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Asia-Pacific

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Asia-Pacific

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The Asia/Pacific Committee covers the Asia/Pacific region, including Afghanistan, Australia, Bangladesh, Bhutan, Brunei, Cambodia, the Cook Islands, Indonesia, Japan, North Korea, South Korea, Laos, Malaysia, Myanmar, Nepal, New Zealand, Pakistan, the Philippines, Singapore, Sri Lanka, Thailand, and Vietnam.

This article highlights selected 2013 legal developments in the Asia-Pacific Region, specifically with regards to Canada and the Trans-Pacific Partnership, Japan, Korea, Republic of the Philippines, and Sri Lanka.

I. Asian Region

A. CANADA AND THE TRANS-PACIFIC PARTNERSHIP

In October 2012, Canada formally joined the Trans-Pacific Partnership (TPP) trade negotiations.¹ The TPP is an “evolution of the [former] Trans-Pacific Strategic Economic Partnership (TPSEP),” a trade agreement originally intended between Singapore, Brunei, Chile, and New Zealand.² In September 2008, however, the United States expressed interest in negotiating a free trade agreement with the TPSEP member countries.³ Soon after, other countries followed suit and the TPSEP was put aside in favor of the newly created TPP.

There are currently twelve countries involved in TPP negotiations: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United

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1. *Canada Formally Joins Trans-Pacific Partnership*, FOREIGN AFFAIRS, TRADE & DEV. CAN. (Oct. 9, 2012), http://www.international.gc.ca/media_commerce/comm/news-communiques/2012/10/09a.aspx.

2. *On-Going Negotiations at a Glance*, INT'L ENTER. SING. (Apr. 26 2012), http://www.fta.gov.sg/fta_ongoingneg_tpp.asp?hl=16.

3. *Id.*

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States, and Vietnam. These countries represent approximately 40 percent of the current global economy.⁴ This significant number is one of the major reasons why so many governments, non-governmental organizations, multi-national corporations, and individuals are keeping a close eye on TPP developments.

Since its inception, the TPP has always been a hot topic in Canada—even more so now that Canada is involved in the negotiations. Since 2010, there have been numerous TPP negotiations—the most recent ones happened from August to November 2013 in Brunei, Mexico, the United States, and Chile, with more scheduled for December 2013, in Singapore.⁵ In these latest rounds, Canada's strategy has been to focus on closing the remaining gaps and advancing technical issues in various areas including market access, rules of origin, intellectual property (IP), competition, and the environment. Several issue-specific technical meetings took place in October and November 2013 as well, covering issues such as rules of origin, government procurement, and State-owned enterprises.⁶

Canada is party to a number of other free trade agreements, the most recognizable one being, of course, the North American Free Trade Agreement.⁷ While 78 percent of Ontario's exports go to the United States, only 45 percent of British Columbia's exports end up south of the border.⁸ While it is true that the United States is Canada's top trading partner, there is certainly room for growth and development with new trading partners. For example, the majority of British Columbia's exports end up in various markets on the other side of the Pacific Ocean⁹ and those markets have, until recently, remained untapped opportunities for the Canadian government.

According to the Honorable Edward Fast, who, at the time that Canada joined the TPP negotiations in 2012, was the Minister of International Trade and Minister for the Asia-Pacific Gateway, Canada's decision to join the TPP would "open[] new markets and increas[e] Canadian exports to . . . the Asia-Pacific region."¹⁰ This decision, according to the Canadian government, is a part of its plan to create jobs, growth, and long-term prosperity for all Canadians.¹¹ As a result, the TPP is being viewed by British Columbia as an enormous opportunity to increase its exports and its Canadian presence overseas.¹² This will be even more so the case if China decides to join TPP negotiations. So far, China's

4. *Trans-Pacific Partnership (TPP) Free Trade Agreement Negotiations*, FOREIGN AFFAIRS, TRADE & DEV. CAN. (Dec. 29, 2013), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/index.aspx>.

5. *Id.*

6. *Trans-Pacific Partnership [sic] (TPP) Free Trade Negotiations*, FOREIGN AFFAIRS, TRADE & DEV. CAN., <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/rounds-series.aspx?lang=eng#a5> (last visited Feb. 21, 2014).

7. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

8. *Trans-Pacific Free Trade Talks a Delicate Chance of Compromise*, VANCOUVER SUN (Oct. 5, 2013), <http://www.vancouversun.com/business/fp/yourmoney/TransPacific+free+trade+talks+delicate+dance+compromise/9001772/story.html>.

9. *Id.*

10. Canada Formally Joins Trans-Pacific Partnership, *supra* note 1.

11. *Trans-Pacific Partnership Free Trade Agreement Negotiations*, FOREIGN AFFAIRS, TRADE & DEV. CAN. (Dec. 12, 2013), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/info.aspx?lang=eng>.

12. *Exporters Voice Support for Canada Joining TPP Negotiations*, CANADIAN MFR. & EXP. (Dec. 13, 2011), <http://cme-mec.ca/?action=show&lid=JCKNC-E742G-1W6JA&cid=TIWTL-DKXU-DCUQR&comaction=show>.

absence from TPP negotiation talks has been a glaring omission. One of the TPP's "hot topics" in 2014 will certainly be whether or not China decides to join negotiations, especially because China's share in total world exports amounts to 11.13 percent.¹³ This might not appear to be a staggering amount until it is compared to the next highest exporters—the United States at 8.40 percent,¹⁴ Germany at 7.65 percent,¹⁵ and Japan at 4.34 percent.¹⁶ Canada's share in total world exports is 2.47 percent.¹⁷

