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Justin G. Persaud

Steve Saunders

Philippe Shin

Byung-Tae Kim

Ngun Cung Lian

See next page for additional authors

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Authors

Justin G. Persaud, Steve Saunders, Philippe Shin, Byung-Tae Kim, Ngun Cung Lian, Eric C. Rose, Matthew H. Baird, Dominic J. Nardi Jr., Albert Vincent Yu Chang, Ricardo Silva, and Sara Frazão

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JUSTIN G. PERSAUD, STEVE SAUNDERS, PHILIPPE SHIN, BYUNG-TAE KIM,
DR. NGUN CUNG LIAN, ERIC C. ROSE, MATTHEW H. BAIRD, DOMINIC J. NARDI, JR.,
ALBERT VINCENT YU CHANG, RICARDO SILVA, AND SARA FRAZÃO*

This article reviews significant legal developments in nations comprising the Asia Pacific Region during 2012.¹

I. Australia

A. NEW REGULATION ON MARKET INTEGRITY

Australia is taking bold preventative strides to learn from the issues presented by the U.S. and European markets on the regulation of dark pools liquidity, automated algorithmic trading, and High Frequency Trading (HFT). In 2012, Australia took two steps to better understand and regulate dark liquidity and HFT. First, in July 2012, Australian Securities and Investments Commission (ASIC) announced the establishment of two new task forces to help ASIC understand the issues that arise with dark pools and HFT.² Second, on November 20, 2012, the ASIC announced new market integrity rules.³

* The 2012 Year in Review of the Asia Pacific Committee of the ABA Section of International Law was coordinated and edited by Justin G. Persaud, LL.M. candidate at Osgoode Hall Law School and an attorney practicing securities, ADR, litigation, commercial, and real estate law in the United States and Canada. The following authors submitted contributions: Justin G. Persaud (Australia); Steve Saunders, Lecturer in International Law, University of Toyama (Japan); Philippe Shin and Byung-Tae Kim, Shin & Kim (Korea); Dr. Ngun Cung Lian, Senior Research Fellow, Myanmar Development Resources Institute, Eric C. Rose, Herzfeld & Rubin P.C., New York, New York, Matthew H. Baird, Environmental Counsel, Sydney, Australia, and Dominic J. Nardi, Jr., Ph.D. student, Department of Political Science, University of Michigan (Myanmar); Albert Vincent Y. Yu Chang, senior counsel, Warner Norcross & Judd LLP, Grand Rapids, Michigan (the Philippines); and Ricardo Silva, Partner, Miranda Alliance's Lisbon Headquarters, with the assistance of Sara Frazão (Timor-Leste).

1. For developments during 2011, see Justin G. Persaud & Steve Saunders, *Asia/Pacific*, 46 INT'L LAW. 483 (2012). For developments during 2010, see William A. Herbert et al., 45 INT'L LAW. 455 (2011).

2. Media Release, Australian Sec. & Invs. Comm'n [ASIC], 12-290MR ASIC Makes Announcements on Market Structure, Dark Liquidity and High Frequency Trading, ASIC (Nov. 21, 2012), <http://www.asic.gov.au/asic/asic.nsf/byHeadline/12-290MR%20ASIC%20makes%20key%20announcements%20on%20market%20structure%2C%20dark%20liquidity%20and%20high%20frequency%20trading?opendocument>.

3. *Key Announcements on Market Structure, Dark Liquidity and High Frequency Trading*, ASIC, <http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Market-structure> (last updated Dec. 5, 2012).

B. DARK LIQUIDITY AND HIGH FREQUENCY TRADING TASK FORCES

In July, prior to the promulgation of the November 2012 Market Integrity Rules, ASIC had established two internal task forces, the Dark Liquidity Task Force and the HFT Task Force. These task forces have been charged with reviewing issues related to dark liquidity and HFT.

The Dark Liquidity Task Force is intended to deepen ASIC's understanding of the impact of dark liquidity on the market. Its work includes, but is not limited to, the following charges: reviewing the existing regulatory framework for dark pools; reviewing the conduct in dark pools; considering what incentives beyond meaningful price improvements are required to foster price discovery, if any; and assessing the clearing and settlement risk of dark trades.⁴

The HFT Task Force is intended to deepen ASIC's understanding of HFT and to promote market quality and integrity by identifying and analyzing the nature and impact of HFT on the market. Its work includes, but is not limited to, the following charges: considering whether the current regulatory framework is adequate; identifying misconduct through HFT; and assessing whether high frequency traders benefit to the detriment of investors.⁵

The task forces also further ASIC's understanding by meeting with other regulators and stakeholders. Interaction with stakeholders occurs through bilateral meetings, presentations, and questionnaires. The work of these task forces informed the formulation of the new Market Integrity Rules.

C. MARKET INTEGRITY RULES

The new Market Integrity Rules are directed at the regulation of automated trading, dark pools/liquidity, and high frequency traders. The new Market Integrity Rules will be rolled out over an eighteen-month period.⁶

These new rules highlight a concern for and an effort to reduce the risk of an Australian "flash crash" due to dark pools and the use of algorithms. Furthermore, the aim of the new Market Integrity Rules is to mitigate issues that may result from the fragmentation of multiple exchange markets and trading information.⁷ The heart of this effort is to strike a balance between building the confidence needed for retail investors to continue investing in the market without unduly encumbering the efficiency of the Australian exchanges.

