feb. 8, 2008.

168. Rodo Kijyun-Ho [Labor Standards Law], Law No. 49 of 1947, art. 41, sec. 2 (Japan), *translated by* Japan Institute for Labour Policy and Training (2003), *available at* http://www.jil.go.jp/english/laborinfo/library/documents/llj_law1-rev.pdf.

169. Nihon Makudonarudo Jiken, Heisei 17, Wa No. 26903.

170. *Id.*

* This section was authored by William A. Herbert, J.D., LL.M (Asian and Comparative Law), a Seattle-based attorney specializing in Japan-related transactions.

171. *See* Takahiro Fukada, *Canada, U.S. Nudge Japan to Join Child Abduction Resolution Framework*, Japan Times, Mar. 15, 2008, *available at* http://search.japantimes.co.jp/cgi-bin/nn20080315a6.html.

172. *See* Miako Ichikawa, *Japan to Sign Parental-abduction Treaty*, Asahi Shimbun, May 10, 2008.

discharge the duties imposed by the Convention.[173] The Japanese Justice Ministry is expected, as early as 2010,[174] to establish such a central authority to discover the whereabouts in Japan of children who have been wrongly removed from another signatory party,[175] to initiate or facilitate judicial or administrative proceedings to obtain the return of the children,[176] and to secure the safe return of children.[177] If Japan were to become a signatory to the convention, Japanese family courts most likely will be forced to change the way that they deal with child custody issues.[178] Under domestic Japanese law, unless both parties agree, compliance with Family Court rulings is "essentially voluntary."[179] The Convention provides that removal or retention of a child is "wrongful" when it violates the rights of a party "under the law of the State in which the child was habitually resident immediately before the removal or retention."[180] If Japan's jurists were to construe the Convention literally, their discretion in hearing petitions from "left-behind" parents for the return of removed children would be limited to only cases in which the judge is able to determine that the removal itself violated the law of the country in which the child was a habitual resident.[181]

J. Notable Calls to Reverse Reforms Increasing the Number of Lawyers*

Japan instituted a new legal education system in 2004 under which seventy-four new U.S.-style graduate law schools opened.[182] One purpose of creating the new schools was to increase the number of lawyers to expand public access to lawyers.[183] The then current number of 1,500 newly minted lawyers each year was projected to increase to 3,000 newly licensed lawyers each year by 2010, cumulating in the goal of having approximately 50,000 actively practicing lawyers in Japan in 2018.[184]

On July 18, 2008, the Japan Federation of Bar Associations, citing concerns that increasing the number of passers of Japan's rigorous bar examination would result in lower quality attorneys, withdrew its support for the government's initiative to increase the

173. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S.89, art. 6, http://www.hcch.net/index_en.php?act=conventions.pdf&cid=24 [hereinafter Hague Convention].

174. *See* Colin P.A. Jones, *Hard Work Begins Once Japan Signs Child-Abduction Treaty*, Japan Times, June 3, 2008, *available at* http://search.japantimes.co.jp/cgi-bin/fl20080603zg.html.

175. Hague Convention, *supra* note 173, art. 7.

176. *Id.*

177. *Id.* art. 8.

178. *See Hard Work Begins Once Japan Signs Child-Abduction Treaty, supra* note 174.

179. U.S. Dep't of State, International Parental Child Abduction Japan, http://travel.state.gov/family/abduction/country/country_501.html (last visited Mar. 10, 2009).

180. Hague Convention, *supra* note 173, art. 3.

181. *See Hard Work Begins Once Japan Signs Child-Abduction Treaty, supra* note 174.

* This section was authored by William A. Herbert, J.D., LL.M (Asian and Comparative Law), a Seattle-based attorney specializing in Japan-related transactions.

182. *See* Justice Sys. Reform Council, Recommendations of the Justice System Reform Council—For a Justice System to Support Japan in the 21st Century (June 12, 2001), *available at* http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html.

183. *See id.*

184. *See id.*

number of licensed attorneys.[185] The Japan Federation of Bar Associations noted that preliminary reports for 2008 indicated that the employment outlook for the total 2,383 people who passed the bar examination in 2008 was gloomy and that new lawyers would not receive on-the-job training necessary for their professional development. Adding its voice to the debate, the Japanese Supreme Court issued a report in October criticizing the skills of new attorneys.[186] As a result of the uncertainties surrounding the question of how many people will be allowed to pass the bar examination and become attorneys in the near future, a significant portion of the new graduate law schools indicated that they planned to decrease the number of students that they take in for each entering class.[187]

V. Malaysia*

As Malaysia continues to strive to create a business environment that welcomes greater foreign investment in the most technologically advanced arenas, the legal developments that took place in 2008 in the realm of intellectual property provide telling insights into what the future holds for foreign business interests in Malaysia.

A. National Intellectual Property Policy

Malaysia's Domestic Trade and Consumer Affairs Ministry (MDTCA) continued to refine and implement a detailed, multifaceted National Intellectual Property Policy (NIPP) in 2008, a policy that demonstrates that Malaysia intends to assert an aggressive role, at home and abroad, to become a seat of significant intellectual property activity.

The policy aspires to make intellectual property "a new engine for growth for the enhancement of economic and social prosperity" in Malaysia.[188] Malaysia's policymakers have stated that the NIPP is needed for several reasons: (1) to guide future laws, regulations, and activities of the government, research institutions, universities, and the private sector; (2) to create an environment where the "creation, protection, enforcement, management and maximum exploitation of IP" is channeled towards the development of a strong intellectual property industry in Malaysia that will become a "future driver of growth of the nation"; and (3) to promote an IP culture among the business community and the public.[189]

The NIPP is comprised of several principal strategies. The first strategy is to create the "highest standard of IP protection" in Malaysia. To achieve this strategy, the NIPP details such steps as (1) the development of a stronger administrative apparatus in Malaysia to

185. *See* Japan Fed'n of Bar Ass'ns, Urgent Proposal Regarding the Problem of the Number of Legal Professionals 2 (July 18, 2008), *available at* http://www.nichibenren.or.jp/ja/opinion/report/data/080718.pdf.

186. *See* Kyodo News, *Quality of Future Legal Professionals in Doubt*, Japan Times, Oct. 6, 2008, *available at* http://search.japantimes.co.jp/cgi-bin/nn20081006a6.html.

187. *See 10 Law Schools Mulling Cutting Student Quotas*, Yomiuri Shimbun, May 22, 2008, at 2.

* This section was authored by Manjit Gill, a shareholder with Gunster Yoakley & Stewart, P.A., in Miami, Florida.

188. Ministry of Domestic Trade & Consumer Affairs, National Intellectual Property Policy (July 31, 2008), *available at* http://www.kpdnhep.gov.my/index.php?option=com_content&task=view&id=12112&Itemid=452 [hereinafter NIPP].

189. *Id.*

simplify the registration process for each category of intellectual property, (b) the strengthening of the government's ability to police and enforce infringements of intellectual property under each of the various acts in Malaysia that proscribe intellectual property infringement, and (c) the creation of dedicated IP courts to hear infringement cases in a much more expedited manner.[190]

Additional strategies that comprise the NIPP include: (1) promoting IP-generating activities within Malaysia; (2) promoting the commercial exploitation of IP; (3) developing expertise in Malaysia to make it a hub for IP management activities in the region; (4) developing infrastructure to support IP transactions (including changes to the corporate, securities, banking, and finance laws); (5) articulating globally Malaysia's viewpoint on IP issues; (6) developing human resource capability with specialized training in IP issues; and (7) promoting foreign investment and technology transfer to Malaysia.[191]

B. Noteworthy Judicial Decisions from 2008 Impacting Intellectual Property

1. *Consitex v. T.C.L. Marketing*

With the advent of the dedicated IP court in Malaysia, infringement actions are being handled with ever-greater dispatch. Two trademark decisions are particularly noteworthy. In *Consitex v. T.C.L. Marketing*,[192] the High Court in Kuala Lumpur, Malaysia, released its judgment in March 2008 in a long-running dispute between the Italian fashion designer, Ermenegildo Zegna, and the Malaysian company, TCL Marketing. Zegna has been marketing his menswear in Malaysia since at least 1989 and registered marks "Ermenegildo Zegna" and "Zegna" in Malaysia to promote these brands. TCL has also been selling clothing in Malaysia, and some of the clothes have been sold under the name "Emmer Zecna" since at least 1991, which mark TCL also sought to register in Malaysia (but which Zegna opposed). After a cease and desist letter did not stop TCL from continuing to market products under the "Emmer Zecna" name, Zegna sued for trademark infringement and passing off.[193]

With respect to trademark infringement, the court viewed the only issue as whether the "Emmer Zecna" mark was so close to the "Ermendegildo Zegna" mark so that it was "likely to deceive or cause confusion."[194] The court held that it did not, and its analysis offers valuable insights into trademark infringement in Malaysia.[195]

First, the courts in Malaysia will undertake both a visual and oral comparison of the competing marks, as a whole. The court noted that TCL's mark, "Emmer Zecna," was

190. *Id.* The dedicated IP court was operational as of July 2007, but as of 2008, there are already reports of a backlog of cases, with trials set in July 2008 for only approximately one quarter of the 222 cases assigned to this court. *Malaysian IP Court Blames Lawyers for Backlog*, Asia Law, July 2008, *available at* http://www.asialaw.com/Article/1988805/Issue/68522/Malaysian-IP-Court-Blames-Lawyers-for-Backlog.html.