Another very recent development is the IP chapter that was leaked by well-known whistleblower website WikiLeaks in November 2013.¹⁸ This caused the TPP negotiations, which had, up until that point, been heavily guarded, to come under heavy scrutiny.¹⁹ This leak in information was picked up almost instantaneously by independent news sources, public interest groups, and academics, including the reputable Dr. Michael Geist who holds the Canada Research Chair in Internet and E-Commerce Law at the University of Ottawa.²⁰ In fact, Dr. Geist writes that, while many of the leaked proposals are "cause for concern," the good news is that Canadian negotiators are in opposition to most of the extreme provisions in the TPP that are supported by the United States.²¹ Canadian negotiators are trying to promote current Canadian laws surrounding copyright and IP as an alternative to what has been the text by the United States. The main concern for Canada regarding this leaked IP chapter is that, *if* the United States is successful in its demands, then Canada, which has recently undergone copyright and IP-related changes due to the E.U. trade negotiations and its copyright reform package, will have to completely overhaul and change its entire legal framework.²² In fact, while the United States is isolated in TPP negotiations, as Henry Farrell had noted,²³ the political landscape could shift at any point in time.

Needless to say, 2013 has been an interesting year for Canada, a latecomer to the TPP negotiations. Based on recent developments such as leaked documents showing the U.S. push for strict and draconian provisions, British Columbia's high degree of interest in

13. *Trade Profiles, China*, WORLD TRADE ORG. (Sept. 2013), <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Country=CN&>.

14. *Trade Profiles, United States*, WORLD TRADE ORG. (Sept. 2013), <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Country=CN&>.

15. *Trade Profiles, Germany*, WORLD TRADE ORG. (Sept. 2013), <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Country=US&Language=E>.

16. *Trade Profiles, Japan*, WORLD TRADE ORG. (Sept. 2013), <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Country=JP&Language=E>.

17. *Trade Profiles, Canada*, WORLD TRADE ORG. (Sept. 2013), <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Country=CA&Language=S>.

18. *Secret TPP Treaty: Advanced Intellectual Property Chapter for All 12 Nations with Negotiating Positions*, WIKILEAKS 1 (Nov. 13, 2013), available at <http://wikileaks.org/tpp/static/pdf/Wikileaks-secret-TPP-treaty-IP-chapter.pdf>.

19. James Trimarco, *Wikileaks Puts the TPP's Feet to the Flames—Can It Take the Heat?*, YES! MAGAZINE (Nov. 5, 2013), <http://www.yesmagazine.org/people-power/wikileaks-puts-the-tpp-s-feet-to-the-flames-can-it-take-the-heat>.

20. See, e.g., Michael Geist, *Leaked TPP Text Confirms Countries Had Plenty to Hide* (Nov. 19, 2013), <http://www.michaelgeist.ca/content/view/7000/159/>.

21. *Id.*

22. *Id.*

23. Henry Farrell, *The United States Is Isolated in the Trans-Pacific Partnership Negotiations*, WASH. POST (Nov. 18, 2013, 10:40 AM), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/11/18/the-united-states-is-isolated-in-the-trans-pacific-partnership-negotiations/>.

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increasing exports, and the potential for China to join TPP talks in the near future, 2014 will prove to be just as interesting, if not even more so, as 2013.

II. Japan

A. CYBER LAW

In February 2013, the Tokyo police arrested Yusuke Katayama, a famous computer hacker who had played a cat-and-mouse game with the police for a few weeks.²⁴ In January, the Tokyo police found a cat with a memory card attached to its collar.²⁵ Included on the memory card was some computer code material that the hacker allegedly used to hijack others' computers, sending out murder and bomb threats.²⁶ Before the police caught up with the alleged hacker, four other men were wrongfully arrested in 2012 and charged with the crimes.²⁷ In addition to committing cybercrime, Katayama will also be charged with obstructing law enforcement.²⁸

B. FREEDOM OF INFORMATION

The government is introducing a new bill designed to increase penalties for leaking classified government information. The proposed law would increase penalties against civil servants who leak any State secrets to as many as ten years in prison. The government suggested that State secrets include defense, diplomacy, counterterrorism, or counterintelligence information, but the definition is not clear from the legislation.²⁹ The proposed law has been met with strong public opposition, and the Foreign Correspondents' Club of Japan expressed concern that the bill would target journalists.³⁰ But the government appears set to pass the law before the parliament (the *Diet*) concludes the current session in December 2013.³¹

24. *Police Arrest Tokyo Man in Malicious Computer Hacking Case*, ASAHI SHIMBUN (Feb. 10, 2013), http://ajw.asahi.com/article/behind_news/social_affairs/AJ201302100067.

25. *Id.*

26. *Id.*

27. *Id.*

28. Adam Westlake, *Japan's Most High-Profile E-Mailer, Hacker Arrested in Tokyo*, JAPAN DAILY PRESS (Feb. 10, 2013), <http://japandailynews.com/japans-most-high-profile-e-mailer-hacker-arrested-in-tokyo-1023065/>.

29. Ayako Mie, *Cabinet to OK State Secrets Bill*, JAPAN TIMES (Oct. 24, 2013), <http://www.japantimes.co.jp/news/2013/10/24/national/cabinet-to-ok-state-secrets-bill/#.UpaO7eKon8M>.

30. Ayako Mie, *FCC Slams 'Vague' State Secrets Bill as Direct Threat to Journalists*, JAPAN TIMES (Nov. 11, 2013), <http://www.japantimes.co.jp/news/2013/11/11/national/fccj-slams-vague-state-secrets-bill-as-direct-threat-to-journalists/#.UpbWW-Kon8N>.