The new rules include the following provisions:

4. Media Release, 12-290MR ASIC Makes Announcements, *supra* note 2.

5. *Id.*

6. Media Release, The Hon. Bill Shorten MP, Minister for Fin. Servs. & Superannuation, Investors to Benefit from New Rules on High Frequency Trading and Dark Pools (Nov. 20, 2012), <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/078.htm&pageID=003&min=brs&Year=&DocType=>. The timeline of Market Integrity Rules is: November 2012 — Extreme Trading Range Rules Apply for ASX and Chi-X; June 2013 — Meaningful Price Improvement Rule; November 2013 — Market Operator Data Reporting Requirements; June 2014 — Kill Switches, Automated Extreme Trading Range Control, Enhanced Data for Supervision. *Id.*

7. ASIC, REGULATORY GUIDE 223, at 5 (Nov. 2012), available at [http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/RG223-published-21-November-2012.pdf/\\$file/RG223-published-21-November-2012.pdf](http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/RG223-published-21-November-2012.pdf/$file/RG223-published-21-November-2012.pdf).

- (i) direct control over trading algorithms, including kill switches;
- (ii) new extreme trading rules in cases of large price movements;
- (iii) requirements that dark pools offer meaningful price improvement over the lit market, with exemptions for block trades; and
- (iv) additional data reporting requirements to assist ASIC in performing market surveillance.⁸

The new Market Integrity Rules for HFT include volatility controls for extreme price movements and automated trading. The new volatility rule for extreme price movements amends the previous anomalous order threshold and extreme cancellation rules and extends the rules to the S&P/ASX 200 index futures.⁹ The automated trading rule will solidify the current rules to require direct and immediate control over filters and orders that will now be subject to annual review of systems.

A new rule of enhanced data supervision focuses on dark liquidity. The rule requires additional data on orders or trades that include identification of crossing systems. The aim of the rule is to identify whether a participant is acting as a principal or agent. For market operators, this rule enters into effect in October 2013, and for market participants, the rule becomes effective on March 10, 2014.¹⁰

For the market operators ASX and Chi-X, there will be an immediate obligation to enforce an extreme trading range for securities trades, coupled with new data reporting requirements. Market operators and participants will be required to have in place a system of controls to ensure the validation and the verification of trades that rely on the pre-trade transparency exception.¹¹

In 2012, Australia made a concerted effort to prevent risks associated with dark liquidity and HFT. These new task forces and rules will undoubtedly play a significant role in shaping the Australian market going forward.

II. Japan

In June, Japan's Diet (parliament) passed a new bill that amended the Copyright Law to prevent illegal downloading and copying of copyrighted material.¹² The new law created penalties for illegal downloading that went into effect on October 1, 2012. Despite opposition from the Japanese Federation of Bar Associations (JFBA), the new bill classified the penalties as criminal rather than civil. Those who violate the new law could face a fine of up to two million yen and up to two years in prison.¹³

Previously, there had been no penalty for illegally downloading material from the Internet, although this act was classified as a crime in the 2010 amendments to the Copy-

8. *Id.* at 5-6 (providing a list from a-k of new provisions to be rolled out).

9. *Id.*

10. Media Release, 12-290MR ASIC Makes Announcements, *supra* note 2.

11. Media Release, ASIC, 12-290MR ASIC Makes Key Announcements on Market Structure, Dark Liquidity and High Frequency Trading (Nov. 21, 2012), <http://www.asic.gov.au/asic/asic.nsf/byHeadline/12-290MR%20ASIC%20makes%20key%20announcements%20on%20market%20structure%2C%20dark%20liquidity%20and%20high%20frequency%20trading?opendocument>.

12. *Japan Introduces Piracy Penalties for Illegal Downloads*, BBC (Sept. 30, 2012, 7:26 PM), <http://www.bbc.com/news/technology-19767970>.

13. *Id.*

right Law. The new penalty does not apply to any content that can be viewed for free online, but downloading such material could still be grounds for a civil action. Copying CDs for personal use is still legal. Copying DVDs is now illegal, but there is no penalty under the new law for this action.¹⁴ DVD-encoding technology generally prevents copying, although there are programs that can override the encoding and allow copying.

In addition to the JFBA, others have expressed concerns about how the law might be applied in relation to online games and written content.¹⁵ Some lawmakers also expressed concern that the law is too vague and does not help the public understand what is legal and what is not. The Recording Industry Association of Japan (RIAJ) has created a green logo, the “L Mark,” to indicate to consumers what websites contain material that can be legally downloaded, but neither the RIAJ nor Japan’s Cultural Affairs Agency (tasked with enforcing the Copyright Law) have done much to publicize the new “L Mark.”

The new law is part of a larger effort by the United States, European Union nations, and other countries to crack down on illegal downloading and copying (ripping) of CDs, DVDs, etc.

III. Korea

Under the Korean Commercial Code in effect prior to April 15, 2012 (the Old KCC), cash-out mergers were controversial because the Old KCC did not specifically address the issue. But the amended Korean Commercial Code (the Amended KCC), which has been in effect since April 15, 2012, now explicitly permits a cash-out merger when the surviving company pays cash (instead of shares, as would be the case in a regular merger) in consideration for the shares of the company to be dissolved in the merger.¹⁶

Due to a lack of clarity in the Old KCC, many legal scholars had interpreted its provisions to mean that shares in the surviving company should be provided as merger consideration and that cash consideration should be allowed only for certain limited purposes, including adjustment of merger ratio and clearance of fractional shares.¹⁷ The Amended KCC, however, allows cash-out mergers and also allows “other properties” to be used as merger consideration.¹⁸ As there is no explicit statutory restriction, “other properties” may include many different types of consideration. Accordingly, under the Amended KCC, merger consideration may be paid solely in cash or in combination with any other properties, such as bonds issued by the surviving company or any third party companies, or shares of the surviving company’s parent company. Still, the value for each needs to be fairly estimated, and equal treatment of shareholders in the dissolving company should be observed in providing such shareholders with cash or other properties as merger consideration. For example, if some shareholders of the dissolving company are cashed-out, while

14. Kazuaki Nagata, *Copyright Law with Teetb Leaves Download Masses Puzzled*, JAPAN TIMES (July 11, 2012), <http://www.japantimes.co.jp/text/nn20120711f1.html>.

