

Asia/Pacific

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This article highlights selected developments during 2009 in India, Japan, Pakistan, the Philippines, South Korea, and Sri Lanka.

I. India

A. INTELLECTUAL PROPERTY LAW

1. *Supreme Court Directs Courts to Dispose of Intellectual Property Cases in Four Months*¹

Expressing unhappiness over the progress of a case pending before the appellate court since December 2007, the Supreme Court, referring to its earlier observations in *Shree*

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1. *Bajaj Auto Ltd. v. TVS Motor Co.*, (2009) Civ. App. No. 6309 (India), available at <http://www.indiankanon.org/doc/1176027/>.

*Vardhman Rice & Gen. Mills v. Amar Singh Chawalwala*² directed all courts and tribunals, *inter alia*, to comply strictly with the provisions in Order XVII Rule 1(2)³ of the Code of Civil Procedure in patent, trademark, and copyright matters; conduct the hearing on a day-to-day basis; and give final judgment within four months from the date of filing of the suit.

B. ARBITRATION LAW

1. Courts to Decide Fraud Cases, Not Arbitrators⁴

Upholding the decision of the lower court, the Supreme Court ruled that in a case where the claimant accused the respondents of fraud and serious malpractice, the case should not go to arbitration, despite the existence of an arbitration agreement. The Court held that the case “must be tried in court and the [a]rbitrator could not be competent to deal with such matters which involved an elaborate production of evidence to establish the claims relating to fraud and criminal misappropriation.”⁵

C. TAX LAW

Tax tribunal held legal fees payable by resident to foreign firm are taxable in India

Deviating from the landmark judgment by the Supreme Court in *Ishikawajima-Harima Heavy Industries Ltd. vs. Director of Income Tax*⁶ for income tax applicable on “fees for technical services,” the Mumbai Income Tax Appellate Tribunal ruled that in the absence of a Double Tax Avoidance Agreement with a country, payments towards legal services paid by an Indian resident to a foreign law firm are “fees for technical services” (FTS) subject to tax in India.⁷

The Income Tax Department held that legal services provided by a Hong Kong-based law firm to a client relating to a client’s Euro Issue of Bonds convertible into Global Depository Receipts for services such as document preparation and due diligence, were FTS as per the Income Tax Act, 1961 (Act).⁸ The Tribunal observed that because the legal services were very much a part and parcel of the transaction, they could not be sliced off from other payments made for services, which fall within the definition of FTS under the Act. The Tribunal further added that because there is no Double Tax Avoidance Treaty with Hong Kong, one may only look into the provisions of the Act for determining the deductibility of tax deducted at source.

2. *Shree Vardhman Rice v. Chawalwala*, (2009) S.L.P.(C) No. 21594 (India), available at <http://courtnic.nic.in/supremecourt/temp/dc%202159409p.txt>.

3. INDIA CODE CIV. PRO., Order XVII Rule 1(2)(a), available at <http://www.vakilno1.com/bareacts/Civil-Procedure/sORDERXVII.htm>.

4. *Radhkrishnan v. Maestro Eng’rs*, (2009) Civ. App. No. 7019 (India), available at <http://www.indiankanoon.org/doc/626171/>.

5. *Id.* ¶ 6.

6. *Ishikawajima-Harima Heavy Indus. Ltd. v. Dir. of Income Tax, Mumbai*, (2007) (1) S.C.R. 112 (India), available at <http://www.indiankanoon.org/doc/245369/>.

7. *Deputy Dir. of Income-tax, Int’l Taxation-2(1) v. Tata Iron & Steel Co.*, (2009) 34 S.O.T. 83 (Mum.) (India).

8. *Id.*

D. COMPANY LAW

No Right to Privacy for Corporate Entities

Re-affirming that the right to privacy is available only to individuals and not to juristic or artificial persons, and that this fundamental right is not available against non-state actors, the Delhi Appellate Court found in favor of defendants, Indian Petro Group, in a corporate privacy and confidentiality case.⁹ In this case, Petronet LNG Limited sued Indian Petro Group alleging that the latter published certain confidential information by way of articles on its website. Relying on the test established in *HRH Prince of Wales v. Associated Newspapers Ltd.*,¹⁰ the court observed that the activities of the plaintiff were of a publicly important nature. After scrutinizing the articles published by the defendants, the court found that publications and disclosures about the plaintiff on the defendant's website were not protected by Article 21 of the Constitution of India.¹¹

The court noted that the sanctity of the freedom of speech guaranteed by Article 19(1)(a) of the Indian Constitution must be preserved, and that the Supreme Court of India had previously held that ensuring the dissemination of news and the free flow of ideas was paramount to upholding this right.¹² The Court further held that the plaintiff was unable to substantiate its claim for confidentiality, and therefore dismissed the suit.

II. Japan

A. CALLS TO LENGTHEN STATUTE OF LIMITATIONS FOR MURDER

In Japan, the statute of limitations for murder was raised to twenty-five years from fifteen years in 2006, but there has been recent public discussion about removing the statute of limitations entirely.¹³ There is a feeling among some that the twenty-five year limit is still too low, and that it might allow a suspect to evade justice for twenty-five years and literally "get away with murder."¹⁴

9. Petronet LNG Ltd. v. Indian Petro Group, (2006) C.S. (O.S.) No. 1102 (2009), available at <http://www.indiankanoon.org/doc/874488/>.

10. Associated Newspaper Ltd. v. H.R.H. the Prince of Wales [2006] EWCA Civ 1776 (U.K.) (establishing "the court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public"), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2006/1776.html>.

11. INDIA CONST. art. 21, available at <http://lawmin.nic.in/coi/coiason29july08.pdf>; Petronet, C.S. (O.S.) No. 1102, at 25.