31. Ayako Mie, *supra* note 29.

III. South Korea

A. THE AMENDMENT TO THE CAPITAL MARKETS ACT—A STEP CLOSER TO THE GLOBAL STANDARD PRIME BROKERAGE BUSINESS

1. *The Amendment*

An amendment to the Financial Investment Services and Capital Markets Act (Act) went into effect on August 29, 2013 (Amendment).³² The Amendment, among other things, established the regulatory framework for global standard prime brokers (*jonghap keumyung tuja saeopja*) (Prime Broker)³³ serving financial industry clients, most notably, hedge funds.³⁴

Under the Act, only Prime Brokers may engage in prime brokerage business.³⁵ The Financial Services Commission is authorized to evaluate and decide on applications from existing securities companies for the appointment as a Prime Broker.³⁶ A Prime Broker must (i) be a corporation (*chusik boesa*) under the Korean Commercial Code, (ii) be engaged in securities underwriting business, (iii) have minimum equity capital of three trillion Korean Won (which is equivalent to approximately U.S. \$2.8 billion), and (iv) be equipped with adequate risk management and internal control infrastructure as prescribed by the Presidential Decree Promulgated Under the Capital Markets Act (Presidential Decree).³⁷

2. *Scope of Business*

Prime Brokerage. A Prime Broker may provide to hedge fund clients (i) securities lending and related brokerage, (ii) money lending and other provision of credit, (iii) custody and management of the assets of hedge funds, and (iv) other services necessary to facilitate an efficient operation of hedge funds as set forth in the Presidential Decree.³⁸

Securities companies in Korea are already permitted to provide many of the services in categories (i) and (ii). But except for handling some securities underwriting, securities companies have not ventured beyond relatively low risk securities brokerage services.

32. Byung Tae Kim et al., *Amendments to the Financial Investment Services and Capital Markets Act - (2) Private Equity Funds*, SHIN & KIM (June 18, 2013), <http://www.lexology.com/library/detail.aspx?g=25c5158b-0cb8-42a0-8d11-64b589a8f16e>.

33. Some commentators refer to “*jonghap keumyung tuja saeopja*” as “investment bank” in English. See *Korea Investment & Securities Compliance Center*, LAW TIMES (Jan. 27, 2014), www.lawtimes.co.kr/LawNews/News/NewsContents.aspx?serial=82109.

34. Hedge funds were first created in Korea under the Act in September 2011. As of that date, a Prime Broker can provide prime brokerage service to Korean hedge funds only, but it is expected that the Presidential Decree will expand the scope of client to include entities such as pension funds, foreign hedge funds, and certain other financial institutions. See Jae Hyun Park & Chae Yeon An, *Regulation of Hedge Funds and Prime Brokers Under the Amended Capital Markets Act*, BFL No. 60 40 (July 2013).

35. 자본시장과 금융투자업에 관한 법률 [Financial Investment Services and Capital Markets Act], Act No. 8635, Aug. 3, 2007, art. 38(2), amended by Act No. 11758, Apr. 5, 2013 (S. Kor.).

36. *Id.* art. 8(1).

37. Yonhap News, *FSC Picks 5 Brokerage Firms as S. Korea's First Investment Banks*, THE KOREA OBSERVER (Oct. 30, 2013, 4:55 PM), <http://www.koreaobserver.com/fsc-picks-5-brokerage-firms-s-koreas-first-investment-banks-9042/>; see also Financial Investment Services and Capital Markets Act, at art. 234-2(1).

38. Act No. 8635 art. 326(2)-(3).

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Even in the case of bond underwriting, they have operated mostly on a fee basis.³⁹ In the Government's efforts to globalize the financial industry through deregulation, the Act went into effect in 2009 and provided the basis for the formation of financial holding groups with expanded asset base by consolidating six capital markets laws.

The Amendment allows the Prime Broker to provide asset custody and management service to hedge funds.⁴⁰ This facilitates the Prime Broker's ability to provide a full range of services to hedge fund clients. The "other services necessary to facilitate efficient operation of private equity funds," as specified by the Presidential Decree, include order-taking and the execution of trades of fund assets; the acquisition and disposition of fund assets in connection with such trades; the trading or brokerage of derivatives and related brokerage and agency service; the sale of fund securities; financial advisory on fund formation or operation; and repurchase agreement transactions and related brokerage and agency service.

These services are currently termed ancillary services or additional services, and some of them require separate licenses. The Amendment has alleviated much of the Prime Broker's efforts to obtain and maintain these licenses separately.⁴¹

Lending to Corporate Clients. The Amendment allows Prime Brokers to provide financing to corporate clients as necessary in connection with their M&A advisory, underwriting, restructuring financing, or venture capital financing services. Such financing can be provided in the form of a loan, payment guarantee, purchase of promissory notes (other than bonds), and other forms of credit provision as determined by the Financial Services Commission.⁴² This is significant in that, for start-up companies and other high-risk projects, new sources of funding with higher risk profiles have now become available. This development should stimulate (i) bridge loans made in furtherance of M&A advisory or underwriting services, (ii) venture capital financing and guaranty provided as principal investment by the Prime Broker, and (iii) structured financing composed by different lending sources.

3. *Notable Limitations*

Under the Act and the Presidential Decree, Prime Brokers are subject to several notable limitations including those listed below.

Limit on Lending to Corporate Clients. Subject to certain exceptions, the aggregate amount that a Prime Broker may lend to corporate clients may not exceed 100 percent of the amount of the Prime Broker's equity capital.⁴³ The Presidential Decree may provide for exceptions to this requirement, and it is expected that such exceptions will include short-term financing provided in connection with M&A advisory service, the lending of money borrowed from a third party by collateralizing the assets of hedge funds provided to the Prime Broker as security, and guaranteed financing. Further, a Prime Broker may

39. Young Do Kim, *Policy Direction in Promotion of Investment Banking*, NAT'L ASSEMBLY RES. SERVICE 10 (Sept. 2011).

40. Byung Tae Kim et al., *supra* note 32.

41. Hyo Yeon Kim, *Regulation of Jongbap Keumyung Tuja Saeopja Under the Capital Markets Act*, BFL No. 60, 25 (July 2013).