15. Tomoko Otake, *Music Industry Wins a Battle as Antidownloading Bill Gets Some Teetb*, JAPAN TIMES (June 21, 2012), <http://www.japantimes.co.jp/text/fm20120621a3.html>.

16. See, e.g., Nathan McMurray, *The Game Has Changed. Revised Korean Commercial Code Set to Take Effect*, KOR. L. TODAY (Mar. 21, 2012), <http://www.korealawtoday.com/2012/03/21/the-game-has-changed-revised-korean-commercial-code-set-to-take-effect/>.

17. *Id.*

18. Sangbeob [Commercial Act], Act. No. 10,600, May 23, 2011, art. 523 (S. Kor.).

others are provided with shares in the surviving company as merger consideration and remain as shareholders, the merger could potentially be invalidated on the ground that it violates the principle of equal treatment of shareholders.

The Amended KCC repealed Article 470 of the Old KCC, which limited the total principal amount of bonds issuable by a Korean corporation. As a result, we can expect to see an increase in the number of cash-out mergers in which consideration is paid in bonds.

In addition, the Amended KCC now permits triangular mergers that provide the dissolving company's shareholders with shares issued by the surviving company's parent company as consideration.¹⁹ Even if only a forward triangular merger is allowed and a reverse triangular merger is still not permissible under the Amended KCC, this reform will likely boost efficiency in corporate restructuring and promote strategic affiliations between companies. In a forward triangular merger, the target company (dissolving company) merges with and into the subsidiary (surviving company) of a parent company, which is often established for the sole purpose of the merger. From the viewpoint of a parent company, the main advantages of a triangular merger are (i) to avoid the automatic assumption of liability resulting from its merger with the target company, which would be desirable especially when the target company is a high-risk enterprise, and also (ii) to avoid allowing the parent company's shareholders to exercise their appraisal rights.

It should be noted that, under the Amended KCC, cash-out mergers may not be used in any consolidation (i.e., the combination of two or more companies into a newly established company). Also, the Amended KCC prohibits the use of cash-out mergers in some other types of corporate restructuring prescribed by the KCC, such as a merger of a spin-off company into another company (referred to as *bup-soo-boon-hal-hap-byung* in Korean).²⁰

Meanwhile, cash-out mergers could help reduce management costs by enabling majority shareholders to squeeze out minority shareholders. Cash-out mergers could also be utilized as an alternative tool for publically traded companies to be taken private. With regard to the former, the majority shareholder of a listed company can easily squeeze out minority shareholders by taking the following sequence of actions: (i) establish an unlisted, wholly-owned subsidiary; (ii) merge the listed company into the newly established company; and (iii) pay the minority shareholders' merger consideration in cash. From the perspective of a majority shareholder, cash-out mergers can be more advantageous for squeeze-outs than the "compulsory acquisition right," which was newly introduced along with cash-out mergers under the Amended KCC.²¹ By exercising the "compulsory acquisition right," a controlling shareholder holding 95 percent or more shares in a Korean company could require minority shareholders to sell their shares to the controlling shareholder at a fair price, similar to the minority shareholders' right to exercise their appraisal right. As a counterpart to a controlling shareholder's compulsory acquisition right, minority shareholders are provided with sellout rights.²² By exercising such rights, minority shareholders may demand purchase of their shares by being "cashed out" when there is a controlling shareholder holding more than 95 percent of the shares in a company.

19. *Id.* art. 523-2.

20. *Id.*

21. *Id.* art. 360-24.

22. *Id.* art. 360-25.

Although minority shareholders can protect their interests by exercising their appraisal right in a cash-out merger, they might not be fully protected if they object to the merger because they would be deprived of the opportunity to share the future profits of the surviving company following the merger. In this regard, commentators have argued that if the sole purpose of a cash-out merger is to exclude minority shareholders of the dissolving company, the merger should be voided because it unfairly damages the interest of minority shareholders.²³ It remains to be seen how courts will decide this issue in the future.

IV. The Republic of the Union of Myanmar

In 2010, the Republic of the Union of Myanmar (also known as Burma) began a process of legal reform designed to bring it in line with its Association of Southeast Asian Nations (ASEAN) neighbors and the international community. Some of the more notable developments in 2012 have been the enactment of the following laws.

A. THE FARMLAND LAW AND THE VACANT, FALLOW, AND VIRGIN LANDS MANAGEMENT LAW

Approved by the *Pyidaungsu Hluttaw* (the Union Assembly) on March 30, 2012, both the Farmland Law²⁴ and the Vacant, Fallow, and Virgin Lands Management Law²⁵ were criticized for causing thousands of farmers to lose control of their land and thus become government tenants.²⁶ The displacement of farmers in Myanmar has recently been exacerbated by land grabs and land concession awards to well-connected individuals and corporations.²⁷

23. For an example of a U.S. court applying this argument to analyze a cash-out merger to exclude a minority shareholder from a lucrative transaction, see *In re Sunbelt Beverage Corp. S'holder Litig.*, No. 16089-CC, 2010 WL 26539 (Del. Ch. Jan. 5, 2010) (voiding cash-out merger and awarding damages to the minority shareholder of 2.5 times the value payable in the merger). See also *Delaware Court Criticizes Board's "Strong-Armed" Tactics in Staging Freeze-Out Merger*, MILBANK, TWEED, HADLEY & MCCLOY LLP (March 10, 2010), <http://www.milbank.com/images/content/7/1/715/031010-In-re-Sunbelt-Beverage-Corp.pdf>.

24. The Farm Land Law, No. 62/2012, Pyidaungsu Hluttaw Law, 2012 (Myan.), available at http://www.burmalibrary.org/KN/30.3.12_Farmland_law-red.pdf. For an unofficial translation of the implementing rules, see *Farm Land Law*, ONLINE BURMA/MYAN. LIBR., http://www.burmalibrary.org/docs14/Uncorrected_Translation_of_Bylaws%20for_Farmland_Law.pdf (last visited Feb. 9, 2013).