12. Petronet, C.S. (O.S.) No. 1102, at 37.

13. Makoto Kito, *Revise the Statute of Limitations/Crime Victims Calling for Longer Time Limits, Retroactive Application*, DAILY YOMIURI ONLINE, June 10, 2009, <http://www.yomiuri.co.jp/dy/columns/commentary/20090612dy03.htm>.

14. Posting of Zichi Lorentz to Japundit, http://www.japundit.com/CrimeandPunishment/In_Japan_you_can_Get_Away_With_Murder (Apr. 30, 2009).

B. THE DEATH PENALTY

Under Japan's *Juvenile Law*, anyone who is less than eighteen at the time of the offense cannot receive the death penalty but can only be sentenced to life imprisonment.¹⁵ Additionally, the Minister of Justice must issue a stay of execution if the condemned is mentally incompetent. A recent survey by the government in 2008 found that about eighty percent of Japanese supported the death penalty.¹⁶ Earlier statistics from a survey in 1967 reported by Shigemitsu Dando suggested seventy percent were in favor, so the number seems to be consistently high in favor of the death penalty.¹⁷

The issue has resurfaced in Japanese public discussion fueled in part by the re-introduced jury system (see Section C below). In addition, the release of a report on conditions on death row in Japan by Amnesty International (Sept. 10, 2009) brought the issue before a broader international audience.¹⁸ Amnesty maintains that conditions are deplorable on death row, where condemned prisoners are kept in silent isolation in small spaces and are not allowed to speak or make eye contact with the guards.¹⁹ They are not informed in advance of the date of the execution and only receive one hour's notice on the day of execution. The Amnesty report maintains that because some individuals have been kept in such conditions since their sentencing, the prisoners may be mentally incompetent and should not be executed.²⁰

C. JAPAN REINTRODUCES THE JURY SYSTEM

A new era in Japanese law began on May 21, 2009 with the reintroduction of the "lay jury" system.²¹ Japan had introduced a system of jury trials in 1928 and this system continued until the middle of World War II. But it was not revived in the post-war Constitution or other laws.

Under the new system in jury trials, six lay jurors will assist three judges in the case. The lay jurors are to be chosen from a list of prospective jurors. Prospective jurors may

15. SHIGEMITSU DANDO, *THE CRIMINAL LAW OF JAPAN: The General Part* 297 (B.J. George trans., Fred B. Rothman & Co. 1997).

16. Opinion Poll, The Maureen & Mike Mansfield Found., Asahi Shimbun Dec. 2008 Regular Opinion Poll (P08-31) (Jan. 9, 2008) [hereinafter Opinion Poll], available at <http://www.mansfieldfdn.org/polls/2008/poll-08-31.htm>.

17. DANDO, *supra* note 15, at 292. Dando is a former Supreme Court judge who admitted that he would favor the abolition of the death penalty. DANDO, *supra* note 15, at 291.

18. See generally Amnesty Int'l, *Mental Health & the Death Penalty in Japan*, ASA 22/005/2009, Sept. 2009, available at <http://www.amnesty.org/en/library/asset/ASA22/005/2009/en/0a0beedd-f6b6-475a-bf92-844c8f7d3915/asa220052009eng.pdf> (summarized at *Japan Continues to Execute Mentally Ill Prisoners*, AMNESTY INT'L, Sept. 10, 2009, <http://www.amnesty.org/en/news-and-updates/report/japan-continues-execute-mentally-ill-prisoners-20090910>). A general summary can be found at <http://www.amnesty.org/en/news-and-updates/report/japan-continues-execute-mentally-ill-prisoners-20090910>.

19. *Id.* at 27; see also Catherine Makino, *Death Penalty: Activists Reveal Japan's Death Row to the World*, IPS, Oct. 10, 2008, <http://ipsnews.net/news.asp?idnews=44211>; see also *Harsb Justice-Japan* (Australian Broad. Corp. 2004), available at <http://www.youtube.com/watch?v=B0BQyS1u8uk>.

20. Amnesty Int'l, *supra* note 18, at 35; see also Int'l Fed'n for Human Rights, *The Death Penalty in Japan: The Law of Silence*, Oct. 2008, available at <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/FIDHJapan94.pdf>.

21. *Japan Introduces Lay Judge System*, UPI, May 20, 2009, http://www.upi.com/Top_News/2009/05/20/Japan-introduces-lay-judge-system/UPI-28311242877141/.

ask to be dismissed from the jury pool on the grounds of being over seventy years old, being a student, being pregnant, having parental responsibilities, or being seriously ill.²²

One issue that has made the jury system controversial among the public was the possibility that lay jurors may be asked to impose the death penalty on some defendants. Surveys indicate that while a majority of Japanese favor the death penalty, they would have difficulty imposing the death penalty on a defendant after looking at him or her eye-to-eye in court.²³

III. Pakistan

In 2009, amid a backdrop of internal conflicts against the Taliban and transition in executive administration and foreign relations, Pakistan experienced yet another set of legal reforms that are nothing short of revolutionary. A new initiative of the Pakistani bar appears to strengthen the role of the Constitution in its rule of law scheme, yet the government granted sweeping concessions to the Taliban and sanctioned the group's authority to administer their own rule of law. The Pakistani government entered into an agreement with Northern tribal leaders to institute Sharia law alongside Pakistan's national law within the region.²⁴ Meanwhile President Zardari re-appointed Chief Justice Iftikhar Chaudhry as the Chief Justice of the Supreme Court of Pakistan, a position the former justice was forced to resign from by the previous administration.²⁵ The Court subsequently created a new national judicial policy.²⁶

To understand the concessions made to the Taliban in their battle of attrition, one must realize that three sources of law have vied for legitimacy in Pakistan: Sharia law inspired by Islam, Pakistan Civil and Criminal Law, and traditional tribal codes that predate the introduction of Islam to the region. While the third operates informally without the necessary institutional structures for enforcement, it nevertheless supplements Sharia law or Pakistani law, depending on the prevalence. As such, Pakistan operates with a parallel judicial system, with the Constitution codifying the creation of a Federal Shariat Court in 1979.²⁷ The Shariat Court is empowered with the judicial authority to review laws for their conformity with Islamic principles.²⁸ Henceforth, the dynamic law and its impact upon Pakistani society vary tremendously according to extra-legal developments.