191. NIPP, *supra* note 188.

192. Consitex S.A. v. T.C.L. Mktg. Sdn Bhd, No. (D8)(IP)(D5)-22-1863-2002 (Kuala Lumpur H.C. Mar. 5, 2008), *available at* http://www.mahkamah.gov.my/judgment/hc/latesthc/D8-22-1863-2002 percent20GROUNDS.pdf.

193. *Id.*

194. *Id.*

195. *See id.* The court also rejected the passing off claim.

much shorter than the "Ermendegildo Zegna" mark, had only one common syllable, was pronounced quite differently and more easily.[196] As a result, these differences did not support a finding of confusion.

Second, Malaysian courts will look to surrounding circumstances and closely consider the markets in which contending products are sold. Here, the court noted that there was little to no overlap in the likely demographic of actual or potential consumers for the goods sold by Zegna and TCL, reinforced by the significant price differential between the products sold by each. Because of this price differential, the court concluded that the average consumer of the Zegna's goods would not purchase the product without inspecting it first, and by inspecting it, would readily be able to confirm whether the product was from Zegna or TCL.[197]

Although not part of the holding of the court on trademark infringement, the court's observations on the Malaysian consumer are also worth mention. First, the court took note of the high literacy rate in Malaysia, noting that the average Malaysian can thus readily distinguish between Zegna's and TCL's trademarks and businesses. The court noted that "Malaysians prefer foreign sounding brands" to those originating in Malaysia, and admonished Zegna that it should not have a "monopoly of Italian sounding names for clothing."[198] The court noted that "with the [Malaysian] government encouraging globalization and assisting local companies to expand into [the] overseas market, Malaysian businesses have to be forward thinking and have to choose brand names which will be accepted in overseas market[s]," and "[a] local sounding trademark will not be easily accepted in western markets."[199]

2. *Abercrombie & Fitch Co. & Anor v. Fashion Factory Outlet KL Sdn Bhd.*

In this matter, the underlying decision by the High Court in Kuala Lumpur, Malaysia vis-à-vis trademark infringement is not as important as the court's express recognition of the role of the Internet in trademark infringement litigation in Malaysia. One of the defenses raised was that plaintiffs had not used their registered trademarks in Malaysia because there was not necessarily a physical bricks and mortar location in Malaysia where plaintiff's goods were being sold.[200]

The court was not troubled by the lack of a physical store in Malaysia. Noting that the plaintiffs' products were also available for purchase on several websites that they owned and operated, all of which were accessible to customers in Malaysia, and that purchases were made online, and goods were shipped to Malaysia bearing the registered marks, the court held that the sales over the Internet qualified as a "use" for purposes of the trademark law in Malaysia: "If the website is intended to be used to seek worldwide trade with a view towards commercial gain (as in the present case) its activities fall squarely within the

196. *Id.*

197. *Id.* ¶ 55.

198. *Id.*

199. *Id.* ¶ 106.

200. Abercrombie & Fitch Co. v. Fashion Factory Outlet KL Sdn Bhd, 4 MLJ 127, D5-22-172-2007 (Kuala Lumpur H.C. Sept. 25, 2007).

category of 'doing business over the internet' and may constitute use for the purpose of trademark proceedings."[201]

VI. New Zealand*

A. The New Zealand Electoral Finance Act 2007

The New Zealand Electoral Finance Act 2007 was adopted on December 19, 2007.[202] The Act provides for several changes in the electoral laws of New Zealand, including a financial agent requirement, additional donation limitation regulations, election campaign expense return rules, increased penalties for violations of the Act, and a more broad definition of "electoral advertisement."[203] The Act came to the forefront of New Zealand politics in 2008. This is because of (1) the New Zealand General Election on November 8, 2008, and (2) the New Zealand Electoral Commissions controversial interpretation of the Act's advertising and promoting provisions, which implicated free speech concerns and spurned dissent and opposition to the Act. Opponents of the Act claim it curbs free speech and deters individuals and groups from participating in the electoral process by placing limits on the amount of money they can raise and spend, while at the same time allows members of parliament (MPs) and parliamentary parties the opportunity to use taxpayer funds on their election campaigns without being subject to the spending limits set out in the Act. Some opponents of the Act have even gone so far as to liken Prime Minister Helen Clark of the Labour Party, and her support of the Electoral Finance Act, to Venezuelan president Hugo Chavez.[204] Proponents of the Act, including the Green Party and the Coalition for Open Government, an organization formed to campaign for the New Zealand's Official Information Act (1982) and the for better election finance laws, supported a spending cap on election campaign funds.[205] Supporters positioned that the Act "serve[d] important democratic ends," as it was a much needed update of the old law, and has created a system better than the sparser electoral regulations previously in place.[206]

The following outlines significant changes in the Act.[207]

- The Act now provides for each candidate, party, and third party to appoint a Financial Agent responsible for authorizing advertising, reporting on election expenses, and receiving donations.[208]

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201. *Id.*

* This section was authored by Anne Zoltani of the Romney Law Office in Steamboat Springs, Colorado.

202. Electoral Finance Act 2007, 2007 No. 111 (N.Z.) (repealed Mar. 1, 2009 by section 15 of the Electoral Amendment Act 2009).

203. *Id.*

204. David Round, *Where Is the Public Anger Over the Electoral Finance Bill?*, PRESS, Jan. 1, 2009, http://www.stuff.co.nz/opinion/162286.

205. *Brick Attack Smashes Green Party Office Window*, NEW ZEALAND HERALD, Feb. 8, 2008, www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10491361.

206. Steven Price, *A Prediction About the Electoral Finance Act*, MEDIA L.J., Jan. 14, 2008, http://www.medialawjournal.co.nz/?p=45.

207. Elections New Zealand, Electoral Finance Act 2007 Detail, http://www.elections.org.nz/rules/ec-media-electfinbill-191107.html (last visited Oct. 28, 2008) [hereinafter Elections New Zealand].

208. Electoral Finance Act 2007, 2007 No. 111, pt. 1, §§ (6)-(7).

- The Act provides for specific regulation of third party advertising. Third parties are groups or individuals who are not candidates or parties but are involved in promoting or persuading electors to vote for candidates, parties, or a type of party or candidate. Third parties must apply for listing with the Electoral Commission if they plan to spend more than $12,000 with a total spending limit of $120,000 when promoting a party and $1,000 with a total spending limit of $4,000 when promoting a candidate.[209]
- All contributions that make up one donation must be declared to the Financial Agent. Anonymous contributions over $1,000 to donations for candidates are prohibited, as are overseas donations over $1,000.[210] Any such donations must be forfeited to the crown bank account. Donations made to parties over $20,000 must be declared to the Electoral Commission.[211]
- Election advertisements can only be published on the authority of the Financial Agent. Election advertisements must include the name and address of the promoter or party whose advertising expenses are below $12,000.00 and the name and address of the candidate whose advertising expenses are below $1000.00.[212]
- Not included in campaign expenses are expenditures made out of parliamentary funds. Communications sent by a member of parliament in their official capacities are not subject to the advertising regulations.[213]
- The Act increases the period in which prosecution can be brought for violating provisions of the Act to one year before the election date. The Act also increases fine amounts. The Electoral Commission and Chief Electoral Office also have discretion in referring matters to the police. Matters are not to be referred "if the offence is so inconsequential that there is no public interest in reporting those facts to the New Zealand Police."[214]
- The Act defines a candidate advertisement to include (1) communications that do not mention a specific candidate's name and (2) new media forms, including websites.[215]

People Power NZ, an independent lobby group protesting the Electoral Finance Act, engaged in direct protests against the Act throughout 2008. People Power NZ even took responsibility for the throwing of a brick into Prime Minister Helen Clark's office window.[216]

Most opposition to the Act, however, came much later in the year due to the Electoral Commission's interpretation and application of the Act. The Act created significant legal confusion as to its application and scope.