25. The Vacant, Fallow, and Virgins Lands Management Law, No. 10/2012, Pyidaungsu Hluttaw Law, 2012 (Myan.), available at http://www.burmalibrary.org/docs13/Farmland_Act-2012-03-30.pdf. For an unofficial translation of the law, see http://www.burmalibrary.org/docs13/VFVLM_Law-en.pdf. For an unofficial translation of the implementing rules, see http://www.burmalibrary.org/docs14/Unofficial_translation_of_by-laws_for_Vacant_Land_Law.pdf.

26. Sandar Lwin, *Farmland Laws Should Be Amended: Committee*, MYAN. TIMES (June 25-July 1, 2012), <http://www.mmtimes.com/2012/news/632/news63201.html>.

27. DISPLACEMENT SOLUTIONS, MYANMAR AT THE HLP CROSSROADS: PROPOSALS FOR BUILDING AN IMPROVED HOUSING, LAND AND PROPERTY RIGHTS FRAMEWORK THAT PROTECTS THE PEOPLE AND SUPPORTS SUSTAINABLE ECONOMIC DEVELOPMENT (2012), available at <http://displacementsolutions.org/files/documents/MyanmarReport.pdf>.

B. THE ENVIRONMENT CONSERVATION LAW

The Environment Conservation Law (EC Law)²⁸ was approved in March 2012, after a decade of internal debate.²⁹ Its objectives include implementation of the Myanmar National Environmental Policy. The law is currently being revised in cooperation with an international group of experts.³⁰

C. THE FOREIGN INVESTMENT LAW

In 2012, most countries suspended or revoked their respective trading sanctions on Myanmar.³¹ Subject to some reporting requirements, however, the United States has retained some major restrictions.³²

The major provisions of the Foreign Investment Law (FIL)³³ are:

- (a) Proposed foreign investment shall be submitted to the Myanmar Investment Commissions (MIC),³⁴ which will decide whether an investment is: (1) in a “permitted” industry, or (2) in a “restricted” or “prohibited” industry and thus subject to government approval. The definition of “restricted” or “prohibited” industries will be clarified later by the implementing regulations or executive order.³⁵
- (b) In “permitted” industries, foreigners can either invest up to 100 percent of the required capital or enter into joint ventures with local partners.³⁶ In “restricted” industries, the MIC can mandate the investment structure.³⁷
- (c) Prohibition of nationalization of foreign investment capital and guarantees for the repatriation of such investment.³⁸
- (d) Incentives encouraging foreign investment, some of which have flexible deadlines.³⁹ For example, approved foreign investors: (1) will receive a five-year income tax holiday;⁴⁰ (2) will be exempted from custom duties for investment in manufacturing equipment, raw materials, and other input for a period of three years;⁴¹ (3) can lease

28. Environment Conservation Act, No. 9/2012, Pyidaungsu Hluttaw Law, 2012 (Myan.), http://www.burmalibrary.org/KN/9_2012_Environment_Conservation_Law_Mirror2012-04-01.pdf.

29. BEWG, UPDATE: THE ENVIRONMENTAL CONSERVATION LAW (2012), available at <http://bewg.org/en/pubs/finish/12/63>.

30. *Int'l Experts Co-Drafting Myanmar's Environment Law*, ELEVEN (Oct. 8, 2012, 6:00 AM), <http://elevenmyanmar.com/national/990-int-l-experts-co-drafting-myanmar-s-environment-law>.

31. Meral Karasulu & Sergei Dodzin, *Myanmar's Reintegration into the Global Economy Promises a Better Future for Its People*, IMF FIN. & DEV. MAG., Sept. 2012, at 40.

32. Exec. Order No. 13,619, 3 C.F.R. 77 (July 11, 2012).

33. See Foreign Investment Law, No. 21/2012, Pyidaungsu Hluttaw Law, 2012 (Myan.), available at http://www.burmalibrary.org/docs14/Foreign_Investment_Law-21-2012-en.pdf.

34. *Id.* § 12(a).

35. *Id.* §§ 4-5.

36. *Id.* § 9.

37. *Id.* § 10(a)(3)-(4).

38. *Id.* §§ 29-30.

39. See *id.* § 27.

40. Foreign Investment Law § 27(a) (Myan.).

41. *Id.* § 27(i).

land for fifty years and receive from the MIC up to two ten-year extensions;⁴² and (4) can receive additional incentives.⁴³

D. "UNION LEVEL ORGANIZATIONS" – CONSTITUTIONAL COURT CASE NO. 01/2012

On March 28, 2012, Myanmar's Constitutional Tribunal ruled that *Pyidaungsu Hluttaw* legislative committees could not be classified as "Union Level Organizations."⁴⁴ Union Level Organizations are appointed by the president and approved by the legislature, according to the Constitutional Tribunal. The tribunal reasoned that Union Level Organizations are, by definition, organizations that have standing to submit proposals before the legislature, implying that they could not also be legislative committee(s).⁴⁵ Several legislators claimed that this decision would limit the ability of legislative committees to amend legislation and subpoena ministers.⁴⁶

In August, the *Hluttaw* voted to impeach the nine Constitutional Tribunal judges,⁴⁷ all of whom resigned on September 6.⁴⁸

V. Republic of the Philippines

In 2012, principal legal developments in the Philippines related to: (1) curbing corruption; (2) updating Philippine law on money laundering and crimes in the information age; (3) clarifying constitutional limitations on foreign investments; and (4) the peace process in the war-torn island of Mindanao.