In 2009, after years of battling the Taliban in the Swat Valley in the Malakand region, the Taliban and the Pakistani government in February agreed to a truce in the region, and permitted the administration, by the Taliban, of Sharia law.²⁹ The Taliban already con-

22. *Many Citizens Confused by Upcoming Lay Jury System*, JAPAN TODAY, Dec. 9, 2009, <http://www.japantoday.com/category/shukan-post/view/many-citizens-confused-by-upcoming-lay-jury-system>.

23. Opinion Poll, *supra* note 16, at SQ2.

24. *Pakistan's Swat gets Sharia Courts*, AL JAZEERA, Mar. 17, 2009, <http://english.aljazeera.net/news/asia/2009/03/200931715490896931.html>.

25. *Pakistan Reinstates Sacked Judge*, BBC NEWS, Mar. 16, 2009, <http://news.bbc.co.uk/2/hi/7945294.stm>.

26. SECRETARIAT, LAW & JUSTICE COMM'N, NAT'L JUDICIAL (POLICY MAKING) COMM., NAT'L JUDICIAL POLICY (2009) [hereinafter NJP], available at <http://www.supremecourt.gov.pk/njp2009/njp2009.pdf>.

27. PAK. CONST. part VII, chap. 3A, available at <http://www.pakistani.org/pakistan/constitution/part7.ch3a.html>.

28. *Id.* § 203D(3).

29. Jane Perlez, *Pakistan Makes a Taliban Truce, Creating a Haven*, N.Y. TIMES, Feb. 16, 2009, http://www.nytimes.com/2009/02/17/world/asia/17pstan.html?pagewanted=1&_r=1.

trolled much of the Federally Administered Tribal Area of Pakistan and this concession can be viewed as a surrender of sovereignty and recognition of the limits of the writ of Pakistani courts. Aside from political ramifications of such a maneuver, the agreement, known as the Malakand Accord, raises serious questions about the perceived role of law in Pakistani society.³⁰

By recognizing the Taliban's authority to administer Sharia law according to the Taliban's interpretation within the borders of Pakistan, the Pakistani government, in effect, has sanctioned a legal system to exist detached from their own authority. This set of laws that will apply in the Malakand region raises concerns about the government's ability to protect individual rights and liberties.

When President Zardari re-appointed Chief Justice Iftikhar Chaudhry as Chief Justice of the Supreme Court of Pakistan on March 15, 2009, a lawyer-driven social movement seeking to reinstate the Chief Justice recognized the victory as an opportunity to implement the National Judicial Policy (NJP). The Chief Justice spearheaded the formulation of the NJP in strict accordance with Pakistan's Constitution, which was solidified in July 2009.³¹

The NJP aims to tackle justice at a grassroots level through reforming institutional and procedural mechanisms within the judiciary. The institutional policy changes seek to establish an independent judiciary, ending corruption, and eradicating the massive backlog of cases.³²

The NJP established a committee to oversee the implementation of an independent judiciary. This committee includes the Chief Justice of the Supreme Court, the Chief Justice of the Federal Shariat Court, and four Chief Justices of High Courts, and also establishes limitations on the activities of retired judges. Notably, the NJP also restricts the judiciary's involvement to conflicts resulting from elections.³³ Limitations such as these are an indication of the ardent desire within the judicial branch of government to unequivocally define its scope of duties within the broader governmental framework.

More importantly, the NJP seeks to eradicate backlogs of the approximately 1.5 million cases pending, for which 19,000 were to be heard by the Supreme Court and the High Courts in 2009.³⁴ The NJP seeks to remedy this delay by creating deadlines for effective procedural justice, statutes of limitations and temporary procedures, requiring police to submit police reports to cases, and limiting judges' authority on setting bail. These mechanisms aim at increasing inter-institutional communication and functionality.

Ultimately, these changes to the legal landscape may establish new vigor within the judiciary. While there are many logistical issues in implementation such as manpower and lack of resources, the general goals of the judiciary are thoroughly outlined and widely accepted. But it remains to be seen to what extent the Constitution, or even differing

30. See Stephanie Palo, *A Charade of Change: Qisas & Diyat Ordinance Allows Honor Killings to Go Unpunished in Pakistan*, 15 U.C. DAVIS J. INT'L L. & POL'Y 93 (2008).

31. Iftikhar Chaudhry, Chief Justice of Pak., Speech at the Concluding Session of the Conference on Implementation of the Nat'l Judicial Policy (July 5, 2009), available at <http://www.ljcp.gov.pk/Menu%20Items/NJPMC/media%20release/today%20HCJ.doc>.

32. *Id.*

33. NJP, *supra* note 26, at 14.

34. SC Announces New National Judicial Policy, DAWN.COM, May 4, 2009, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/18-sc-announces-new-national-judicial-policy-sa-04>.

interpretations of Sharia law sanctioned by Federal Shariat Courts, will have on the Taliban's administration of Sharia law within the Malakand region.

IV. Republic of the Philippines

Having enjoyed positive GDP growth amidst the global meltdown,³⁵ the Philippines has been considered among countries that "best weathered the global recession."³⁶ As the government kept focus on economic development while addressing allegations of human rights violations, legal developments in the Philippines for 2009 include laws enacted by the Philippine legislature in the areas of economic development, preservation of the national patrimony and environment, and human rights protection.