In February 2008, the Electoral Commission requested that an anti-Labour Party website, dontvotelabour.com, put an authorizing statement on its website with identifying information required of election advertisements. The website shut down and returned as a

209. *Id.* pt. 2, subpt.9, § (118).
210. *Id.* pt.2, subpt. 1, §§ (30), (32).
211. *Id.* pt. 2, subpt. 4, § (54).
212. *Id.*, pt. 2, subpt. (6).
213. *Id.*, pt.2, subpt. 8, § (93).
214. *Id.*, pt.2, subpt. 8, § (111).
215. *Id.* pt. 1, § (4).
216. Elections New Zeland, *supra* note 207.

blog.[217] While websites are covered under the definition of election advertisement, the Act exempts internet publications made by an individual, on a non-commercial basis, and based on personal political views "being the kind of publication commonly known as a blog."[218]

In September 2008, a warning was given by the Electoral Commission to political parties about the use of bumper stickers during this year's election campaign.[219] Under the Act, it is illegal for party advertisements to be displayed on polling day. Bumper stickers fell within the definition of electoral advertisement. Under the Act, the maximum penalty for such an offense is $20,000.[220] The 2008 Chief Electoral Officer, Robert Peden, has publicly stated that "no-one has ever been prosecuted over the matter"; however, he also stated that "any stickers would have to be removed from vehicles on election day" and questioned the sense in parties issuing bumper stickers.[221]

In April 2008, the Electoral Commission ruled that a Labour Party booklet was an election advertisement and thus, was required carry to an authorization and identifying information from the party's Financial Agent. "The booklets were paid for out of parliamentary funds," which the MPs "had insisted meant [that the booklet] could not be counted as [a] campaign expenditure" and would be exempt from expenses returns.[222] Justice Minister Annette King suggested that anything "printed off party websites by a member of the public" that encouraged individuals to vote for that party "but which failed to include a statement authori[z]ing its publication, was in breach of the" Act.[223] Ultimately, the Electoral Commission found that the Labour party was in violation of the Act but "decided to warn the party rather than pass[ ] the complaint on to police for investigation," judging the violation to be too inconsequential and that there was public interest in reporting the incident.[224]

In October 2008, the Electoral Commission reviewed whether certain billboard advertisements were election advertisements.[225] Tui, a popular beer brand, had placed around the country billboards captioned: "When Winston Peters says no, he means no—Yeah right."[226] In August 2008, Winston Peters stood down as Foreign Affairs and Racing Minister due to allegations that he had failed to declare political donations received by NZ First, his political party. In September 2008, he was censured by the Parliament for knowingly providing false or misleading information on a return of pecuniary interests.[227] These billboards were part of larger marketing brand-building in which Tui advertise-

217. Electoral Finance Act 2007 No 111, pt. 1, § (5)(2)(g).

218. *Id.*; Claire Trevett, *Electoral Watch Dog Seeks Advice on Websites*, NEW ZEALAND HERALD, Feb. 28, 2008, http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10494964.

219. *Parties Warned Over Bumper Stickers*, TVNZ, Sept. 19, 2008, http://tvnz.co.nz/view/page/2089293.

220. *Id.*

221. *Id.*.

222. *Confusion Over Election Material*, DOMINION POST, Apr. 9, 2008 *available at* http://www.stuff.co.nz/stuff/feedback/4470680a6160.html.

223. *Id.*

224. *Labour First to Fall Foul of Own Laws*, STUFF.CO.NZ, Apr. 3, 2008, *available at* http://www.stuff.co.nz/national/politics/344931.

225. Electoral Commission Decision 2008-36 (Oct. 13, 2008) (relating to an alleged Election Advertisement by DB Breweries Limited), *available at* http://www.elections.org.nz/files/2008-36_tui_ads.pdf.

226. *Id.*

227. *Parliament Votes to Censure Winston Peters*, NAT'L BUS. REV., Sept. 23, 2008 http://www.nbr.co.nz/article/parliament-votes-censure-winston-peters-35588.

ments focused on a prominent public figure who had made a public mistake and delivered an ironic "yeah right" in response to the prominent event or individual. These billboards did not contain authorizing statements or identifying information, and DB Breweries Limited of Tui Beer was not listed as a third party. The Electoral Commission ruled that the billboards could not be regarded as encouraging or persuading voters to vote in a particular fashion as is required under the definition of electoral advertisement under Section 5 of the Act.[228]

VII. The Philippines*

The year 2008 saw more scandals and controversies that alleged massive graft and corruption at the highest levels of the Philippine government—from an overpriced broadband project that was to result in a $130 million kickback payment to the first gentleman and a former elections commissioner,[229] to the alleged diversion of a 728 million Philippine pesos (approximately $15 million) fund intended for the purchase of fertilizer for farmers to the election campaign fund of President Gloria Macapagal-Arroyo's allies during the 2004 election.[230] Both cases received national media attention and triggered senate investigations and other court proceedings.

Amidst the distraction, legal developments in the Philippines have been focused on the major issues confronting the country. The statutes and administrative regulations sought to boost the economy, address income inequality, increase efficiency in the administration of justice, and protect against human rights violations; meanwhile the judiciary has effectively maintained the balance of power among the coequal branches of government.

A. Investment Promotion and Economic Stability

1. *Special Visa to Non-Immigrants*

Executive Order 758, which was issued by President Arroyo on October 20, 2008, creates a new visa otherwise referred to as the Special Visa on Employment Generation (SVEG).[231] Under Order 758, a non-immigrant foreigner who employs at least ten Filipino nationals in a lawful and sustainable enterprise, trade, or industry will be qualified to apply for a SVEG, subject to other requirements.[232] A SVEG holder will have multiple entry privileges and will be allowed to stay in the Philippines for extended periods of

228. *Id.*at 2.

* This section was authored by Albert Vincent Y. Yu Chang. Mr. Yu Chang is an associate with Warner Norcross & Judd LLP in Grand Rapids, Michigan. He is licensed to practice law in the State of Michigan and the Republic of the Philippines. Mr. Yu Chang practiced in Manila, Philippines with the law firm of SyCip Salazar Hernandez & Gatmaitan. He is vice chair for publications of the Asia Pacific committee of the American Bar Association Section of International Law.

229. Veronica Uy, *Lozada Links First Gentleman, Abalos to NBN Deal*, INQUIRER.NET, Feb. 8, 2008, http://newsinfo.inquirer.net/breakingnews/nation/view_article.php?article_id=117553.

230. Gil C. Cabacungan Jr. & Anselmo Roque, *House Summons Fertilizer Scam Runner*, INQUIRER.NET, Nov. 20, 2008, http://www.inquirer.net/specialfeatures/thebolantecase/view.php?db=1&article=20081120-173271.

231. Prescribing Guidelines for the Issuance of a Special Visa to Non-Immigrants for Employment Generation, Exec. Order No. 758, §§ 1-2 (2008) (Phil).

232. *Id.*

time.[233] These privileges may also be enjoyed by the SVEG holder's spouse and any dependent, unmarried child below eighteen years of age, whether such child is legitimate, illegitimate, or adopted.[234] As of November 18, 2008,[235] the Bureau of Immigration has formed a special committee that will draft the implementing rules and regulations, as required under Order 758.

B. Credit Information System

On October 31, 2008, President Arroyo approved the Credit Information System Act (CISA),[236] which creates a credit information system and establishes the Credit Information Corporation (CIC).[237] The Office of the President describes CISA as very relevant to the global financial crisis.[238] It is expected to lower the cost of credit and reduce dependence on collateral.[239] The CIC will compile credit data from various financial institutions and act as central repository of credit information.[240] CISA authorizes the CIC to release and disclose consolidated basic credit data to specified entities, including banks, quasi-banks, trust entities, investment houses, financing companies, cooperatives, microfinancing organizations, credit card companies, insurance companies, and other institutions.[241] CISA provides that credit information will be held by receiving entities under strict confidentiality and used "only for the declared purpose of establishing the creditworthiness of the borrower."[242]

C. Micro Financing

On May 23, 2008, the Magna Carta for Micro, Small, and Medium Enterprises[243] was signed into law. Amending the seventeen year old Magna Carta for Small Enterprises,[244] the new law seeks to expand small entrepreneurs' access to financial resources and grow

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233. *Id.* § 1.
234. *Id.*
235. Jerome Aning, *Rules on Investors Visas in the Works*, INQUIRER.NET, Nov. 19, 2008, http://newsinfo.inquirer.net/breakingnews/nation/view/20081119-173196/Rules-on-investors-visas-in-the-works.
236. An Act Establishing the Credit Information System and for Other Purposes, Rep. Act No. 9510 (2008) (Phil.).
237. *Id.* §§ 4-5.
238. Press Release, Republic of the Philippines, PGMA Signs Into Law Tomorrow Credit Information System, Oct. 30, 2008, www.gov.ph/news/default.asp?i=22676.
239. Rep. Act No. 9510, *supra* note 236.
240. *Id.* § 5.
241. *Id.* § 6.
242. *Id.*
243. An Act to Promote Entrepreneurship by Strengthening Development and Assistance Programs to Micro, Small, and Medium Scale Enterprises, Amending for the Purpose Republic Act No. 6977, as Amended, Otherwise Known as the "Magna Carta for Small Enterprises" and for Other Purposes, Rep. Act No. 6977, as Amended, and for Other Purposes, Rep. Act No. 9501, § 18 (2007) (Phil.), *available at* http://www.senate.gov.ph/republic_acts/ra percent209501.pdf [hereinafter Rep. Act. No. 6977].
244. An Act to Promote, Develop and Assist Small and Medium Scale Enterprises Through the Creation of a Small and Medium Enterprise Development (SMED) Council, and the Rationalization of Government Assistance, Programs and Agencies Concerned with the Development of Small and Medium Enterprises, and for Other Purposes, Rep. Act No. 6977 (1991) (Phil.).