A. CORRUPTION

In May 2012, the Philippine Senate, sitting as an impeachment court, ousted Renato C. Corona from his post as chief justice of the Supreme Court of the Philippines.⁴⁹ In the articles of impeachment, Corona was accused of, among other things, failure to disclose assets. Philippine law requires government officials to disclose assets, liabilities, and net worth.⁵⁰ Based on that allegation, Corona was convicted of betrayal of public trust and culpable violation of the constitution.

42. *Id.* §§ 31-32.

43. *Id.* §§ 13, 36.

44. *Verdict Handed Down on Submission No. 1/2012 Submitted by Attorney-General of the Union on Behalf of the President of the Union*, NEW LIGHT MYAN., Aug. 16, 2012, at 4-5, available at <http://www.burmalibrary.org/docs14/NLM2012-08-16.pdf> (reprinting the full text of the decision of the Constitutional Tribunal).

45. MYANMAR CONST. ch. IV, § 90.

46. Gregory Poling & Kathleen Bissonnette, *Myanmar's Crisis Calls for Constitutional Overhauling*, SOUTH-EAST ASIA FROM CORNER 18TH & K STREETS (Ctr. for Strategic & Int'l Studies, Newsletter, Washington, D.C.), Sept. 13, 2012, at 1-3.

47. Win Ko Ko Latt, *MPs Pass Impeachment Motion Despite Warnings*, MYAN. TIMES, Sept. 3-9, 2012, <http://mmtimes.com/2012/news/642/news08.html>.

48. *President Office Order No. 29/2012*, NEW LIGHT MYAN., Sept. 7, 2012, available at <http://www.burmalibrary.org/docs14/NLM2012-09-07.pdf>.

49. Maila Ager, *Senate Votes 20-3 to Convict Corona*, PHILIPPINE DAILY INQUIRER (May 29, 2012, 5:55 PM) <http://newsinfo.inquirer.net/202929/senate-convicts-corona>.

50. CONST. (1987), art. XI, sec. 17 (Phil.); AN ACT ESTABLISHING A CODE OF CONDUCT AND ETHICAL STANDARDS FOR PUBLIC OFFICIALS AND EMPLOYEES, Rep. Act No. 6713, § 8, 139 O.G. 12069 (Feb. 20, 1989) (Phil.).

The completion of the impeachment process has been viewed by some quarters as an indication of the soundness of the democratic institutions in the Philippines.⁵¹ Corona was the first public official in the Philippines to be removed from office through impeachment. The first public official to be impeached, former President Joseph Estrada, was actually ousted by street protests after the impeachment proceedings were aborted when senators on the prosecution team walked out of the proceedings concerning a dispute over the interpretation of evidentiary rules.⁵²

Philippine President Benigno C. Aquino, III, who campaigned on an anti-corruption platform, touted Corona's ouster as "just the start" of his anti-corruption drive.⁵³ As of August 30, 2012, the Philippine Tax Bureau has filed tax evasion charges against Corona, his daughter, and his son-in-law.⁵⁴

B. UPDATING PHILIPPINE LAW

1. Money Laundering

On June 18, 2012, President Aquino signed into law Republic Act No. 10167,⁵⁵ which amends the Philippine Anti-Money Laundering Act of 2001 (AMLA Amendments), and Republic Act No. 10168,⁵⁶ otherwise known as the Terrorism Financing Prevention and Suppression Act of 2012 (Terrorism Prevention Act). The Philippine Anti-Money Laundering Council (AMLC) has approved the implementing rules and regulations (IRR) of these two laws.

These legislative measures are part of a series of reforms needed for the country's compliance with the international standards set by the Financial Action Task Force (FATF) of the Organization of Economic Cooperation and Development.⁵⁷ Based on these measures, the FATF upgraded the Philippines from its "dark grey list" to its "grey list."⁵⁸

51. Genalyn D. Kabling, *Palace Lauds Conviction*, MANILA BULL. (May 29, 2012, 7:32 PM), <http://www.mb.com.ph/node/360726/palace-laud#.UN-4z3froug>.

52. Cathy C. Yamsuan, *Estrada to Defense, Prosecutors: Finish the Trial for Closure*, PHILIPPINE DAILY INQUIRER (Feb. 2, 2012, 1:46 AM), <http://newsinfo.inquirer.net/138277/estrada-to-defense-prosecutors-finish-the-trial-for-closure>.

53. Gil C. Cabacungan Jr., *Corona Impeachment Just the Start of Anti-Corruption Drive*, PHILIPPINE DAILY INQUIRER (Sept. 9, 2012, 7:38 PM), <http://newsinfo.inquirer.net/267084/corona-impeachment-just-the-start-of-anti-corruption-drive-aquino>. President Aquino had openly pushed for the conviction on the view that Corona was protecting former President Gloria Macapagal-Arroyo, who has been accused of plunder, corruption, and electoral fraud. Months before the impeachment, the Corona-led Supreme Court issued a temporary restraining order against a government travel ban on Arroyo and her husband who wanted to leave the country despite undergoing preliminary investigation in several criminal cases. Temporary Restraining Order, *Arroyo v. De Lima*, G.R. Nos. 199034 & 199046 (S.C., Nov. 15, 2011) (Phil.).

54. Mark Marueñas, *BIR Files P150-M Tax Evasion Raps vs. Corona, Daughter, Son-in-Law*, GMA NEWS (Aug. 30, 2012, 1:25 PM), <http://www.gmanetwork.com/news/story/271822/news/nation/bir-files-p150-m-tax-evasion-raps-vs-corona-daughter-son-in-law>.

55. See An Act to Further Strengthen the Anti-Money Laundering Law, Rep. Act No. 10167, 3009 O.G. 4275 (June 18, 2012) (Phil.).

56. See An Act Defining the Crime of Financing of Terrorism, Rep. Act No. 10168, 3127 O.G. 5015 (June 18, 2012) (Phil.).

57. Norman Bordadora, *Philippines Avoids International Blacklist*, INQUIRER BUS. (June 23, 2012, 3:00 PM), <http://business.inquirer.net/66937/philippines-avoids-international-blacklist>.