A. ECONOMIC DEVELOPMENT, ENVIRONMENTAL PROTECTION AND NATIONAL PATRIMONY

1. *Real Estate Investments*

As of September 30, 2009, the Philippine legislature passed a bill³⁷ known as the Real Estate Investment Trust Act of 2009 (REIT Act).³⁸ The REIT Act seeks to democratize wealth by providing small and large investors with the opportunity to participate in the ownership and financing of large-scale real estate projects. It also seeks to encourage foreign direct investments in the Philippine real estate industry.

Under the proposed law,³⁹ a REIT, among other things: (i) is a stock corporation that invests in income-producing real estate assets;⁴⁰ (ii) allows direct returns on investments in a securitized form;⁴¹ (iii) must be a public company with a paid-up capital of Php one billion (approximately US\$22 million) and at least 1,000 public shareholders, each owning at least 100 shares of any class and aggregately owning at least one-third of the outstanding capital stock;⁴² (iv) must distribute annually at least ninety percent of its distributable

35. Rhea Sandique-Carlos & Cris Larano, *Philippines Grew in Second Period*, WALL ST. J., Aug. 28, 2009, <http://online.wsj.com/article/SB125135888924163031.html>; see also *Towards an Inclusive Recovery, Philippines Quarterly Update*, WORLD BANK, Nov. 2009, <http://www.worldbank.org.ph/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/PHILIPPINESEXTN/0,,contentMDK:21983749~pagePK:1497618~piPK:217854~theSitePK:332982,00.html> (reporting "Real GDP growth is projected to rise from 1.4% in 2009 to 3.1% in 2010.")

36. Nouriel Roubini, *Are There Bright Spots Amid the Global Recession?*, FORBES.COM, <http://www.forbes.com/2009/08/05/recession-china-india-qatar-poland-brazil-opinions-columnists-nouriel-roubini.html>.

37. Under Philippine law, every bill passed by Congress must be approved by the President. CONST. (1987), Art. VI, § 27(1) (Phil.), available at <http://www.chanrobles.com/article6.htm>.

38. The Philippine House of Representatives passed House Bill No. 6379 on September 30, 2009 and the Philippine Senate passed Senate Bill 2639 on September 29, 2009. An Act Providing the Legal Framework for Real Estate Inv. Trust & for Other Purposes, Rep. Act. No. 9856 (Sept. 30, 2009) (Phil.), available at http://www.senate.gov.ph/republic_acts/ra%209856.pdf.

39. Zinnia B. Dela Peña, *Rules on Real Estate Investment Trusts to be Signed by Yearend*, PHILSTAR, Oct. 1, 2009, <http://www.philstar.com/Article.aspx?articleId=510007&publicationSubCategoryId=66> (reporting "A law that will provide the regulatory framework for real estate investment trusts (REITS) is expected to be signed by the end of the year.")

40. Rep. Act. No. 9856, § 3(x).

41. *Id.* § 4.

42. *Id.* §§ 4, 6.

income;⁴³ and (v) has at least sixty percent of its deposited property invested into or consisting of income-generating real estate.⁴⁴

2. *Renewable Energy*

Signed into law on December 16, 2008, the Renewable Energy Act of 2008⁴⁵ (REA) took effect on January 30, 2009. The REA promotes the development and commercialization of renewable energy resources (such as biomass, solar, wind, geothermal, ocean energy, hydropower, and other emerging renewable energy technologies⁴⁶) and encourages sustainable development to reduce harmful emissions.⁴⁷ The REA provides incentives to business enterprises that will invest in this sector.⁴⁸ Incentives include an income tax holiday, a preferential corporate income tax rate, net operating loss carry over, accelerated depreciation on plant machinery and equipment, zero-rated value-added tax on certain renewable energy projects and activities transactions, and tax exemption on the sale of carbon credits.⁴⁹

3. *National Patrimony*

On March 10, 2009, Republic Act No. 9522⁵⁰ (the Amendment) was signed into law, amending a 1961 statute⁵¹ that defines the baselines of the territorial sea of the Philippines. Under the Amendment, the definition and description of the Philippine archipelagic baseline does not include Kalayaan Island group (part of the Spratley Islands and also known as Nansha Islands) or Scarborough Shoal (also known as Huangyan Island),⁵² which are all expressly made part of a “Regime of Islands under the Republic of the Philippines.”⁵³

While proponents of the Amendment state that these measures seek to avoid territorial disputes,⁵⁴ the Amendment maintains the Philippines’ “sovereignty and jurisdiction” over the “Regime of Islands” with express reference to the United Nations Convention on the Law of the Sea (UNCLOS).⁵⁵ Based on Article 121 of UNCLOS,⁵⁶ it may be claimed

43. *Id.* § 8.

44. *Id.* § 9.

45. An Act Promoting the Dev., Utilization & Commercialization of Renewable Energy Resources & for Other Purposes, Rep. Act No. 9513 (Dec. 16, 2008) (Phil.), available at http://www.senate.gov.ph/public_acts/ra%209513.pdf.

46. *Id.* § 4(uu).

47. *Id.* § 2.

48. *Id.* §§ 15-26.

49. *Id.* § 15.

50. An Act to Amend Certain Provisions of Rep. Act 3056, as Amended by Rep. Act No. 5445, to Define the Archipelagic Baselines of the Phil. & for Other Purposes, Rep. Act No. 9522 (Mar. 10, 2009) (Phil.), available at http://www.senate.gov.ph/republic_acts/ra_9522.pdf.

51. An Act to Define the Baselines of the Territorial Sea of the Phil., Rep. Act No. 3056, as amended by Rep. Act No. 5446 (June 17, 1961) (Phil.), available at http://www.lawphil.net/statutes/repacts/ra1961/ra_3046_1961.html.