their businesses to their full potential.[245] Under the new law, banks and other lending institutions will be required to increase their allotment for micro and small businesses from 7 to 8 percent of their portfolio. The old Magna Carta did not include micro enterprises.[246] The new law defines micro enterprises as businesses with a total asset size of up to 3 million Philippine pesos; small enterprises as businesses with more than 3 million up to 15 million Philippine pesos in total assets; and medium enterprises as those with more than 15 million up to 100 million Philippine pesos in total assets.[247]

D. Tax Relief and Other Amendments

On June 17, 2008, President Arroyo signed into law a statute that introduced amendments to the National Internal Revenue Code of 1997.[248] Under the amendments, minimum wage earners in both private and government sectors are exempt from income tax.[249] The exemption extends to wage and work-related benefits such as holiday pay, overtime pay, night shift differential pay, and hazard pay.[250] This exemption is estimated to benefit more than half a million minimum wage earners in both the private a public sectors.[251] The amendments also provide for: (1) an increase in the total amount of exemptions for families from 96,000 Philippine pesos (approximately $2,000) to a maximum of 200,000 Philippine pesos (approximately $4,000);[252] (2) an increase in the optional standard deduction (OSD) rate for self-employed and professionals from 10 percent of gross income to 40 percent of gross sales or gross receipts;[253] and (3) the OSD benefit to corporations at the same rate of 40 percent of gross income.[254]

E. Social Legislation

1. *Cheap Medicine Act*

On June 6, 2008, the Universally Accessible Cheaper and Quality Medicines Act of 2008[255] was signed into law. Under the law, the President of the Philippines, upon the recommendation of the Secretary of Health, may impose maximum retail prices over cer-

245. Press Release, Senate of the Phillipines, Roxas Calls for Immediate Implementation of RA 9501 Small Enterprises Key to Lasting Growth (May 31, 2008), *available at* http://www.senate.gov.ph/press_release/2008/0531_roxas3.asp.
246. Rep. Act No. 9501, § 18.
247. *Id.* § 3.
248. An Act Amending Sections 22, 24, 34, 35, 51, and 79 of Republic Act No. 8424, as Amended, Otherwise Known as the National Internal Revenue Code of 1997, Rep. Act No. 9504 (2007) (Phil.), *available at* http://www.ops.gov.ph/records/issuances-ra/RA9504.pdf [hereinafter Rep. Act No. 9504].
249. *Id.* § 2.
250. *Id.*
251. Press Release, Republic of Philippines Department of Finance, Income Tax Reform to Bring Relief to Individual Taxpayers (June 17, 2008), www.dof.gov.ph/pressroom.asp?sec=news&id=88.
252. Rep. Act No. 9504, *supra* note 248, § 4.
253. *Id.* § 3.
254. *Id.*
255. An Act Providing for Cheaper and Quality Medicines, Amending for the Purpose Republic Act No. 8293 or the Intellectual Property Code, Republic Act No. 6675 or the Generics Act of 1988, and Republic Act No. 5921 or the Pharmacy Law, and for Other Purposes, Rep. Act No. 9502 (2007) (Phil.), *available at* http://www.doh.gov.ph/ra/cheaper_drugs.

tain drugs and medicines, such as anesthetic agents, intravenous fluids, drugs and medicines indicated for treatment of chronic illnesses and life threatening conditions, those indicated for prevention of diseases and pregnancy, those included in the Philippine National Drug Formulary Essential Drug List, and others which the Secretary of Health may determine to be in need of price regulation.[256]

In pursuit of its aim to ensure access to quality affordable medicine, the new law amends certain provisions of three existing laws—the Intellectual Property Code ("IPC"), the Generics Act, and the Pharmacy Law.[257] The new law authorizes the government and Director General of the Intellectual Property Office to grant a license to exploit a patented invention without the consent of the patent owner under certain circumstances (*e.g.*, the public interest requires it, the demand for the patented article in the Philippines is not being met, in case of national emergency, or where the patent is anti-competitive), subject to the payment of adequate remuneration to the patent owner.[258] The new law also liberalizes the importation of drugs and medicines by enabling the government to authorize or permit the importation of patented drugs and medicines without the patent owner's authorization, where the products have been made available anywhere in the world by the patent owner.[259]

2. *Personal Equity and Retirement Accounts*

On August 22, 2008, the Personal Equity and Retirement Account Act of 2008, more popularly known as PERA Law, was signed into law.[260] PERA Law seeks to promote a culture of savings among Filipinos, particularly overseas Filipino workers who resort to work abroad due to the lack of employment opportunities in the country.[261] Under the law, an individual can make an aggregate maximum contribution of 100,000 Philippine pesos (approximately $2,000) to a personal equity and retirement account, and married individuals can make a combined contribution of 200,000 Philippine pesos (approximately $4,000).[262] Overseas Filipinos are allowed to make maximum contributions double the allowable maximum amount.[263] The contributor will be given an income tax credit equivalent to 5 percent of the total contribution; and if the contributor is an overseas Filipino worker, he or she will be entitled to claim a tax credit for any tax payable to the Philippine government on account of the contribution.[264]

256. *Id.* § 17.

257. *Id.* §§ 5-16, 37-44.

258. *Id.* §10.

259. *Id.* § 7.

260. An Act Establishing a Provident Personal Savings Plan, Known as the Personal Equity and Retirement Account (PERA), Rep. Act No. 9505 (2008) (Phil.), *available at* http://www.lawphil.net/statutes/repacts/ra2008/ra_9505_2008.html.

261. *Id.* § 2.

262. *Id.* § 5.

263. *Id.* § 5.

264. *Id.* § 8.

F. Judicial Efficiency: Small Claims Court

On September 9, 2008, the Supreme Court of the Philippines approved the *"rule of procedure for small claims cases,"*[265] *which will govern the procedure in actions for payment of money where the value of the claim will not exceed 100,000 Philippine pesos (approximately $2,000), exclusive of interest and cost.*[266] The American Bar Association Rule of Law Initiative worked closely with a technical working group of the Supreme Court of the Philippines to prepare draft rules and procedures for the small claims court.[267] *The rule prohibits representation by lawyers*[268] and prescribes forms for different steps in the proceedings.[269] Decisions must be rendered on the day of the hearing[270] and will be final and not subject to appeal, except for special civil actions in case of grave abuse of discretion by the magistrate.[271]

G. Protection Against Government Abuse

1. *Writ of Habeas Data*

On January 22, 2008, the Supreme Court of the Philppines adopted the rule on the writ of habeas data.[272] The rule states that the "writ of habeas data is a remedy available to any person whose right to privacy in life, liberty or security is violated or threatened by an unlawful act or omission of a public official or employee, or of a private individual or entity engaged in the gathering, collecting or storing of data or information regarding the person, family, home and correspondence of the aggrieved party."[273] The writ of habeas data complements two other writs—the writ of habeas corpus and the writ of amparo[274]—to address the reality of extralegal killings and enforced disappearances in the country. Philippine Supreme Court Chief Justice Reynato Puno explains that the writ of habeas data may function as an independent remedy to protect a person's right to informational

265. Resolution Regarding the Rule of Procedure for Small Claims Cases, A.M. No. 08-8-7-SC (S.C., Sept. 9, 2008) (Phil.), *available at* http://www.lawphil.net/courts/supreme/am/am_08_8_7_sc_2008.html [hereinafter Supreme Court Resolution].

266. *Id.* § 2.

267. American Bar Association, *ABA ROLI Helps to Establish a Small Claims Court in the Philippines*, Sept. 2008, http://www.abanet.org/rol/news/news_philippines_small_claims_court_establiished.shtml.

268. Supreme Court Resolution, *supra* note 265, § 17.

269. *Id.* § 15. *See also id.* §§ 8, 10, 16, 21-24.

270. *Id.* § 23.

271. *Id.* § 14.

272. The Rule on the Writ of Habeas Data,, A.M. No. 08-1-16-SC (2008), *available at* http://119.111.101.4/judjuris/juri2008/jan2008/am_08_1_16_sc_2008.html.

273. *Id.* § 1.