42. Act No. 8635 art. 72(1).

43. *Id.* art. 249-2(4).

not lend to the same borrower (or persons that share the credit risk of such borrower) an amount in excess of 25 percent of its equity capital.⁴⁴

Restriction on Lending to Hedge Funds. Under the Act, a Prime Broker can lend money or provide other forms of credit to its hedge fund clients but only for an investment in securities and for no other types of assets, e.g., real estate, derivatives.⁴⁵ This is a significant restriction, considering the very nature of hedge funds.

Requirement of Prime Broker Agreement. Prime Brokers providing prime brokerage services must execute a prime broker agreement with their clients.⁴⁶ This requirement purports to minimize disputes between the parties regarding matters such as rehypothecation of collateral provided by the hedge fund.⁴⁷ The Act, however, does not impose a maximum on the amount of assets that can be rehypothecated.⁴⁸

Ban on Affiliate Transaction. The Act imposes a complete ban on Prime Broker's provision of prime brokerage service to any hedge funds that are affiliated with the Prime Broker.⁴⁹ This ban is under criticism because it will prevent the major financial holding groups in Korea from providing prime brokerage service to its subsidiary funds. Commentators recommend creating reasonable exceptions to the rule.⁵⁰ The Prime Broker is also banned from providing financing to any corporate clients that are affiliated with it.⁵¹

4. *Ending Observation*

The Amendment has set the stage for the introduction of a homegrown global standard investment bank by allowing the concentration of several formerly distinct businesses in one entity and implementing further measures facilitating its operation. In that sense, the impact of the Amendment is bigger than the sum of its parts. It should be noted that the Amendment is a result of compromise from a considerably more ambitious original proposal from the Korean Government. Many expect that the Government will continue on its drive to deregulate and support the emergence of globally competitive prime brokers in Korea.

IV. Republic of the Philippines

In 2013, legal developments in the Philippines covered the following areas: (i) economic development, (ii) taxation (transfer pricing), (iii) human rights and social welfare, (iv) governance (electoral reform), and (v) financial regulations (anti-money laundering). In a year when an unprecedented scandal hounded national leaders,⁵² and a record-breaking

44. *Id.* art. 342(1).

45. Hyo Yeon Kim, *supra* note 41, at 23.

46. Act No. 8635 art. 86(2).

47. Hyo Yeon Kim, *supra* note 41, at 23.

48. In the United States, rehypothecation of collateral by broker-dealers is limited to 140 percent of the loan amount to a client, under Rule 15c3-3 of the Securities Exchange Commission. Customer Protection – Reserves and Custody of Securities Delegation of Authority to the Director of the Division of Market Regulation, Exchange Act Release No. 34-47480, 79 SEC Docket 2267 (Apr. 16, 2003).

49. Act No. 8635 art. 84(4).

50. Hyo Yeon Kim, *supra* note 41, at 31.

51. Act No. 8635 art. 274(2).

52. In July 2013, the Philippine Daily Inquirer exposed a scam, now known as the Priority Development Assistance Fund scam, which is a political scandal involving the alleged misuse by several members of Philip-

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storm surge devastated parts of the country,⁵³ these new enactments complement the government's focus on boosting the promising Philippine economy⁵⁴ while focusing on the welfare of the marginalized sector of society.

A. ECONOMIC DEVELOPMENT: AGRICULTURE AND FISHERIES

On June 5, 2013, Philippine President Benigno C. Aquino signed into law the Agricultural and Fisheries Mechanization Law (AFMech Law).⁵⁵ The AFMech Law seeks to modernize the agriculture and fisheries sector by improving farm mechanization that will support the country's food sufficiency goals.

Specifically, among other things, the AFMech Law provides that (i) "[v]entures in local manufacture, fabrication and assembly of agri-fisheries machinery and equipment shall be eligible for loans under the Agricultural Competitiveness Enhancement Fund [] under the program of the [Department of Agriculture]";⁵⁶ (ii) the Department of Science and Technology and the Commission on Higher Education will "provide competitive research grants . . . [for] needs-oriented research as well as institutional development and upgrading of laboratory facilities and equipment";⁵⁷ (iii) all "[a]gricultural and fisheries machinery and equipment to be sold in the market shall pass . . . testing and evaluation by the Agricultural Machinery Testing and Evaluation Center";⁵⁸ and (iv) "[t]he use of renewable and non-conventional energy such as wind, solar, hydro, biomass and other farm-based energy sources shall be promoted . . . for the operation and maintenance of agricultural and fisheries machinery."⁵⁹

The Philippine agriculture secretary has noted "that mechanizing agriculture would reduce post-harvest losses which now stand between 10 to 37 percent for rice and 30 percent for corn," and "would diversify farms and farm products, particularly the intercropping of the 2.1 million hectares of coconut lands that have remained idle or underutilized for many years."⁶⁰

pine Congress of their priority development assistance fund (more popularly known as "pork barrel"), a discretionary fund which can be spent by each member of Congress on priority development projects of the Philippine government. Nancy C. Carvajal, *NBI Probes P10-B Scam*, PHILIPPINE DAILY INQUIRER (July 12, 2013, 12:01 AM), <http://newsinfo.inquirer.net/443297/nbi-probes-p10-b-scam>.