52. Rep. Act No. 9522, § 1.

53. *Id.* § 2.

54. Chen Hurng-yu, *Manila's Island Grab Is a Threat*, *TAIPEI TIMES*, Feb. 12, 2009, <http://www.taipetimes.com/News/editorials/archives/2009/02/12/2003435928/print>.

55. Rep. Act No. 9522, § 2.

that each island under the Regime of Islands will have its own territorial sea, contiguous zone, exclusive economic zone, and continental shelf, and this may effectively increase the size of the Philippine archipelagic waters.⁵⁷ The Chinese government has protested the Amendment for being a violation of China's sovereignty and defiance of protests from the Chinese government.⁵⁸

B. HUMAN RIGHTS

1. *Women's Rights*

On August 14, 2009, the Magna Carta of Women⁵⁹ (MCW) was signed into law. It creates the framework to implement the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, to which the Philippines is a party.⁶⁰ The MCW recognizes that "women's rights are human rights" and mandates, among other things, setting up "violence against women's desk" in every *barangay* (the most basic local government unit) in the Philippines, a mandatory increase of women in third-level positions in government within the next five years, and the grant of leave benefits for employed women who undergo gynecological surgery.⁶¹

2. *Anti-Torture Law*

Pursuant to the country's commitment at the United Nations Convention Against Torture in Geneva,⁶² the Anti-Torture Law of 2009⁶³ (ATL) was signed into law on November 10, 2009. The ATL criminalizes torture and other inhumane punishment. Under ATL, torture is defined as "an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining" information or intimidating another person.⁶⁴

56. U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 396, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

57. *Id.*; Hurng-yu, *supra* note 54.

58. *China Opposes Philippine Claim on Islands*, CHINADAILYONLINE, Mar. 11, 2009, http://www.chinadaily.com.cn/china/2009-03/11/content_7569668.htm.

59. An Act Providing for the Magna Carta of Women, Rep. Act No. 9710 (Aug. 14, 2009) (Phil.), available at http://www.senate.gov.ph/republic_acts/ra_9710.pdf.

60. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 12, available at <http://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20IV/IV-8.en.pdf>.

61. Rep. Act No. 9710, §§ 9(d), 11(a), 18.

62. U.N. Convention Against Torture, Dec. 10, 1984, A/RES/39/46, available at <http://www.un.org/documents/ga/res/39/a39r046.htm>.

63. An Act Penalizing Torture & Other Cruel, Inhuman & Degrading Treatment or Punishment & Prescribing Penalties Therefore, Rep. Act No. 9745 (Nov. 10, 2009) (Phil.), available at http://www.senate.gov.ph/republic_acts/ra_9745.pdf.

64. *Id.* § 3(a).

V. South Korea

A. MERGERS & ACQUISITIONS

The Financial Services Commission (FSC) has proposed amendments to introduce special purpose acquisition companies (SPACs) to the Enforcement Decree of the Financial Investment Services and Capital Markets Act and the Financial Investment Business Regulations.⁶⁵ SPACs are acquisition vehicles formed by “sponsors” for the sole purpose of merging with another company with the proceeds of its initial public offering (IPO). SPACs will be exempted from the application of regulations relating to collective investment to the extent that they satisfy certain requirements.⁶⁶ These requirements include: that the sponsors include a financial investment company that holds an investment dealing license; that a minimum of ninety percent of the proceeds of the IPO are held in trust pending merger with the target; that the SPAC dissolve if it fails to list its shares within ninety days or fails to consummate a merger within three years of its IPO; that the SPAC does not select its target prior to its IPO; that the voting rights of the sponsors and management of the SPAC are restricted at a shareholders’ meeting to approve or reject the proposed merger with the target; and that shareholders are entitled to appraisal rights in connection with the SPAC merger with the target only if that shareholder participated in the IPO and is entitled to vote at a shareholders’ meeting to approve or reject the merger.⁶⁷

B. ARBITRATION

1. *Supreme Court Ruling on Nominating an Arbitrator*

In a 2009 case involving a motion by the applicant for nomination of an arbitrator by the court, the Korean Supreme Court confirmed that Korean courts cannot deny such a motion based upon a review of the merits of a dispute.⁶⁸ According to the decision, an arbitral tribunal, not a court, should review the merits of a dispute.

2. *Ongoing Efforts to Revise the KCAB’s International Rules*

Currently, the Korean Commercial Arbitration Board (KCAB) uses two sets of rules.⁶⁹ One is intended for domestic arbitration and the other for international arbitration. The KCAB’s international rules are similar to the arbitration rules used by many other major arbitration institutions, but are relatively new (effective 2007). Also, because the international rules only apply when parties specifically agree to use them, the international rules have almost never been used.⁷⁰ The KCAB, however, is reported to be currently working

65. Proposed Amendments to the Enforcement Decree of the Fin. Inv. Servs. & Capital Markets Act & Fin. Inv. Regulations, LEGAL UPDATES (Kim & Chang, Seoul, S. Korea), Oct. 19, 2009, available at http://www.kimchang.com/UserFiles/files/LegalUpdates_ProposedAmendmentstoEnforcementDecreeofFSCMA091019.pdf.

66. *Id.*

67. *Id.*

68. 2009 MA 1395 (Sup. Ct., Oct. 14, 2009) (S. Korea).

69. Int’l Arbitration Rules (S. Korea), available at http://www.kcab.or.kr/jsp/kcab_eng/law/law_03_2.jsp.

70. *Id.* art. 3.

to revise the international rules to make them more user-friendly. Many observers expect the KCAB to complete the revision process sometime in 2010.