274. In 2007, the Philippine Supreme Court promulgated the rule on the writ of amparo, which is a remedy available to any person "whose right to life, liberty, and security has been violated or is threatened with violation by an unlawful act or omission of a public official or employee, or of a private individual or entity." The Rule on the Writ of Amparo, A.M. No. 07-9-12-SC, § 1 (2007) (Phil.), *available at* http://jlp-law.com/blog/rule-on-the-writ-of-amparo-full-text/. It is broader in scope than the writ of habeas corpus; while the writ of habeas corpus protects against illegal detention, the writ of amparo protects against the violation or threatened violation of human rights. Carlos Mejorada, *The Writ of Amparo, Mexican Procedure to Protect Human Rights*, 243 Am. Acad. Pol. & Soc. Sci. 107, 107-111 (1946).

privacy.[275] Justice Puno said that the writ may be sought to gain access to military and police files or can be used to by any citizen against any government agency to find out what information has been compiled against him or her.[276]

The writ of habeas data is based on the 108th Convention on Data Protection of 1981 of the Council of Europe.[277] The Convention developed safeguards to secure the privacy of the individual by way of regulating the processing of personal information or data. Since then, the writ of habeas data has been adopted by Latin American countries, such as Brazil, Colombia, Paraguay, Peru, Argentina, and Ecuador.[278]

2. *Unconstitutional Peace Pact*

On October 14, 2008, the Supreme Court of the Philippines struck down a memorandum of agreement between the government of the Philippines and the Moro Islamic Liberation Front, a rebel group in the Southern Philippine island of Mindanao and neighboring islands.[279] If its signing was not restrained, the memorandum of agreement could have ended an age-old conflict and ushered in an era of peace in the region, but the memorandum and the surrounding circumstances suffered from legal infirmities under the Philippine Constitution.[280] The supreme court cited various constitutional grounds, including that the memorandum referred to the concept of associative relationship between the government and the judicial entity to which the memorandum grants expansive authority and jurisdiction over a designated territory.[281] The concept of an associative relationship under international law—that historically, has "been used as a transitional device of former colonies on their way to full independence"[282]—is contrary to the Philippine Constitution.[283]

With specific references to associative relationships, the memorandum sought to give the juridical entity broad authority on, among other things, the exploitation of natural

275. Gleo Guerra, *SC Promulgates Rule on the Writ of Habeas Data*, Supreme Court of the Philippines, JAN. 24, 2008, http://sc.judiciary.gov.ph/news/courtnews%20flash/2008/01/01240801.php .

276. *Id.*

277. *Id.*; Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data

278. Andres Guadamuz, *Habeas Data: The Latin-American Response to Data Protection*, 2 J. INFO., L. & Tech. (2000), *available at* http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_2/guadamuz.

279. Province of North Cotabato v. Gov't of the Republic of the Phil. Peace Panel on Ancestral Domai, G.R. No. 183591 (S.C. Oct. 14, 2008) (Phil.), *available at* http://www.lawphil.net/judjuris/juri2008/oct2008/gr_183591dt_2008.html; Gov't of Zamboanga v. Gov't of the Republic of the Phil. Peace Negotiating Panel, G.R. No. 183752 (S.C. Oct. 14, 2008) (Phil.), *available at* http://www.lawphil.net/judjuris/juri2008/oct2008/gr_183591dt_2008.html; City of Iligan v. Gov't of the Republic of the Phil. Peace Panel on Ancestral Domain, G.R. No. 183893 (S.C. Oct. 14, 2008) (Phil.), *available at* http://www.lawphil.net/judjuris/juri2008/oct2008/gr_183591dt_2008.html; Provincial Gov't of Zamboanga del Norte v. Gov't of the Republic of the Phil. Peace Negotiating Panel, G.R. No. 183951 (S.C. Oct. 14, 2008) (Phil.), *available at* http://www.lawphil.net/judjuris/juri2008/oct2008/gr_183591dt_2008.html; Maceda v. Republic of the Philippines, G.R. No. 183962 (S.C. Oct. 14, 2008), *available* at http://www.lawphil.net/judjuris/juri2008/oct2008/gr_183591dt_2008.html. (decided en banc by the Supreme Court of the Philippines) [hereinafter Mindanao Region Cases].

280. *See id.*

281. *Id.*

282. *Id.* (citing HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 274 (2nd ed. 1987).

283. *Id.*

resources, the expansion of an existing Muslim territory and, much like an independent state, the ability of the Muslim government to enter into international agreements.[284] The supreme court observed that the memorandum contemplated the creation of a state that "in all but name as it meets the criteria of a state [as] laid down in the Montevideo convention . . ."[285] This ran counter to the constitution that contemplated an autonomous region in Mindanao within the legal framework of the national sovereignty and territorial integrity of the Philippines[286]—as opposed to an independent Mindanao state.

The lack of transparency in the process renders the memorandum and the intentions of the proponents suspect. While relevant laws and constitutional provisions require a consultative process,[287] the International Herald Tribune reported that the memorandum was not disclosed to the public until two days before it was to be signed in Kuala Lumpur, Malaysia.[288] Critics of President Arroyo believe that the memorandum was a ploy to keep her in power beyond her term under the Philippine Constitution.[289] For the arrangement contemplated by the memorandum to work, the Philippine Constitution would have had been amended to transform the Philippines into a federal republic. In a speech, President Arroyo herself confirmed that her administration would work for a shift to federalism. She said, "I advocate federalism as a way to gain lasting peace in Mindanao."[290] The Philippine Supreme Court, though filled with Arroyo appointees, stood in the way. But, with the High Court protecting the territorial integrity of the country, the ultimate casualty is peace in Mindanao.

VIII. South Korea

A. Change in Regulatory Framework for Financial Supervisory Organizations*

Following the inauguration of the new administration of President Myung-Bak Lee on February 25, 2008, amendments to the Government Organization Act and the Act on the Establishment of Financial Supervisory Organizations were promulgated. The amendments modify the number of central administrative bodies from eight ministries and four sub-ministerial agencies to fifteen ministries and two sub-ministerial agencies. Major amendments regarding the functions of economic and financial authorities are discussed in more detail in the paragraphs below.

First, the Ministry of Planning and Budget and the Ministry of Finance and Economy were integrated to form the Ministry of Strategy and Finance, which performs functions

284. *Id.*
285. *Id.*
286. *Id.*; *see also* Const. (1987), Art. X, § 15 (Phil.), *available at* http://www.lawphil.net/consti/cons1987.html.
287. *See* Mindanao Region Cases, *supra* note 279.
288. Carlos H. Conde, *Suspicions of Arroyo Helped Sink Muslim Peace Deal*, Int'l Herald Trib., Aug. 14, 2008, *available at* http://www.iht.com/articles/2008/08/14/asia/phils.php.
289. *Id.*
290. *Id.*

* This and the following sections on South Korea were authored by Chang Hyeon Ko and Sang-Hoon Lee. Mr. Ko is a partner in the Corporate and Finance Practice Groups at Kim & Chang. Mr. Lee is a partner in the Corporate and Securities Practice Group at Kim & Chang.

such as establishing economic and financial policies, preparing and executing the national budget, and managing the national treasury. Second, the Ministry of Commerce, Industry, and Energy and the Ministry of Science and Technology were integrated to form the Ministry of Knowledge Economy, which is responsible for policies related to industry, technological research, development, and energy. Third, the concurrent position of the Minister of Finance and Economy and the Deputy Prime Minister was abolished.

Fourth, the Financial Services Commission (FSC) was newly established by integrating the Financial Supervisory Commission and the Financial Policy Bureau of the Ministry of Finance and Economy. The FSC is composed of nine members: Chairperson, Vice-chairperson, two standing commission members, four ex officio commission members (Vice-Minister of the Ministry of Strategy and Finance, Vice-Governor of the Bank of Korea, Governor of the Financial Supervisory Service, and Chairman & President of Korea Deposit Insurance Corporation), and one non-standing commission member.[291] The FSC performs the functions of both financial policy-making and financial supervision, including: planning financial policies and systems; stabilizing financial markets; supervising, examining, and sanctioning financial companies; approving and authorizing financial companies and management; and controlling capital markets.

Fifth, the Financial Supervisory Service (FSS) operates as an executive authority under the FSC. The FSS performs the executive function of financial supervision and examination under the guidance and supervision of the FSC. The concurrent position of the Chairman of the Financial Supervisory Commission and the Governor of the FSS was abolished. Finally, the functions of economy-related governmental authorities, including the Bank of Korea, the Fair Trade Commission, and the National Tax Service, are maintained without material changes.

B. Financial Investment Business and Capital Market Act

Effective February 4, 2009, the Financial Investment Business and Capital Market Act (FCA) implements a comprehensive regulatory system based on the financial function of an activity and the degree of consumer risk.[292] A general overview of the FCA is discussed in the following paragraphs.

1. *Consolidation of Capital Markets-Related Laws*

Currently, there are separate laws regulating various types of financial institutions depending on the type of financial institution (e.g., whether it is a securities company, futures company, or asset management company) that subject financial institutions to different licensing and ongoing regulatory requirements (e.g., the Securities and Exchange Law (SEL), Futures Business Law, and Indirect Investment and Asset Management Business Law (AMBA)). By applying one uniform set of rules to financial businesses with the same economic function, the FCA attempts to improve and address issues caused by the

291. Act on the Establishment of Financial Services Commission, Act. No. 8863 (Feb. 29, 2008), art. 4 (S. Korea).

292. Financial Services Commission, The Financial Investment Services and Capital Markets Act (FCA) & Common Concerns in the Market, Feb. 16, 2009, *available at* http://74.125.47.132/search?q=cache:0m927HYgRgMJ:www.fsc.go.kr/downManager%3Fbbsid%3DBBS0048%26no%3D57715+Financial+Investment+Business+and+Capital+Market+Act&cd=4&hl=en&ct=clnk&gl=us.

current legal system. To this end, the FCA categorizes current capital market-related businesses (Financial Investment Businesses) into six different functions:[293] (1) dealing (trading and underwriting of financial investment products), (2) brokerage (brokerage of financial investment products), (3) collective investment (establishment of collective investment schemes and the management thereof), (4) investment advice, (5) discretionary investment management, and (6) trust.