58. *FATF Upgrades Philippines for Move Against Money Laundering, Terrorist Financing*, XINHUA (June 23, 2012, 3:37 PM), http://news.xinhuanet.com/english/world/2012-06/23/c_131671458.htm.

Before the enactment of these two laws, there were concerns that the country would be “blacklisted” by the FATF, which would have compromised the Philippines’ ability to attract foreign investment.⁵⁹

The AMLA Amendments empower the Philippine Court of Appeals to issue a freeze order on any money instrument or property, upon a verified *ex parte* petition by the AMLC and a determination that probable cause exists that any monetary instrument or property is in any way related to unlawful activities defined under AMLA.⁶⁰ Moreover, the AMLA Amendments empower the AMLC to “inquire into or examine any particular deposit or investment, including related accounts, with any banking institution or non-bank financial institution” upon order of any competent court based on an *ex parte* application.⁶¹ Such inquiries can be made “when it has been established that there is probable cause that the deposits or investments, including related accounts involved, are related to [unlawful activities defined under AMLA].”⁶²

The Terrorism Prevention Act criminalizes the act of “financing of terrorism,”⁶³ as well as attempting or conspiring to do so,⁶⁴ and prohibits “dealing with property and funds of designated persons,”⁶⁵ as the term is defined under the law. Moreover, the law empowers the AMLC to conduct investigations,⁶⁶ which include the power to freeze bank accounts *ex parte*, without a court order or the need to notify the depositor concerned.⁶⁷

2. *Cybercrime*

On September 12, 2012, President Aquino signed into law Republic Act No. 10175, otherwise known as Cybercrime Prevention Act of 2012 (Cybercrime Law).⁶⁸ The Cybercrime Law criminalizes various offenses, including illegal access to a computer system (hacking), illegal interception, data and system interference, device misuse, computer-related forgery, fraud and theft, cybersex, child pornography, and unsolicited commercial communications (spam).⁶⁹ It also supplements the Revised Penal Code of the Philippines (the Penal Code) by criminalizing all offenses punishable under the Penal Code, including libel,⁷⁰ when committed using a computer, and imposing stricter penalties for such offenses.⁷¹

The law drew protests from Internet users and rights groups for allegedly infringing on civil liberties.⁷² Upon the passage of the Cybercrime Law, various protest groups filed

59. Karen Lema, *Philippines Risks Joining Money-Laundering Blacklist*, REUTERS (June 17, 2012, 4:48 AM) <http://www.reuters.com/article/2012/06/07/us-philippines-moneylaundering-idUSBRE8560CL20120607>.

60. Act to Further Strengthen the Anti-Money Laundering Law, § 1 (Phil.).

61. *Id.* § 2.

62. *Id.*

63. Act Defining the Crime of Financing of Terrorism, § 4 (Phil.).

64. *Id.* §§ 5-6.

65. *Id.* § 8.

66. *Id.* § 10.

67. *Id.* § 11.

68. See An Act Defining Cybercrime, Rep. Act No. 10175, 2796 O.G. 5808 (Sept. 12, 2012) (Phil.).

69. *Id.* § 4.

70. *Id.* § 4(c)(4).

71. *Id.* § 6.

72. See, e.g., Cecil Morella, *Outrage over Philippine Cybercrime Law*, ABS-CBNNEWS.COM (Sept. 29, 2012, 1:38 p.m.), <http://www.abs-cbnnews.com/-depth/09/29/12/outrage-over-philippine-cybercrime-law>; *Philip-*

petitions with the Philippine Supreme Court to challenge the law's constitutionality. On October 2, 2012, the Philippine Supreme Court issued a resolution enjoining the enforcement of the Cybercrime Law.⁷³

C. FOREIGN INVESTMENTS

On October 9, 2012, the Philippine Supreme Court ruled in *Gamboa v. Teves*⁷⁴ to categorically limit foreign equity ownership in a public utility (i.e., the Philippine Long Distance Telephone Company (PLDT)) to 40 percent of the corporation's voting stock, pursuant to the provisions of the Philippine Constitution.⁷⁵ PLDT argued that the 40 percent limitation on foreign ownership in a public utility under Philippine law applied to its voting and non-voting stock taken together. But the Court held that Philippine nationals must have "[f]ull beneficial ownership of 60 percent of the outstanding capital stock, coupled with 60 percent of the voting rights."⁷⁶ The Court explained: "to construe broadly the term 'capital' as the total outstanding capital stock, treated as a single *class* regardless of the actual classification of shares, grossly contravenes the intent and letter of the Constitution that the 'State shall develop a self-reliant and independent national economy *effectively controlled* by Filipinos."⁷⁷ Thus, the Court reaffirmed its earlier observation that "[a] broad definition unjustifiably disregards who owns the all-important voting stock, which necessarily equates to control of the public utility."⁷⁸

D. PEACE IN MINDANAO

On October 15, 2012, the Government of the Philippines and the Moro Islamic Liberation Front⁷⁹ signed the Framework Agreement,⁸⁰ a roadmap for establishing a political settlement between the two signing parties.

The process provides for the creation of a transition commission that will draft a basic law that will define relations between the local government units, the central government, and the *Bangsamoro*.⁸¹ This includes a new political entity based on the *Bangsamoro* iden-

pines: New 'Cybercrime' Law Will Harm Free Speech, HUM. RTS. WATCH (Sept. 28, 2012), <http://www.hrw.org/news/2012/09/28/philippines-new-cybercrime-law-will-harm-free-speech>.

73. *Biraogo v. Nat'l Bureau of Investigation*, G.R. No. 203299 (S.C., Oct. 2, 2012) (Phil.), available at http://sc.judiciary.gov.ph/jurisprudence/2012/october2012/203299_notice.pdf (issuing a temporary restraining order enjoining respondents from enforcing the cybercrimes act for 120 days).