3. *Model Arbitration Agreements for Korean Entertainment Industry*

In 2009, the KCAB and the Korean Entertainment Law Society (KELS) released six model contracts specifically designed for the Korean entertainment industry. These contracts rely on arbitration to resolve disputes between/among the interests of entertainers and managers. Both the KCAB and the KELS believe the model contracts will help Korea continue the trend towards arbitration.

C. HUMAN RESOURCES

1. *Developing Issues: Non-Regular Employee*

In Korea, the term “non-regular” employee is not defined under the law, but it is a general term that refers to employees on fixed term contracts (or contract employees), agency workers (or dispatched workers), and part-time employees. The Act on the Protection of Dispatched Workers (the APDW) and the Act on the Protection of Fixed-Term and Part-Time Employees (the APFP) both protect non-regular employees from discrimination.⁷¹ Under these laws, employers cannot discriminate against dispatched workers or contract employees, respectively, with regard to wages or working conditions without reasonable cause.

Previously, the anti-discrimination provisions of the APDW and the APFP applied only to large-sized employers. Effective July 1, 2009, the anti-discrimination provisions of the APDW and the APFP became applicable to all employers that employ five or more employees. Employers that fail to comply with these provisions may be subject to a corrective order issued by a labor committee. A corrective order may require an employer to suspend discriminatory conduct, improve working conditions, or pay monetary compensation.⁷²

Since the enactment of the APFP on July 1, 2007, all contract employees who worked for an employer with five or more employees for more than two consecutive years will be granted the status of employee with an indefinite term (or regular employee).⁷³ In 2009, two years after the APFP was enacted, this provision finally became relevant. Many contract employees who entered into employment contracts on or after July 1, 2007, and continued employment were automatically deemed regular employees.

2. *Act on the Age Discrimination Prohibition in Employment and Aged Employment Promotion (the AADPE)*

On March 22, 2009, a large portion of the revised AADPE came into effect, with the remainder scheduled to come into effect in January 2010. Currently, the AADPE prohibits age discrimination in recruitment, but after January 2010, it will protect all aspects of

71. Act on the Protection, etc., of Dispatched Workers, art. 21 (3) (S. Korea) [hereinafter APDW]; Act on the Protection of Fixed-Term and Part-Time Employees, art. 8 (S. Korea) [hereinafter APFPE].

72. APDW art. 21(3); APFPE art. 13.

73. APFPE art. 4(2).

employment and prospective employment from age discrimination, including in the areas of recruitment, training, wages, benefits, promotions, transfers, and dismissals.⁷⁴

Under the revised AADPE, any employee who is a victim of age discrimination may file a petition with the National Human Rights Commission (NHRC).⁷⁵ The NHRC may recommend measures to redress the discrimination. If an employer fails to comply with the NHRC, the Ministry of Labor may intervene to protect victims of age discrimination by issuing corrective orders.⁷⁶ Failure to comply with a corrective or retaliatory action against an employee may result in fines⁷⁷ and criminal liability.⁷⁸

VI. Sri Lanka

A. INTRODUCTION

One of the most significant legal developments in the recent past has been judicial consideration of the scope and extent of the Doctrine of Public Trust. Other important legal developments reflect the increased international attention to environmental concerns, as well as the country's legislative adjustments in the post-war scenario of nation rebuilding.

1. *Case Law Critique of Enforceability of Contracts Under the Doctrine of Public Trust*

The golden thread that bound the interest of the media and the public to the series of decisions discussed below was their significance to the Doctrine of Public Trust. At a time when many Sri Lankans regard their contribution to helping to shape the future of their nation as trivialized to participation in mere democratic formalities that result in the election of politicians who could, once voted into power, do as they pleased, the revival of the Doctrine of Public Trust was seen by many as a welcome development. The doctrine could operate as a check against blatant abuses of discretionary power vested in the organs of government.

The Doctrine of Public Trust is a judicial innovation from the 1990s that finds its origins in the Constitution of Sri Lanka. The Sri Lankan Constitution does not use sovereignty as a term to merely describe the power of the State, but rather specifically recognizes such sovereignty as originating from the people and belonging to the people.⁷⁹ The organs of Government are recognized by the Constitution as being the custodians of this sovereignty, which hold such power in trust to promote the beneficial interest of the people. Where these organs of Government act purportedly for the discharge of that trust, the actions taken by them will bind the people. Conversely, where the power is purportedly used in a manner that is detrimental to the interests of the people of Sri Lanka, the relevant organ of Government will be deemed to have breached the trust, and the people of the country will not be liable for the actions taken.

74. Act on Age Discrimination Prohibition in Employment and Aged Employment Promotion, art. 4-4 (S. Korea) [hereinafter AADPE].

75. *Id.* art. 4-6.

76. *Id.* art. 4-7.

77. *Id.* arts. 4-7, 24(1).

78. *Id.* arts. 4-9, 23-3 (1).

79. CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, art. 3.

Questions as to the precise scope of the Doctrine, and whether this Doctrine is unfettered in its application to all and any acts of a public or government institution, remain unanswered. Some schools of thought contended that the Supreme Court had overstepped its role under the Constitution and unlawfully arrogated powers, while others welcomed the willingness of the judiciary to combat blatant abuses of executive power.

a. The Water's Edge Case⁸⁰

The facts of the case span twenty years, but culminate in a single point of contention—whether land that was acquired for a public purpose under the Land Acquisition Act No. 9 of 1950 could be subsequently vested in private individuals for profit-motivated purposes. The land was acquired to preserve the low-lying marshlands of the Battaramulla area just outside the Colombo Municipal Council limits for flood-retention, and to develop the Parliamentary Administrative Complex and a public playground. Almost ten years after the acquisition, a series of land allotments were made to a private developer by way of leases and free of charge ‘giveaways’ to build a golf course and construct holiday villas. These were intended to be sold under the direction of the Urban Development Authority. It appears that, originally, the Authority allotted the land on the basis that management of the property by a private company could generate much needed revenue for the Authority to fulfill other public purposes. But the seriously undervalued prices for which the allotments were made, as well as the fact that the company was permitted to construct on land that was earmarked for flood retention (potentially damaging wetlands) and to sell the villas directly were all factors that arguably outweighed any economic benefit that accrued to the Authority. The semblance of public purpose was also called into question.