53. A typhoon, codenamed Haiyan, (Yolanda in the Philippines) was a powerful tropical cyclone that devastated parts of the Philippines in November 2013. With winds of up to 270 kilometers per hour, it is the deadliest typhoon in history of the Philippines, having caused at least 5,209 deaths. *Typhoon Haiyan Death Toll Rises Over 5,000*, BBC NEWS ASIA (Nov. 22, 2013, 8:14 PM), <http://www.bbc.co.uk/news/world-asia-25051606>.

54. According to HSBC, the economy of the Philippines will become the sixteenth largest economy in the world, the fifth largest economy in Asia, and the largest economy in the Southeast Asian region by 2050. Kevin Voigt, *World's Top Economies in 2050 Will Be . . .*, CNN (Jan. 12, 2012, 3:37 AM), <http://business.blogs.cnn.com/2012/01/12/worlds-top-economies-in-2050-will-be/>.

55. An Act Promoting Agricultural and Fisheries Mechanization Development in the Country, Rep. Act. No. 10601 (June 5, 2013) (Phil.), *available at* <http://www.gov.ph/2013/06/05/republic-act-no-10601/>.

56. *Id.* § 16.

57. *Id.* § 11.

58. *Id.* § 18.

59. *Id.* § 35.

60. Cielito M. Reganit, *DA Says Agricultural and Fisheries Mechanization Law Will Contribute to National Food Security*, BALITA (July 11, 2013, 11:45 PM), <http://balita.ph/2013/07/11/da-says-agricultural-and-fisheries-mechanization-law-will-contribute-to-national-food-security/>.

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B. TAXATION: TRANSFER PRICING

On January 23, 2013, the Bureau of Internal Revenue adopted regulations relating to transfer pricing (Regulations).⁶¹ The Regulations authorize the Commissioner of Internal Revenue to review controlled transactions among associated enterprises and to distribute, apportion, or allocate their income and deductions to reflect the true taxable income of such enterprises.⁶² Among other things, the Regulations expressly adopt the “arm’s length principle,” which requires that a transaction with a related party should “be made under comparable conditions and circumstances as a transaction with an independent party,” so that a taxpayer’s income from a related party transaction must be equivalent to what would be earned by a similarly situated taxpayer from a transaction with a third party.⁶³ The Regulations can apply to cross-border transactions and domestic transactions.⁶⁴ The transfer pricing guidelines of the Organization for Economic Co-operation and Development served as the framework for the Regulations.⁶⁵

C. HUMAN RIGHTS AND SOCIAL WELFARE

1. *Protection and Welfare of Domestic Workers*

On January 18, 2013, President Aquino signed into law the Domestic Workers Act or *Batas Kasambahay* (DWA).⁶⁶ The implementing rules and regulations were issued on May 9, 2013.⁶⁷ With the passage of the DWA, the country complies with the International Labor Organization’s (ILO) Domestic Workers Convention, which “extends the ILO standards to a sector which continues to be poorly regulated and remains largely part of the informal economy.”⁶⁸

The DWA seeks to promote the welfare of and ensures safe and healthful working conditions for domestic workers.⁶⁹ Specifically, the DWA, among other things, (i) requires the employer and the domestic worker to execute an employment contract that provides for specific terms;⁷⁰ (ii) prohibits the employer from placing domestic workers under debt bondage,⁷¹ which is defined as “the rendering of service . . . as security or

61. Revenue Regulations No. 2-2013 (Jan. 23, 2013) (Phil.), *available at* <ftp://ftp.bir.gov.ph/webadmin1/pdf/68122RR%202-2013.pdf>.

62. *Id.* § 3.

63. *Id.* § 5.

64. *Id.* § 2.

65. *Id.*

66. An Act Instituting Policies for the Protection and Welfare of Domestic Workers, Rep. Act No. 10361 (Jan. 18, 2013) (Phil.), *available at* <http://www.gov.ph/2013/01/18/republic-act-no-10361/>.

67. Implementing Rules and Regulations of Republic Act No. 10361 Otherwise Known as the “Domestic Workers Act” or “*Batas Kasambahay*” (May 09, 2013) (Phil.), *available at* http://www.ilo.org/wcmsp5/groups/public/-asia/-ro-bangkok/-ilo-manila/documents/publication/wcms_213638.pdf.

68. *Infographic: What You Should Know About the Kasambahay Law*, GMA NEWS ONLINE (June 10, 2013, 1:10 PM), <http://www.gmanetwork.com/news/story/312182/news/specialreports/infographic-what-you-should-know-about-the-kasambahay-law> (quoting *Landmark Treaty for Domestic Workers to Come into Force*, INT’L LABOR ORG. (Sept. 5, 2012), http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_189191/lang-en/index.htm).

69. Rep. Act No. 10361 § 2.

70. *Id.* § 11.

71. *Id.* § 15.

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payment for a debt where the length and nature of service is not clearly defined or when the value of the service is not reasonably applied in the payment of the debt”;⁷² (iii) ensures that domestic workers are entitled to, among other things, an aggregate daily rest period of eight hours per day,⁷³ at least twenty-four consecutive hours of rest in a week,⁷⁴ a minimum wage,⁷⁵ and other benefits, such as social security, health insurance, and home development mutual fund.⁷⁶

The DWA is expected to benefit at least 2.5 million household workers in the Philippines.⁷⁷

2. Elimination of Trafficking

On February 6, 2013, President Aquino signed into law the Expanded Anti-Trafficking in Persons Act of 2012.⁷⁸ The new law seeks to plug loopholes in existing anti-trafficking laws. Specifically, the new law, among other things, (i) penalizes trafficking at an attempted stage,⁷⁹ (ii) holds accomplices and accessories liable,⁸⁰ (iii) expands the definition of “Acts that Promote Trafficking in Persons” and “Qualified Trafficking in Persons,”⁸¹ (iv) includes provisions that seek to facilitate the investigation and prosecution process,⁸² and (v) imposes stronger penalties.⁸³

In 2012, the U.S. State Department reportedly “removed the Philippines from the Tier 2 category in its Annual Trafficking in Person report but the country remains in the watchlist.”⁸⁴

3. Anti-Bullying

On June 5, 2013, President Aquino signed into law the Anti-Bullying Act of 2013.⁸⁵ The new law defines “bullying” as:

any severe or repeated use by one or more students of a written, verbal or electronic expression, or a physical act or gesture, or any combination thereof, directed at another student that has the effect of actually causing or placing the latter in reasonable

72. *Id.* § 4(a).