Therefore, all current financial businesses relating to financial investment products are reclassified as one or more of the Financial Investment Businesses described above, and financial institutions are subject to the regulations applicable to their relevant Financial Investment Business, irrespective of the type of the financial institution (i.e., in principal, derivative business conducted by banks and securities companies are subject to the same regulations under the FCA).

2. *Comprehensive Definition of Financial Investment Products*

To encompass the various types of securities and derivative products available in the capital markets, the FCA sets forth a comprehensive term "financial investment products," which is defined to mean all financial products with a risk of loss in the invested amount (in contrast to "deposits" which are financial products for which the invested amount is protected or preserved).[294] Financial investment products are classified into two major categories: (1) securities (relating to financial investment products where the risk of loss is limited to the invested amount), and (2) derivatives (relating to financial investment products where the risk of loss may exceed the invested amount). As a result of the general and open-ended manner in which financial investment products are defined, any future financial product could potentially come within the scope of the definition of financial investment products, thereby enabling Financial Investment Companies to handle a broader range of financial products. Under the FCA, securities companies, asset management companies, futures companies, and other entities engaging in any Financial Investment Business are classified as "Financial Investment Companies."[295]

3. *New License System and the Conversion of Existing Licenses*

Financial Investment Companies are able to choose what Financial Investment Business to engage in by specifying the desired (1) Financial Investment Business, (2) financial investment product, and (3) target customers to which financial investment products may be sold or dealt to, via a "check the box" method set forth in the relevant license application.[296] The new system under the FCA enables Financial Investment Companies to acquire licenses not based on its category of financial institution, as was the case before the FCA, but rather on the business function in which the Financial Investment Company wishes to engage (this is referred to as the evolution from an "institutional regulation" to a "functional regulation"). The Regulations elaborated on this concept by dividing licenses into seventy-seven different units based on the type of the business function.[297] Licenses

293. *Id.* at art. 6.
294. *Id.* at art. 3, para. 1.
295. *Id.* at art. 6.
296. *Id.* at art. 12, para. 1.
297. Presidential Decree of the FCA, sched. 1.

are issued under the specific business sub-categories described above. For example, it would be possible for a Financial Investment Company to obtain a license to engage in the Financial Investment Business of (1) dealing (2) over the counter derivatives products (3) only with sophisticated investors. Further, the Regulations establish the level of minimum capital required for each type of license unit, which were decided with various goals in mind, including encouraging expansion of financial institutions, enhancing the specialization of the Financial Investment Companies, and relaxing the barrier to entry.[298]

Almost all financial institutions currently engaging in business activities constituting a Financial Investment Business took certain steps to continue engaging in such business activities. The period to complete the necessary steps commenced in August 2008 and ended in October 2008.

4. *Expanded Business Scope of Financial Investment Companies*

A financial institution licensed as a securities company may not currently engage in asset management business. Under the FCA, pursuant to the integration of its current businesses involving the financial investment products into a single Financial Investment Business, a licensed Financial Investment Company is permitted to engage in all types of Financial Investment Businesses, subject to satisfying relevant regulations (e.g., having a Chinese Wall adequately in place, if required). As to incidental business (i.e., financial-related business that is not a Financial Investment Business), the FCA basically allows a Financial Investment Company to freely engage in the incidental business by shifting away from the current positive-list system towards a more comprehensive system.

5. *Improvement in Investor Protection Mechanism*

While the FCA widens the scope of financial businesses in which financial institutions are permitted to engage, a rigorous investor-protection mechanism is imposed upon Financial Investment Companies dealing financial investment products. The FCA distinguishes general investors from sophisticated investors and provides new or enhanced protections to general investors.[299] For instance, the FCA expressly provides for a strict know-your-customer rule for general investors and imposes an obligation that Financial Investment Companies solicit financial investment products suitable to each general investor with prior written explanations.[300] Under the FCA, a Financial Investment Company could be liable for damages or losses relating to such general investor's investment in financial investment products solicited by such Financial Investment Company in the absence of the requisite written explanation.[301]

With respect to conflicts of interest between Financial Investment Companies and investors, the FCA expressly requires disclosure of any conflict of interest to investors and mitigation of conflicts of interest to a comfortable level or abstention from the relevant transaction.

298. The website version of this article includes a table setting forth selected license units and the corresponding minimum capital requirements.
299. FCA, at art. 12.
300. *Id.* at art. 46-47.
301. *Id.* at art. 48.

6. *Other Changes of Securities/Fund Regulations*

The FCA aims to change various securities regulations, including those relating to public disclosure, insider trading, and proxy contests, which are currently governed under the SEL. For example, the 5 percent and 10 percent reporting obligations under the SEL will become more stringent.

The AMBA strictly limited the kind of vehicles that could be utilized under a collective investment scheme, restricting the range of potential vehicles to trusts and corporations, and the type of funds that can be used for investments. But under the FCA, these restrictions are significantly liberalized, permitting all vehicles that may be created under Korean law, such as limited liability companies or partnerships, to be used for the purpose of collective investments and allowing funds to be much more flexible as to their investments.

7. *Amendments to the FCA - Introduction of Hedge Funds*

A bill was recently released by the FSC to amend the FCA. This bill included various proposals to amend the FCA. One of the proposals would allow private hedge funds to target only a limited group of qualified investors, a group consisting of certain institutional investors and pension funds as designated by the Presidential Decree. If this bill is enacted, hedge funds will be able to engage in cash borrowing and investing in derivative products.

By introducing hedge funds that target qualified investors, the government anticipates that the collective investment businesses will be able to develop and implement innovative investment strategies and techniques, giving the investors expanded opportunities to invest in new and diverse Financial Investment Products, which ultimately will contribute to the development of the domestic financial industry.

C. Corporate Law*

On October 21, 2008, the Korean government submitted to the Korean National Assembly a bill proposing extensive changes to the Corporation Chapter of the Korean Commercial Code (Amendments).[302] The Amendments are meant to create a less restrictive legal environment that stimulates small businesses and eliminates inane bureaucratic constraints. They are also meant to help standardize and consolidate many aspects of Korean corporate law that were either inconsistent or spread out among many disparate laws and regulations, including the Securities and Exchange Act, which, effective February 4, 2009, will be consolidated into the Law concerning Capital Markets and Financial Investment. The National Assembly is expected to pass the bill in early 2009 without signif-

* This section was authored by Hee-Chul Kang & Raymond Kang of Yulchon, Attorneys at Law. Mr. Hee-Chul Kang is a partner and a co-leader of the Corporate & Finance Group at Yulchon. Mr. Raymond Kang is a partner of the Corporate & Finance Group at Yulchon.

302. The Korean version of the Amendments is available at the home page of the Korean National Assembly, http://likms.assembly.go.kr/bill/jsp/BillDetail.jsp?bill_id=ARC_J0E8G1I0T2J1U1B8C1X0N1F3H7R9G4.

icant changes.[303] According to the Amendments, the new Code will become effective one year (one and half years for some limited provisions) after its promulgation by the President. Below is a brief summary of some of the most significant provisions of the Amendments.

1. *New Company Forms*

The Amendments introduce two new company forms, *Hapja Johap* and *Yuhan Chaegim Hoesa*, which are respectively equivalent to the limited liability partnership and the limited liability company as defined under many U.S. state laws.[304] They were created to offer a flexible alternative for investors who want limited liability protection and the flexibility of a partnership.

2. *Corporate Finance and Operation*

The Amendments allow a joint stock corporation, *Chusik Hoesa*, the most widely used corporate form in Korea, greater autonomy regarding corporate finance, including the types and characteristics of shares (hereinafter, unless otherwise specified, a corporation will mean a joint stock corporation). For example, corporations will be permitted to issue non-par value shares and issue a higher percentage of non-voting shares. Currently, shares must have a par value, and only one fourth of the total and outstanding shares of a corporation may be non-voting shares. Under the Amendments, up to half of the total outstanding shares may be non-voting or limited voting shares.[305]

The Amendments significantly liberalize when and how dividends may be declared by corporations. Presently, before a corporation declares a dividend it is necessary to obtain a shareholder resolution, and dividends can only be given in cash or stock. Under the Amendments, a corporation may stipulate in its articles of incorporation that the board of directors, instead of the shareholders, may decide on dividends, and dividends may be given in cash or in the form of assets.[306]

The Amendments abolish restrictions on the total issue amount of corporate bonds and provides a legal basis for issuing various types of corporate bonds, including dividend participation bonds. Corporations will also be permitted to issue electronic share certificates and bond certificates instead of paper (tangible) certificates. These changes will allow corporations to take advantage of new advances in technology and reduce the burden of issuing and recording paper share certificates and bond certificates.