Although each allotment of land had received some sort of state sanction,⁸¹ a three-judge bench of the Supreme Court held that procedural compliance could not serve to legitimize contracts, which in effect, violate the doctrine of public trust. The Court held that the acquisition of land for a public purpose does not permit it to subsequently be used for any public benefit. The Court found that the legislative intent was that public purpose must be one that has as its primary object public utility, because any project, even those that are purely profit-minded, can generate some form of public benefit. The Court further held that the project must also be one that benefits the general interest of the community as a whole, and is not one that merely indirectly benefits individuals.

b. Bunkering Case⁸²

This landmark judgment concerned the sale of the controlling interest in the bunker company, Lanka Marine Services Ltd., (LMSL), which was a “wholly owned company of the Ceylon Petroleum Corporation (CPC), which was a profit making, debt free, taxpay-

80. Mendis et al. v. Perera et al. [Supreme Court] S.C. (FR) No. 352/2007 (Sri Lanka).

81. This State sanction took various forms including approval by the Urban Development Authority, the Board of Investment, the Sri Lanka Land Reclamation and Development Corporation, the Cabinet of Ministers or the recommendation of the then President, in her capacity as the Minister of Finance and Planning. See *id.* at 7-12.

82. Nanayakkara v. Choksy, et al. [Supreme Court] S.C. (FR) 209/2007 (Sri Lanka) [hereinafter NANAYAKKARA I].

ing company to, John Keels Holdings Ltd.”⁸³ The sale took place with a view to liberalizing bunkering, which had previously been monopolized by the CPC.

The Petitioner was a national politician who filed his application in the public interest in terms of Article 126 of the Constitution on the basis of a breach of a fundamental right to equality guaranteed under Article 12(1) of the Constitution. The impugned action was alleged to have been perpetrated at the behest of, and the application therefore was brought against, the then-Chairman of the Public Enterprises Reform Commission (PERC),⁸⁴ the then-Cabinet of Ministers,⁸⁵ and the then-President.

The sale was allegedly affected in a manner that was not consistent with the phased-out arrangements recommended by the PERC. It was also alleged that the sale lacked transparency, was drastically disproportionate to the profits generated by the company prior to sale, and that the purchase price of the shares were undervalued. It was also suggested that the undervalued amount was even lower than the profits accrued for the year in which the sale took place. Furthermore, it was argued during the hearing of the case, that subsequent to the sale, the company had failed to generate the anticipated price reductions and competitiveness sought for the bunker market.

The validity of the State grant of land was considered in light of the 13th Amendment to the Constitution and the State Lands Ordinance, which provides for the “exercise of legislative and executive power within a Province in respect of matters in the Provincial Council List on a system akin to the ‘Westminster’ model of Government.”⁸⁶ While the President is constitutionally empowered to be the ultimate authority for alienation and dispositions of state land, the exercise of that power is subject to the requirements of Appendix II of the Ordinance.

The Court ordered the tank farm to be returned to the Sri Lanka Ports Authority and held that the Petitioner had *locus standi* to inquire into the actions of the former Chairman of PERC. The Court concluded that the Chairman had acted outside of statutory authority to go beyond advising and assisting by acting on a transaction and effecting a sale without government authorization, and that the impugned transaction was an arbitrary exercise of executive power, which contravened the Rule of Law that is the basis of the Constitution of the country.

c. Sri Lanka Insurance Corporation Case⁸⁷

This case was another landmark judgment that examined the improper procedures that were followed by the Secretary to the Treasury in the course of the privatization of a public corporation, namely the Sri Lanka Insurance Corporation (SLIC). One of the matters considered by the Supreme Court was the failure of the Secretary to the Treasury to comply with the requirement that the Tender Board for the privatization process ought to be constituted by the Cabinet. The Secretary, instead, had himself appointed the Board. Furthermore, it was discovered that the bid was finally awarded to companies who had not

83. *Id.* at 2-3.

84. At the time of hearing of the case, the Chairman was the Secretary to the Treasury.

85. At the time of hearing, the present Leader of the Opposition was then the Prime Minister.

86. NANAYAKKARA I, at 48 (under this system, the Board of Ministers is collectively answerable to the Provincial Council).

87. *Nanayakkara v. Choksy, et al.* [Supreme Court] S.C. (FR) 158/2007 (Sri Lanka) [hereinafter NANAYAKKARA II].

been a part of the tender process at the time and, worse, were not even in existence at the time the privatization process had commenced.

The Supreme Court held that the privatization of SLIC amounted to an arbitrary and illegal exercise of executive power and declared that the Sale and Purchase Agreement for the transfer of ninety percent of the shares of the SLIC was null and void, and reversed the privatization of the Corporation.

2. *Newly Enacted Legislation and Significant Amendments*

a. Consolidating International and Regional Commitments to Eradicate Illicit Drug Trafficking

Although Sri Lanka is not a significant producer of narcotics or synthetic drugs or any of the chemicals related to them, there have been recorded instances of transshipment of heroin via Sri Lanka to neighboring countries and even to Europe. There has also been a modest upsurge in domestic consumption, particularly of ecstasy, according to the 2009 International Narcotics Control Strategy Report (INCS).⁸⁸

Last year, in pursuit of its obligations under the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,⁸⁹ and the Convention on Narcotic Drugs and Psychotropic Substances,⁹⁰ Sri Lanka enacted the Conventions Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act No. 1 of 2008.