73. *Id.* § 20.

74. *Id.* § 21.

75. Rep. Act No. 10361 § 24.

76. *Id.* § 30.

77. *Infographic: What You Should Know About the Kasambahay Law*, *supra* note 68.

78. An Act to Institute Policies to Eliminate Trafficking in Persons Especially Women and Children, Establishing the Necessary Institutional Mechanisms for the Protection and Support of Trafficked Persons, Providing Penalties for its Violations and for Other Purposes, Rep. Act No. 10364 (Feb. 6, 2013) (Phil.), available at <http://www.pcoo.gov.ph/issuances/issuances-ra/RA-10364.pdf>.

79. *Id.* § 5.

80. *Id.* §§ 6–7.

81. *Id.* §§ 8–9.

82. *Id.* § 11.

83. *Id.* § 12.

84. *Aquino Signs Expanded Anti-Trafficking in Persons Act*, EMBASSY OF THE PHILIPPINES (Feb. 14, 2013, 3:38 PM), <http://www.philembassy.no/news-item/aquino-signs-expanded-anti-trafficking-in-persons-act>.

85. An Act Requiring All Elementary and Secondary Schools to Adopt Policies to Prevent and Address the Acts of Bullying in Their Institutions, Rep. Act No. 10627 (Sept. 12, 2013) (Phil.), available at <http://www.gov.ph/2013/09/12/republic-act-no-10627/>.

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fear of physical or emotional harm or damage to his property; creating a hostile environment at school for the other student; infringing on the rights of the other student at school; or materially and substantially disrupting the education process or the orderly operation of a school.⁸⁶

Under the new law, elementary and secondary schools are required to adopt anti-bullying policies and to provide for mechanisms for addressing bullying.⁸⁷ Furthermore, the new law “prescribe[s] the appropriate administrative sanctions on school administrators who . . . fail to comply with the [relevant] requirements.”⁸⁸

This has been noted as a major step in protecting children in the Philippines. A 2008 study of Plan International “showed that one in two school children in the Philippines are bullied or suffer from other forms of abuse.”⁸⁹

D. GOVERNANCE AND ELECTORAL REFORM: MANDATORY BIOMETRIC VOTER REGISTRATION

On February 15, 2013, President Aquino signed into law an act providing for mandatory biometric voter registration.⁹⁰ This is intended to protect the sanctity of elections in the Philippines by establishing a “clean, complete, permanent and updated list of voters through the adoption of biometrics technology.”⁹¹ By reference to the Omnibus Election Code, the new law penalizes:

- (a) [a]ny person who shall prohibit, impede, obstruct or prevent a registered voter or a new voter from submitting his or her biometrics for capture through the use of force, intimidation or monetary consideration; and
- (b) [a]ny public official or person who, under the guise of implementing [the new law], shall unjustifiably and without due process, cause the deactivation or reactivation of any registered voter.⁹²

E. FINANCIAL REGULATIONS: ANTI-MONEY LAUNDERING

On February 15, 2013, President Aquino signed the Republic Act No. 10365, which further strengthens the Anti-Money Laundering Law.⁹³ This new law expands the list of entities required to report financial transactions to the Anti-Money Laundering Council to include, among others, pre-need companies, money changers, real estate agents, and

86. *Id.* § 2.

87. *Id.* §§ 3–4.

88. *Id.* § 6.

89. Helen M. Flores & Marvin Sy, *Anti-Bullying Law Enacted*, PHILIPPINE STAR (Sept. 19, 2013, 12:00 AM), <http://www.philstar.com/education-and-home/2013/09/19/1226601/anti-bullying-law-enacted>.

90. An Act Providing for Mandatory Biometric Voter Registration, Rep. Act No. 10367 (Feb. 15, 2013) (Phil.), *available at* http://www.comelec.gov.ph/uploads/laws/RepublicActs/RA_10367.pdf.

91. *Id.* § 1.

92. *Id.* § 11.

93. An Act Further Strengthening the Anti-Money Laundering Law, Amending for the Purpose of Republic Act No. 9160, Otherwise Known as the “Anti-Money Laundering Act of 2001,” as Amended, Rep. Act No. 10365 (Feb. 15, 2013) (Phil.), *available at* <http://www.gov.ph/downloads/2013/02feb/20130215-RA-10365-BSA.pdf>.

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dealers of precious stones and metal.⁹⁴ It also enumerates additional activities that constitute “unlawful activities” in relation to which money laundering is committed, such as kidnapping, corruption, plunder, smuggling, hijacking, swindling, robbery and extortion, forgeries and counterfeiting, and terrorism.⁹⁵ The law also further strengthens the anti-money laundering initiative by requiring foreign exchange establishments, real estate dealers, and jewelry and precious metal dealers to report any suspicious transactions.⁹⁶

The new law has kept the country from being blacklisted by the International Financial Action Task Force,⁹⁷ which could have resulted in a more stringent processing of financial transactions involving Filipinos and Filipino corporations, including those of overseas Filipino workers.