74. *Gamboa v. Teves*, G.R. No. 176579 (S.C., Oct. 9, 2012) (Phil.), available at <http://sc.judiciary.gov.ph/jurisprudence/2012/october2012/176579.pdf>.

75. CONST. (1987), art. XII, sec. 11 (Phil.).

76. *Gamboa*, G.R. No. 176579, at 11.

77. *Id.* at 33.

78. *Gamboa v. Teves*, G.R. No. 176579 (S.C., June 28, 2011) (Phil.), available at <http://sc.judiciary.gov.ph/jurisprudence/2011/june2011/176579.html>, *aff'd*, *Gamboa*, G.R. No. 176579.

79. The Moro Islamic Liberation Front is a militant group that aims to create a separate Islamic state in the southern Philippines. *Guide to the Philippines Conflict*, BBC NEWS, <http://news.bbc.co.uk/2/hi/asia-pacific/7887521.stm> (last updated Dec. 18, 2009).

80. 2012 Framework Agreement on the Bangsamoro (GPH Copy), Joint GPH-MILF Draft, available at <http://pcdsp.gov.ph/downloads/2012/10/20121007-GPH-MILF-Framework-Agreement.pdf>.

81. *Id.* ¶ VII(3-4).

tity, a term that refers to the original inhabitants of Mindanao, the Sulu archipelago, and adjacent islands.⁸²

The proposed *Bangsamoro* entity to be governed by the basic law will, among other things, (1) “have a just and equitable share in the revenues generated through the exploration, development, or utilization of natural resources obtain[ed] in all areas/territories, land, or water covered by and within the jurisdiction of the *Bangsamoro*” entity;⁸³ (2) enjoy fiscal autonomy over time;⁸⁴ and (3) have competence over the Shariah justice system, which shall apply only to Muslims.⁸⁵ The national government will retain control over, among other things, national defense and security, foreign policy, global trade, coinage, and monetary policy.⁸⁶

The Framework Agreement has been considered a “breakthrough”⁸⁷ and a “model for some of Asia’s other conflicts.”⁸⁸ There have been similar conflicts in Thailand, Myanmar, and Sri Lanka where other approaches have not achieved the desired level of peace.⁸⁹

VI. Timor-Leste

A. BUSINESS LAW

Decree-Law No. 12/2012 of February 29, 2012, approved the legal framework applicable to agency (or commercial representation) contracts.⁹⁰ Furthermore, Decree-Law No. 42/2012 of September 7, 2012, approved the legal framework on Public-Private Partnerships (PPP).⁹¹ The PPP Decree-Law constitutes the first effort at a statutory framework for the development of PPP projects in Timor-Leste. Among other things, the Decree-Law establishes: (1) the definition of public partnership; (2) the identification of the matters expressly excluded from PPP contracts; (3) the rules on the study, preparation, evaluation, and approval of PPPs; (4) the public bodies that will support PPPs; and (5) special rules on tendering procedures.

B. CRIMINAL LAW

In late 2011, “the National Parliament established [the] standards for the prevention, detection, and reporting of relevant evidence of money laundering and financing of ter-

82. *Id.* ¶ I(5).

83. *Id.* ¶ IV(4).

84. *Id.* ¶ IV(7).

85. *Id.* ¶ III(3).

86. *Id.* ¶ III(2).

87. *Jam to Moros: A Breakthrough in Mindanao Has Lessons for Other Violent Insurgencies in Asia*, THE ECONOMIST, Oct. 13, 2012, available at <http://www.economist.com/node/21564562>.

88. *Id.*

89. *Id.*

90. Decree-Law No. 12/2012, Feb. 29, 2012, JORNAL DA REPÚBLICA [OFFICIAL GAZETTE] I (8): 5741 (Timor-Leste), available at http://www.jornal.gov.tl/?mod=secao_1&id=3; *Timor-Leste*, LEGAL NEWS (Miranda Correia Amendoeira & Associados, Lisbon, Port.), Dec. 2011–Feb. 2012, at 1, http://www.mirandalawfirm.com/uploadedfiles/20120614_eed233.pdf.

91. Decree-Law No. 42/2012, Sept. 7, 2012, JORNAL DA REPÚBLICA [OFFICIAL GAZETTE] I (30A): 18–24 (Timor-Leste), available at http://www.jornal.gov.tl/?mod=secao_1&id=3.

rorism.”⁹² “The new rules are applicable to financial institutions, casinos, professionals providing financial services or involved in financial real estate transactions on behalf of clients, accountants, auditors, and tax consultants.”⁹³

C. ENVIRONMENT

Decree-Law No. 26/2012 of July 4, 2012, sanctioned the Environmental Framework Law.⁹⁴ In line with the international responsibilities undertaken by Timor-Leste—notably, following the ratification of the U.N. Framework Convention on Climate Change and the Kyoto Protocol—this statute enshrines the basic framework of environmental policy, including the guiding principles for the conservation and protection of the environment and the preservation and sustainable use of natural resources.

D. LABOR

During 2012, the National Parliament also approved the new Labor Law of Timor-Leste.⁹⁵ The statute will apply to all private sector employees and employers, and enshrines the fundamental principles governing the performance of work, the special rules applicable to individual and collective labor relations, and the rules and procedures applicable to the infringement of its provisions.⁹⁶ With regard to individual labor relations, the new statute covers the following matters: (1) employment contracts and their termination; (2) rights and obligations of the parties; (3) salaries; (4) safety, hygiene, and health at work; and (5) special protection regimes on maternity, paternity, and employment of minors, the disabled or chronically ill, student workers, and foreigners.⁹⁷

The National Parliament also approved rules through Law No. 5/2012 related to employees exercising their right to strike.⁹⁸

E. OIL AND GAS

Of the utmost importance was the approval of Decree-Law No. 1/2012, of February 1, 2012.⁹⁹ This statute establishes the legal framework for the “supply, processing, transportation, storage, sales and marketing of petroleum, refined petroleum products, and similar products in Timor-Leste.”¹⁰⁰ The new statute also “defines the powers of the National

92. Decree-Law No. 17/2011, Feb. 16, 2011, JORNAL DA REPÚBLICA [OFFICIAL GAZETTE] I (13): 5865 (Timor-Leste), available at http://www.jornal.gov.tl/?mod=secao_1&id=3; *Timor-Leste*, *supra* note 90, at 1.