The Amendments also include provisions regarding minority share squeeze-outs, which allow corporations to pursue investment goals and opportunities more efficiently. Specifically, majority shareholders who possess 95 percent or more of the total issued and outstanding stock of a corporation may force minority shareholders to sell their shares at the fair market price.[307] Correspondingly, minority shareholders may exercise a put option

303. The Korean Commercial Code was amended as Law No. 9362, effective February 4, 2009, in order to first enact a part of the Amendments concerning the corporate governance of the listed companies that had been included in the Securities and Exchange Act. *See* COMMERCIAL CODE §§ 542-2-542-12 (S. Korea).

304. COMMERCIAL CODE, amends. §§ 86-2-86-9, 170, 287-2-287-45.

305. COMMERCIAL CODE, amend. § 344-3.

306. COMMERCIAL CODE, amend. §§ 462, 462-4.

307. COMMERCIAL CODE, amend. § 364-24.

and require the 95 percent controlling shareholder to buy their shares at the fair market price.[308]

3. *Corporate Governance*

The Amendments introduce the registered executive officer, *Jiphaeng Imwon*, system that may be adopted by a corporation at its option.[309] If the system is adopted, the chief executive officer and other executive officers will be elected by the board of directors and registered with the court. They will be responsible for carrying out the business of a corporation, while the main function of the board of directors is changed to supervising the executive officers.

Currently, a director must obtain informed approval from the board of directors if a director has a personal interest in a transaction. Under the Amendments, directors must also obtain informed approval if the director's family members, or other specially related persons, have a personal interest. Additionally, directors must also obtain approval from their corporation before they take any opportunity in which the corporation may have an interest.[310]

Although the Amendments aim to prevent directors and major shareholders from exploiting corporations, they offer several protections to prevent talent from being scared away from the boardroom. Other than situations where a director acts willfully, recklessly, or through gross negligence, directors will only be liable for up to six times their annual salary for acts they take in their capacity as a director.[311] Liability for an outside director will be limited to three times his or her annual salary.[312]

D. Taxation*

With the commencement of the five-year presidential term of Myung-Bok Lee of the Grand National Party in February 2008, and in the midst of the global financial crisis, the foremost priority of the Korean government's policy throughout the year has been economic growth. From a tax perspective, such a policy direction can be paraphrased as "minimum tax burden," and it is reflected throughout the Ministry of Strategy & Finance's tax reform plan for 2008 and subsequent years.

1. *Corporate Income Tax Cut*[313]

As a first measure, the corporate income tax rate that was previously 25 percent (13 percent up to 100 million South Korean wons, approximately $80,000) will be reduced by 3 percent to 22 percent beginning in 2009 (11 percent up to 200 million South Korean

308. Commercial Code, amend. § 463-25.
309. Commercial Code, amend. §§ 408-2-408-9.
310. Commercial Code, amend. § 398(3).
311. Commercial Code, amend. § 400(2).
312. *Id.*
* This section was authored by Kyung-Geun Lee & Soo-Jeong Ahn of Yulchon, Attorneys at Law.
313. In addition to the corporate income tax rate discussed below, a resident surtax in the amount of ten percent of the corporate income tax applies. Thus, if the relevant corporate income tax is twenty percent, the aggregate tax rate (including the resident surtax) applicable to a corporation (whether Korean or foreign) will be twenty-two percent.

wons). Beginning 2010, the corporate income tax rate will go down further to 20 percent (10 percent up to 200 million South Korean wons).[314]

Along the same vein, the alternative minimum tax rate for medium and small-sized companies, which is currently 10 percent, will go down to 8 percent.[315] Further, the withholding tax rate on foreign corporations' or nonresidents' (without any permanent establishment in Korea) Korean-source dividend, interest (other than interest on bonds), royalty, and other income will go down to 20 percent from the current 25 percent in 2009.[316] For foreign corporations' and nonresidents' (without any permanent establishment in Korea) capital gains income, the lesser of 10 percent or 20 percent (instead of the current 25 percent) will apply from 2009.[317]

2. *Partnership Taxation*

Previously, Korean tax law did not provide for any express rules concerning partnership taxation. At the end of 2007, however, the partnership taxation rule was introduced and included as part of the Special Tax Treatment Control Law, and will go into effect on January 1, 2009, after a one year grace period.[318]

Under this rule, "eligible entities" may elect to be taxed as a partnership, and, once the election is made, it cannot be revoked for five consecutive years.[319] Eligible entities include an association (*Johab* under the Korean Civil Code), an unlimited company (*Hapmyong Hoesa* or *Hapja Hoesa* under the Korean Commercial Code, which includes private equity funds established in Korea), and certain specified professional service firms (e.g., firms rendering legal, accounting, and tax services under Korean law).[320] Before the adoption of the partnership taxation laws, the manner of taxation of these entities was either unclear or amounted to double taxation. Foreign partnerships and other foreign entities do not fall under the scope of eligible entities yet.

Similar to the U.S. partnership tax rule, the Korean rule provides that the amount of income and loss should be calculated at the level of the partnership but should be allocated to its partners and taxed at each partner level, rather than at the partnership level.[321] If a partner is a nonresident or a foreign corporation, the partnership would be required to withhold the relevant tax.

Under the current Corporate Income Tax Act, investment companies, investment purpose companies, and private equity funds formed under the AMBA can deduct from their taxable income dividends paid to their investors, provided that 90 percent or more of the distributable income is declared as dividends.[322] But the Ministry of Finance and Economy recently proposed an amendment to the foregoing partnership rule, and if it goes into effect, private equity funds established under AMBA in or after 2009 will no longer be

314. Corporate Income Tax Act (CITA) § 55(1) (S. Korea).
315. Special Tax Treatment Control Law (STTCL) § 132(1) (S. Korea).
316. CITA § 98(1)3.
317. CITA § 98(1)4.
318. STTCL §§ 100-14-100-26.
319. STTCL § 100-17.
320. STTCL § 100-15.
321. STTCL § 100-18.
322. CITA § 51-2(1).

eligible for the above deduction but, instead, will be subject to the partnership tax rule without any exception.

3. *Expansion of Net Operating Loss Carryovers*

Currently, net operating loss may be carried forward to five subsequent taxable years. The period of the carry forward will be extended to ten years.[323] But the current requirement to maintain accounting books to substantiate the carry forward will remain. This proposal would apply to net operating losses arising from a fiscal year beginning on or after January 1, 2009.

4. *Others*

The government's plan contains many other tax law changes aimed at bringing the Korean tax system up to par with other developed countries. First, the consolidated tax return system will be implemented by 2010 to provide corporate taxpayers with more flexibility in structuring business entities and to alleviate the tax burden. In order to minimize the revenue loss and confusion in tax administration during the initial stage, the consolidated return may be made available to a parent company and its wholly-owned subsidiaries only.

Second, as part of the nation-wide effort to create "business-friendly Korea" and alleviate uncertainties surrounding tax implications of business transactions, the National Tax Service announced the introduction of the Advance Ruling Procedure, similar to the Private Letter Ruling Procedure in the United States, effective October 1, 2008.[324] Under this procedure, a taxpayer will be able to request a *binding* advance ruling from the National Tax Service on its interpretation and application of relevant tax law with respect to a specific transaction. This would enhance the predictability of tax consequences of the taxpayer's business activities.

Last but not the least, the thin capitalization rule that had been tightened, a three-to-one debt-equity ratio for foreign-invested financial institutions under the 2007 tax law amendment, went back to the original six-to-one debt-equity ratio.[325] This sudden shift in policy emanated mainly from the recent drastic change in the exchange rate movement from South Korean won appreciation to depreciation vis-à-vis U.S. dollars.

E. ANTITRUST AND COMPETITION*

1. *Korea Fair Trade Commission's 2008 Action Plan*

The Korea Fair Trade Commission announced its 2008 action plan in March 2008.[326] The underlying theme of the plan is a shift in focus from regulating large conglomerates

323. CITA § 13.

324. NTS Internal Rules on Handling Advanced Ruling, NTS Internal Rules, art. 1701.

325. Law for Coordination of Internal Tax Affairs (LCITA) § 14(2).; LCITA Enforcement Decree § 26.

* This section was authored by Timothy J. O'Brien, a foreign attorney in the Corporate, M&A and Antitrust and Competition Practice Groups at Kim & Chang.

326. *Annual Work Plan for 2008 by KFTC Reported to President*, KTFC NEWSLETTER (Rep. Of Korea/Fair Trade Comm'n), Mar-Apr. 2008, at 2, *available at* http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=10 (follow "KFTC Newsletter 7" hyperlink).

to creating a competition-promoting and market-friendly regulatory and law enforcement system. In order to achieve these goals, the Commission stated that it would invigorate the market economy by deregulating economic activities, increasing efficiency through promotion of competition, improving conditions for the competition by small-and medium-sized enterprises, and promoting substantive consumer rights. In addition, the Commission stated that it will limit discretionary investigations to cases where there is a significant suspicion of a violation of law and a significant restriction of competition or consumer harm. The Commission will also limit on-site investigations to the cases where documentary investigation is insufficient.