V. Sri Lanka

The year 2013 was arguably one of the most significant years for the judicial system of Sri Lanka in the recent past. Many consider that, with the conclusion of Parliamentary Select Committee proceedings and the subsequent impeachment of the Chief Justice by a vote of Parliament at the beginning of the year, the rule of law and independence of the judiciary in Sri Lanka suffered yet another serious and fundamental blow.⁹⁸ One commenter on the legal system referred to the impeachment as the “[e]rasing [of] the memory of law, an independent judiciary and the legal profession.”⁹⁹

Another feature of 2013 was the uncertainty that arose in regard to the issue of acquisition of ownership of land in Sri Lanka by foreigners consequent to a proposal made by the President of Sri Lanka in his budget speech in November 2012.¹⁰⁰ This has had a disastrous impact on the climate for foreign investment in Sri Lanka.¹⁰¹

A considerable amount of legislation was passed in 2013. A raft of amendments to legislation was introduced in Parliament to give effect to certain proposals in the President's 2012 Budget Speech.¹⁰² Twenty-one bills were placed on the Order Paper of Parliament on March 8, 2013.¹⁰³ Eleven of these bills were challenged by fifteen separate

94. *Id.* § 1.

95. *Id.* § 2.

96. *Id.* § 7.

97. *Aquino Signs Expanded Law vs 'Dirty Money,'* PHILIPPINE DAILY INQUIRER (Feb. 16, 2013, 3:15 AM), <http://newsinfo.inquirer.net/359395/aquino-signs-expanded-law-vs-dirty-money-2>.

98. R. K. Radhakrishnan, *Sri Lanka Parliament Impeaches Chief Justice*, THE HINDU (Jan. 12, 2013, 11:38 IST), <http://www.thehindu.com/news/international/sri-lankan-parliament-impeaches-chief-justice/article4298865.ece>.

99. *Age 70 Limit for Lawyers: AHRC Condemns De Facto CJ's Announcement*, COLOMBO TELEGRAPH (Nov. 18, 2013), <https://www.colombotelegraph.com/index.php/age-70-limit-for-lawyers-ahrc-condemns-de-facto-cjs-announcement/>.

100. Mahinda Rajapaksa, President, Sri Lanka, Budget Speech (Nov. 9, 2012), available at http://www.srilankaguardian.org/2012/11/the-budget-speech-2013_8767.html.

101. *Sri Lanka Government Makes It Difficult for Foreigners to Buy Property*, PROPERTY IN SRI LANKA (Mar. 1, 2013), <http://propertyinsrilanka.wordpress.com/2013/03/01/sri-lanka-government-makes-it-difficult-for-foreigners-to-buy-property/>.

102. Rajapaksa, *supra* note 100.

103. Order Paper of Parliament No. 262 (Mar. 8, 2013) (Sri Lanka), available at http://www.parliament.lk/uploads/documents/orderpapers/PUBDOC4420_document.pdf.

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petitions filed in the Supreme Court. The applications brought against these bills will be discussed separately hereafter.¹⁰⁴

In November, it was reported that an announcement had been made by the *de facto* Chief Justice, Mohan Pieris, who stated that new measures would be introduced and limit the maximum age up to which a lawyer could practice to seventy and that new requirements would be imposed on practicing lawyers below that age to apply to renew their licenses every two years. This development was viewed with alarm by many.¹⁰⁵

On November 21, 2013, the Budget Speech for 2014 was also delivered by the President of Sri Lanka in Parliament. The focus appears to be one of increased attention to the boosting of infrastructure through development projects particularly aimed at improving local agriculture, animal husbandry, road connectivity, and higher education.¹⁰⁶

A. UNCERTAINTY

A disturbing trend, witnessed in regard to several areas of law, is that policy decisions, once taken, are not implemented properly through the enactment of legislation or that existing legislation is simply ignored if it does not accord with policy changes.

For example, with regard to the possibility for persons who wish to retain or resume Sri Lankan nationality, while continuing to have citizenship of another country, although the law provides for the possibility of such persons applying for this right, and criteria were in place for many years, the processing of applications was administratively suspended.¹⁰⁷ A new scheme has been awaited but press reports have indicated that it will still be a considerable period of time before details of the new scheme are finalized and amendments to the relevant legislation are enacted.¹⁰⁸

With regard to adoptions, although the law provides for the possibility for adoption of Sri Lankan children by persons who are not domiciled and resident in Sri Lanka, administratively, it would appear, according to certain reports, that the process of granting letters of allocation for the adoption of children after the conclusion of a home study report has ceased (except in the case of children with special needs).

Sri Lankan law has never contained a prohibition on the acquisition by foreign individuals of privately owned land in Sri Lanka. But, since 1963, the transfer of ownership to a foreign citizen of land in Sri Lanka was made liable to payment of a 100 percent tax calculated according to the market value of the land. The position, as a matter of law, did not change since the proposal of the President of Sri Lanka in his Budget Speeches in 2012 and 2013. As a matter of law, therefore, there is still nothing that prevents a for-

104. *Constitutional Challenges to 11 Bills: Summary of Submissions by Counsel for the Petitioners*, COLOMBO TELEGRAPH (Mar. 22, 2013), <https://www.colombotelegraph.com/index.php/constitutional-challenges-to-11-bills-summary-of-submissions-by-counsel-for-the-petitioners/>.

105. *Age 70 Limit for Lawyers: AHRC Condemns De Facto CJ's Announcement*, *supra* note 99.

106. *Budget Speech 2014*, CEYLON TODAY (Nov. 21, 2013, 1:30 PM), <http://www.ceylontoday.lk/16-48105-news-detail-budget-speech-2014.html>.