93. *Timor-Leste*, *supra* note 90, at 1.

94. Decree-Law No. 26/2012, July 4, 2012, JORNAL DA REPÚBLICA [OFFICIAL GAZETTE] I (24): 6015 (Timor-Leste), available at http://www.jornal.gov.tl/?mod=secao_1&id=3.

95. Decree-Law No. 4/2012, Feb. 21, 2012, JORNAL DA REPÚBLICA [OFFICIAL GAZETTE] I (6): 5633 (Timor-Leste), available at http://www.jornal.gov.tl/?mod=secao_1&id=3.

96. *Timor-Leste*, *supra* note 90, at 1.

97. *Id.*; Decree-Law No. 4/2012 (Timor-Leste).

98. Decree-Law No. 5/2012, Feb. 29, 2012, JORNAL DA REPÚBLICA [OFFICIAL GAZETTE] I (6): 5638 (Timor-Leste), available at http://www.jornal.gov.tl/?mod=secao_1&id=3; *Timor-Leste*, *supra* note 91, at 1.

99. Decree-Law No. 1/2012, Feb. 1, 2012, JORNAL DA REPÚBLICA [OFFICIAL GAZETTE] I (4): 5584-609 (Timor-Leste), available at http://www.jornal.gov.tl/?mod=secao_1&id=3. See also Caryl C. Ben Basat et al., *International Energy and Natural Resources Law*, 47 ABA/SIL YIR (n.s.) 295 (2013).

100. *Timor-Leste*, *supra* note 90, at 1.

Petroleum Authority in these areas, the duties of licensees and the rules and procedures applicable to the infringement of its provisions.”¹⁰¹

Moreover, the Institute of Petroleum and Geology was created by Decree-Law No. 33/2012, of July 18, 2012.¹⁰² This public institute will be responsible for archiving, producing, managing, storing, and disseminating geological data, including that relating to oil, gas, and mineral resources. It is expected that the data collected and managed by the institute will provide the basis for the prospecting, exploration, and production of mineral resources in Timor-Leste’s onshore and offshore areas.

F. TELECOMMUNICATIONS

By means of Government Resolution No. 9/2012, of March 28, 2012, the draft Settlement Agreement to be entered into between the State of Timor-Leste and Timor Telecom was approved.¹⁰³ The parties had entered into a concession contract for the provision of telecommunication services in the country in 2002. But due to national and international developments, the parties agreed to terminate the existing contract. As a result, Timor Telecom waived its exclusive right over the network and its exclusive concession. Later, the government approved Regulations on the Telecommunications Sector,¹⁰⁴ which created the National Authority for Communications, the regulatory body for the telecommunications sector. This agency’s powers include: (1) the supervision of the sector; (2) the registration of telecommunications service providers; (3) the licensing of radio spectrum; and (4) the resolution of disputes amongst operators.¹⁰⁵ The Regulations also establish rules on anti-competition practices and penalties for breach of its provisions, with fines of up to UD \$50,000 for individuals and US \$2 million for entities.¹⁰⁶

G. STATE

After winning the second round of the presidential elections with 61 percent of the votes, José Maria de Vasconcelos (also known as Taur Matan Ruak) was elected the new President of the Democratic Republic of Timor-Leste.¹⁰⁷ The first round of the elections took place in March, and the top two candidates, Taur Matan Ruak and Francisco Guterres Lu-Olo, moved on to the second round in April.¹⁰⁸ With regard to the National Parliament elections, after winning with 36.68 percent of the votes in July, the CNRT-National Council for the Reconstruction of Timor-Leste joined the FRENTI-

101. *Id.* National Petroleum Authority in Portuguese is *Autoridade Nacional do Petróleo*.

102. Decree-Law No. 33/2012, July 18, 2012, JORNAL DA REPÚBLICA [OFFICIAL GAZETTE] I (25A): 1-6 (Timor-Leste), available at http://www.jornal.gov.tl/?mod=secao_1&id=3.

103. *Timor-Leste*, LEGAL NEWS (Miranda Correia Amendoeira & Associados, Lisbon, Port.), Mar.-May 2012, at 1, http://www.mirandalawfirm.com/uploadedfiles/20120831_5bf463.pdf.

104. *Id.*

105. Decree-Law No. 15/2012, Mar. 28, 2012, JORNAL DA REPÚBLICA [OFFICIAL GAZETTE] I (12): 5820 (Timor-Leste), available at http://www.jornal.gov.tl/?mod=secao_1&id=3; *Timor-Leste*, *supra* note 103, at 1.

106. Decree-Law No. 15/2012, art. 78, at 5851 (Timor-Leste).

107. *Timor-Leste*, *supra* note 103, at 1.

108. *Id.*

MUDANÇA Party and PD-Democratic Party to form a new Government coalition in Timor-Leste.¹⁰⁹ The office of the Prime Minister was once again assigned to the President of CNRT, Kay Rala Xanana Gusmao.

109. See *Timor-Leste Country Brief: Political Overview*, AUSTRALIAN DEPARTMENT OF FOREIGN AFFAIRS & TRADE, <http://www.dfat.gov.au/geo/timor-leste/timor-leste-brief.html> (last visited Feb. 9, 2013).