The Commission, in line with its past policy, announced that it will strengthen focused monitoring and rectification in areas where there is a serious concern of collusion resulting in price increases. In this regard, the Commission announced that it will intensify monitoring of abuses of market-dominant position and unfair trade practices in monopolistic or oligopolistic industries, such as gasoline, mobile phone services, and automobile manufacturing. The Commission will also keep a close watch on the areas where the domestic price is significantly higher than the international price and will promote price reduction by publicly announcing the price differential between the domestic prices and international prices. The 2008 action plan is expected to lead to deregulation in many areas, but it also shows the Commission's resolve in strengthening its market-policing role over anti-competitive activities.

2. *Amendments to the Enforcement Decree to FTL*

On June 17, 2008, the Korean cabinet meeting of the Executive Branch approved amendments to the Enforcement Decree to the Monopoly Regulation and Fair Trade Law with the effective date of July 1, 2008. Major points of the amendments are as follows:

- *Increase of the Asset or Sale Threshold for Business Combination Filing.* Previously, one of the conditions to trigger a business combination filing obligation in Korea was that one of the involved parties should have assets or sales in the amount of 100 billion South Korean won or more, and the other party should have assets or sales in the amount of 20 billion won. This 100 billion won threshold had not been revised since 1997, and the amendment increases it to 200 billion won. The Commission expects that the number of transactions requiring a business combination report filing will decrease by 33 percent once the amendment takes effect. Smaller-sized companies will be relieved from the burden of preparing and submitting a business combination filing, while a more in-depth analysis is expected for those larger transactions that are required to be filed.
- *Increase of Size Threshold for Business Group Designation.* The size threshold for the "Business Group" designation under the law will increase from 2 trillion South Korean won to 5 trillion won. The increase of this threshold is expected to reduce the number of Korean companies (chaebol) subject to the restrictions on cross-investment and guarantees applicable to a Business Group. The number of companies subject to the Business Group restrictions is expected to be reduced from seventy-nine to forty-one with this amendment, which seeks to increase flexibility in managing business groups of a smaller scale.

3. *New Emphasis in Recent Merger Reviews*

Three important decisions by the Commission in September 2008, approving complicated acquisitions, demonstrate a greater depth of analysis and flexibility than the Commission's past decisions.

On September 24, 2008, the Commission approved the acquisition by eBay Incorporated of GMarket Incorporated, subject to certain conditions including the prohibition of an increase of commissions for three years.[327] The merged entity will have a combined market share of 87.2 percent in the Internet open market.[328] On September 17, 2008, the Commission also issued a noteworthy decision on the transaction between Samsung Tesco (Home Plus) and E-Land Retail (Home Ever), approving the combination without ordering any divestiture. This decision was in direct contrast to the decision reached by the Commission in two prior cases involving the same market, E-Land/Carrefour and EMart/Wal-Mart. In both of these prior cases, the Commission ordered the divesture of several stores. On the same day, the Commission, for the first time, withdrew a previously issued divestiture order and instead issued behavioral measures in connection with the acquisition by Owens Corning of Saint-Gobain's glass fiber reinforcements business.

Each of these favorable results came as something of a surprise to observers, based on the Commission's more restrictive prior practice in comparable cases in the past. This series of recent decisions shows that the Commission, in its review of business combination filings, is deviating from its more conventional legalistic, formalistic approach and is focusing more on assessment of the reality of the market and the dynamic aspects of the industry structure. These decisions also reflect the "business-friendly" environment that the Korean government, newly inaugurated earlier this year, aims to create.

For example, in its review of the eBay filing, the Commission did not adopt the traditional approach of relying on the statutory presumption of anti-competitiveness based solely on market share. Instead, the Commission considered various factors, such as dynamic competitive nature, consumers' ability to easily switch to other shopping sites, the relative ease of market entry in the Internet shopping market, and the possibility of entry by neighboring market players into the open market and concluded that there would be no anti-competitive concern for consumers, even though the combined market share in the customer-to-customer Internet market would reach 87.2 percent. In addition, the Commission imposed certain conditions only on transactions with vendors. This case illustrates a change in the competition policy of the Commission to valuing more of the dynamic aspects of market competition.

327. K.T. Jung & Timothy J. O'Brien, *KFTC Emphasizes Economic and Industrial Analysis in Recent Review of Business Combination Filings: eBay, Samsung Tesco and Owens-Corning*, KIM & CHANG NEWS & UPDATES, Oct. 2, 2008, http://www.kimchang.com/UserFiles/files/NewsUpdates-KoreanCompetitionLawPolicy(081002)%5B0%5D.pdf.

328. *Id.*

IX. Thailand*

A. Former Premier Sentenced

In 2008, Thaksin Shinawatra, the former Thai Premier, and his wife Pojama, faced a number of legal battles.[329] In August 2008, Mrs. Shinawatra was sentenced by a Bangkok Criminal Court to serve three years in jail for tax evasion.[330] Days later, she and her husband fled to London and continue to reside there in a self-imposed exile.[331]

On October 21, 2008, the former premier was found guilty of abuse of power as a state official.[332] The case stemmed from a transaction in which Mrs. Shinawatra purchased an expensive piece of real estate at a government auction.[333] The prosecution filed criminal charges against both Mrs. Shinawatra and her husband because the land transaction was allegedly done with the consent of Mr. Shinawatra while he was still holding the office of premier.[334] The Supreme Court of Thailand sentenced Mr. Shinawatra to two years in prison.[335] Mrs. Shinawatra was found not guilty.[336] Neither defendant was present in court when the verdict was read because they were still in exile.[337] The former premier has several more corruption-related cases pending against him.[338]

B. Computer Violation Law*

The Thai Parliament passed a computer violation law in 2008.[339] The Computer Violation Act went into effect on August 23, 2008.[340] The Act mandates that certain internet user traffic data be collected and retained by all businesses, banks, schools, hotels, internet service providers, government agencies, apartment residential complexes, Internet cafes, and game shops.[341] The law requires the collected information to be retained for ninety days to assist the police in their efforts to locate persons suspected of being involved in

* This section on Thailand was authored by Lori J. Williams, an attorney in private practice in Charleston, South Carolina. She is the former Acting Attorney General for the Federated States of Micronesia and former legal counsel for the FSM Banking and Insurance Board.

329. *See Former Thai Premier Thaksin Sentenced to Two Years (Lead)*, THAINDIAN NEWS, Oct. 21, 2008, http://www.thaindian.com/newsportal/world-news/former-thai-premier-thaksin-sentenced-to-two-years-lead_100109894.html.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

* This section was authored by Lori J. Williams. Ms. Williams is an attorney in private practice in Charleston, South Carolina. She recently returned from practicing law overseas. She is the former Acting Attorney General for the Federated States of Micronesia and former legal counsel for the FSM Banking and Insurance Board.

339. *See* Computer Violation Act, THAILAND L. FORUM, Aug. 2, 2008, http://www.thailawforum.com/news/2008/news-Aug2-08.html (last visited Apr. 14, 2009).

340. *Id.*

341. *Id.*

cyber crimes.[342] The type of information that must be collected and maintained under the new law includes the identity of the computer users, log in times, and websites visited.[343]

C. Anti-Human Trafficking in Persons Act

Thailand's new Anti-Human Trafficking in Persons Act came into force in June 2008.[344] The law replaced the 1997 Measures in Prevention and Suppression of Trafficking in Women and Children Act.[345] The new law is designed "to prevent and suppress" human trafficking related activities such as "prostitution, slave labour, begging, [and] organ amputation for profit . . ."[346] The Act covers all persons regardless of gender or age. This expanded coverage is a departure from the Act that it replaced, which only protected the rights of women and children.[347] The new Act also provides that a fund will be created to prevent and suppress trafficking in persons and to aid the victims of trafficking.[348]

A person charged with an offense under the Anti-Human Trafficking in Person's Act "will face a jail term of between four and fifteen years and a fine of between 80,000 and one million baht, if convicted."[349]

342. *Id.*

343. *Id.*

344. *See Thailand's First Anti-Trafficking in Persons Act Has Come Into Force*, THAILAND NEWS, Oct. 6, 2008, http://thailand.prd.go.th/view_inside.php?id=3495 (last visited Apr. 14, 2009) [hereinafter *Anti-Trafficking Act*].

345. *See* Anti-Human Trafficking Act 2008, THAILAND LAW FORUM: THAI LEGAL AND BUSINESS NEWS, Oct. 12, 2008, http://www.thailawforum.com/news/2008/news-Oct-08.html.

346. *Id.*

347. *Id.*

348. *Id.*

349. *See Anti-Trafficking Act*, *supra* note 345.