107. *Dual Citizenship*, DEP'T OF IMMIGR. & EMIGRATION SRI LANKA, http://www.immigration.gov.lk/web/index.php?option=Com_content&view=article&id=231%3Adual-citizenship&catid=1%3Alatest-news (last visited Jan. 20, 2014).

108. See Kirithi Hewamanne, *Dual Citizenship: To Offer or Not to Offer*, DAILY MIRROR (Nov. 20, 2013, 11:44 AM), <http://www.dailymirror.lk/business/features/39012-dual-citizenship-to-offer-or-not-to-offer.html>.

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eigner from purchasing land in Sri Lanka. But, a 100 percent tax on such purchases is required.¹⁰⁹

Administratively, however, the registration of deeds conveying title to land (such registration confers a right of priority—in most areas in Sri Lanka, the system is one of registration of deeds, not a system of registered title) in favor of foreigners has been suspended due to circulars addressed by the Ministry of Finance to the Registrar-General and communicated to the Registrars of Land.¹¹⁰

Legislation to implement the President's 2013 budget proposals, which were expected to have been passed by April or May of 2013, has not been enacted or even presented to Parliament.¹¹¹ The resulting situation is extremely unclear and uncertain at the moment. Some fear that, if legislation is introduced, it may be made retroactive.¹¹² This has had a negative impact on the purchase of land in Sri Lanka by foreigners.¹¹³ It has further caused considerable anxiety and disquiet by foreigners wishing to exit from their investments in land in Sri Lanka, since it is likely that only other foreigners would pay the high prices paid by such foreign owners at the time of acquisition of ownership of the lands.

According to Ministry of Finance circulars, the proposed prohibition on land acquisition would extend to companies of which more than 49 percent of the shares are owned by foreigners.¹¹⁴ Exemptions are expected to apply to condominium apartments above the fourth floor that are purchased by foreigners.¹¹⁵

According to the latest circulars, which were copied to the Department of Inland revenue, the practice of the Department in regard to stamping of share transfer forms by Departmental endorsement has now changed, and according to certain reports, where the share transfer form is of a transfer of shares in a company to a foreigner and such company owns land, the Department will not endorse payment of stamp duty on the share transfer form.

B. LEGISLATION IN 2013

There has been a considerable amount of legislation passed in the year 2013:¹¹⁶

- Divineguma Act, No.1 of 2013;
- Inland Revenue (Amendment) Act, No. 18 of 2013;
- Betting and Gaming Levy (Amendment) Act, No. 19 of 2013;
- Tax Appeals Commission (Amendment) Act, No. 20 of 2013;

109. JONES LANG LASALLE, SRI LANKA PROPERTY INVESTMENT GUIDE 2013 2–3 (2012), available at <http://www.joneslanglasallesites.com/appig/wp-content/uploads/2013/02/Sri-Lanka-Property-Investment-Guide-2013.pdf>.

110. Bandula Sirimanna, *Jolt for Sri Lanka's Condo Market*, THE SUNDAY TIMES (Mar. 10, 2013), <http://www.sundaytimes.lk/130310/business-times/jolt-for-sri-lankas-condo-market-35543.html>.

111. *Id.*

112. *See id.*

113. *Id.*

114. JM Swaminathan & Geetani Athurupane, *Sri Lanka: Accelerating Business Growth*, ASIALAW PROFILES, <http://www.asialawprofiles.com/Guide/1046/Accelerating-business-growth.html> (last visited Feb. 22, 2014).

115. R.G. Ariyawanasa & A.G.P.I. Udayanthika, *Living in High-Rise: An Analysis of Demand for Condominium Properties in Colombo*, 4 INT'L J. SOCIOLOGY & ANTHROPOLOGY 31, 36 (2012).

116. *Acts & Bills*, PARLIAMENT OF SRI LANKA, <http://www.parliament.lk/en/business-of-parliament/acts-bills?view=actsandbills&tab=acts#current> (enter year and act number of legislation).

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- Fiscal Management (Responsibility) (Amendment) Act, No. 15 of 2013;
- Notaries (Amendment) Act, No. 13 of 2013;
- Strategic Development Projects (Amendment) Act, No. 16 of 2013;
- Finance Act, No. 12 of 2013;
- Nation Building Tax (Amendment) Act, No. 11 of 2013;
- Powers of Attorney (Amendment) Act, No. 14 of 2013;
- Resettlement Authority (Amendment) Act, No.10 of 2013;
- Excise (Amendment) Act, No. 7 of 2013;
- Telecommunication Levy (Amendment) Act, No. 8 of 2013;
- Customs (Amendment) Act, No. 9 of 2013;
- Ports and Airports Development Levy (Amendment) Act, No. 5 of 2013;
- Convention on the Suppression of Terrorist Financing (Amendment) Act, No. 3 of 2013;
- Code of Criminal Procedure (Special Provisions) Act, No. 2 of 2013;
- Local Authorities Filling of Vacancies (Special Provisions) Act, No. 30 of 2013;
- Economic Service Charge (Amendment) Act, No. 6 of 2013;
- Value Added Tax (Amendment) Act, No. 17 of 2013;
- Registration of Electors (Special Provisions) Act, No. 27 of 2013;
- Marriage Registration (Amendment) Act, No. 22 of 2013;
- Muslim Marriage and Divorce (Amendment) Act, No. 24 of 2013;
- Kandyan Marriage and Divorce (Amendment) Act, No. 23 of 2013;
- Births and Deaths Registration (Amendment) Act, No. 25 of 2013; and
- Registration of Documents (Amendment) Act, No. 21 of 2013.

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