The Act enacts as offenses under Sri Lankan law,⁹¹ and as recognized by the Conventions, actions connected with the sale and purchase of psychotropic substances and drugs, or their production and use, as well as the processes and resulting derivatives. All of these offenses are punishable with imprisonment for a term of not less than ten years and not exceeding fifteen years.⁹² The scope of the Act extends to persons living within and outside of Sri Lanka and includes non-citizens,⁹³ provided the commission of such offenses occurs in Sri Lanka.

The Act also includes within the ambit for potential liability those who have abetted and/or conspired in the commission of any of the enumerated offenses. It permits the court, when determining the punishment to be imposed on an offender, to consider the effect of the offense on society at large, particularly the effect on the most vulnerable members of society, such as children. The court is also permitted to take into account the relationship of the offender with any organizations or persons who could exacerbate the

88. 1 Bureau for Int'l Narcotics & Law Enforcement Affairs, U.S. Dep't of State, Drug and Chemical Control 538 (2009).

89. The Convention was adopted at the 1988 United Nations Conference held in Vienna. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 2 ¶ 1, Dec. 20, 1988, 1582 U.N.T.S. 165.

90. This Convention was adopted at the Fifth Summit of the South Asian Association for Regional Cooperation held in 1990 in Male. See South Asian Association for Regional Cooperation, Convention on Narcotic Drugs and Psychotropic Substances art. 2 ¶ 2, Nov. 23, 1990, http://www.slmfa.gov.lk/saarc/images/agreements/saarc_narcotics_and_drugs_1990.pdf.

91. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act No. 1 of 2008 §§ 2 (a)-(j) (Sri Lanka).

92. *Id.* § 2.

93. See *id.* (applying the Act to “[a]ny person who, whether in or outside Sri Lanka, and whether he is a citizen of Sri Lanka or not.”).

exposure, distribution and entailing dangers, and adverse effects of the substances or drugs with which the offender is alleged to have been involved.

b. Environmentally Friendly Legislation

Last year (2009) saw much attention paid to environmental issues, culminating with the convening of the world's first Global Summit for Climate Change in Copenhagen. Sri Lanka, though a small player and voice in so far as global environmental concerns are concerned, has enacted the following measures to protect the environment.

- **Motor Traffic Amendment Act**

The Motor Traffic (Amendment) Act No. 8 of 2009, which was passed in Parliament in October 2008, went into effect in July 2009. One of the amendments makes it mandatory for all motor vehicles, except new ones less than one year old, to obtain a Certificate of Fitness and an Emission Certificate, indicating that the vehicles do not cause unauthorized exhaust emissions,⁹⁴ before the annual revenue licenses can be renewed. If the vehicle fails the tests, the revenue license will not be renewed until the necessary repairs are completed to ensure safe levels of exhaust emission.

The emission requirements were first imposed in Colombo, even though restricting a pilot project to a particular locality or city could have arguably amounted to unequal treatment,⁹⁵ thereby violating the equal protection clause of the Constitution. The decision was justified on the basis that the highest levels of fuel emission were recorded in Colombo.

- **Environment Conservation Levy**

The Environment Conservation Levy Act No. 26 of 2008 was enacted in accordance with the Rio Declaration on Environment and Development, which Sri Lanka has ratified, to tax environmental costs on the basis of the polluter pays principle. The revenue collected from such levies is intended to be deposited in the Environment Conservation Fund, and to be disbursed for environmentally friendly activities.⁹⁶ The Act confers wide discretion on the Minister of Finance to impose, in consultation with the Minister of Environment, levies on goods owned by consumers, items imported or manufactured in Sri Lanka, and services provided within the country.⁹⁷

3. *New Scope of Citizenship*

The Grant of Citizenship to Stateless Persons (Special Provisions) Amendment Act No. 5 of 2009 was enacted to permit Sri Lankans who were of Indian origin who had been "compelled to leave Sri Lanka . . . and thereupon [take] up residence in India,"⁹⁸ to be registered as citizens of Sri Lanka. The amendment was intended to integrate into Sri

94. Motor Traffic (Amendment) Act No. 8 of 2009 ¶ 18 (Sri Lanka) (amending §§ 29 (1)(a)-(b) of the Motor Traffic Act).

95. In fact, the Ministry of Environment and AirMAC did argue that this amounted to unequal treatment because it placed people in different legal situations, a violation of Article 12(1) of the Constitution. See Constitution of the Democratic Socialist Republic of Sri Lanka, art. 12(1).

96. Press Release, Sri Lanka Dep't of Gov't Info., Implementation of New Env't Conservation Tax Act (June 20, 2008) http://www.news.lk/index.php?option=com_content&task=view&id=6209&Itemid=70.

97. Environment Conservation Levy Act No. 26 of 2008 § 2 (Sri Lanka).

98. Grant of Citizenship to Stateless Persons (Special Provisions) Amendment Act No. 5 of 2009 ¶ 2 (Sri Lanka) (amending Act No. 39 of 1988).

Lankan society those persons who had left the country for India during the 1983 racial riots.

The previous amendment to the Citizenship Act (Act No. 35 of 2003) had only addressed citizenship with regard to persons of Indian origin who were residents in Sri Lanka, which enabled 300,000 persons who were unregistered at the time to acquire the benefits of citizenship.⁹⁹

⁹⁹ See, e.g., Sulakshani Perera, *The Excluded: The Strange Hidden World of the Stateless-Sri Lankan Success Story*, REFUGEES MAGAZINE, Sept. 6, 2007, available at <http://www.unhcr.org/46dbd34a2.html>.

