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Committee Co-Chairs' / Co-Editors' Messages

Greetings, Ayubowan and Vanakkam. This is the Spring 2010 issue of the Asia/Pacific Committee's Asia Law News (*ALN*). We hope you enjoyed the Winter issue of *ALN*. In the co-editors' message, we touched upon the topic of disasters and had a picture of the Maldivian Government staging a media event – a meeting of its Cabinet underwater. This was a dramatic way of getting the point of view of the Maldives across to the world about the potential consequences of climate change. While the scientific debate rages on, as promised in our Winter issue message, this Spring issue offers you, our readers, articles on climate change law generally and on some specific countries in the Asia/Pacific region. [Read more](#)

Climate Change Law in Asia – Copenhagen and Beyond

By [Thomas Shaw](#)

The recent Copenhagen COP-15 climate change conference has highlighted the need for all countries to come to an agreement on how to reduce the emissions causing climate change. The outcome from Copenhagen will be debated for some time to come but what is clear is that there are already laws, proposed legislation and private efforts underway to address climate change. In Asia/Pacific, there are a number of different activities taking place, from revisions of the existing statute in New Zealand to Japan's legislation in support of the Kyoto [Read more](#)

Climate Change and India

By [Akil Hirani](#)

Climate change has been at the centre of mainstream political debate in the weeks and months preceding and following the UN Conference on Climate Change at Copenhagen. Even though the Copenhagen Accord was brokered by a small group of countries, it represents a major shift in international climate change negotiations. For the first time, the developing countries, including, Brazil, South Africa, India and China (the "BASIC Countries") have agreed to undertake emissions reduction targets and report mitigation actions. [Read more](#)

Financing Renewable Energy in Vietnam – The Basics

By [Oliver Massmann](#), [Giles Cooper](#), [Mark Oakley](#), [Phan Thi Mai](#)

For Vietnam to cope with its increasing electricity demand, it will need to add approximately 4,000 megawatts (MW) of generation capacity to the national grid each year. Given the rapid depletion of Vietnam's gas and crude oil reserves (which may be exhausted within 20 to 30 years), pundits predict that by 2020 Vietnam will have to import 100 million metric tons of coal per year to fuel its power plants. It is clear that Vietnam will become dependent on fossil fuel imports unless and until it is able to unlock its rich renewable energy potential. [Read more](#)

Intellectual Property Law in Asia – Protection and the Internet

By [Thomas Shaw](#)

As economies of the world continue to become more services oriented, the principal investments of corporations are now weighted towards the development of intangible assets, such as intellectual property, instead of for tangible assets. This is even more so for companies selling goods and services on the Internet. As I discussed in the last issue, most Asian countries have now implemented electronic commerce statutes that provide a legal foundation for doing business on the Internet. Using this electronic interaction business model requires protecting intellectual property developed and deployed to provide e-commerce services. [Read more](#)

Climate Change Law in Asia – Copenhagen and Beyond (Part 1)

By Thomas Shaw



The recent Copenhagen COP-15 climate change conference has highlighted the need for all countries to come to an agreement on how to reduce the emissions causing climate change. The outcome from Copenhagen will be debated for some time to come but what is clear is that there are already laws, proposed legislation and private efforts underway to address climate change.

Europe has had such laws in place for some time. The U.S, with the change in administrations, is moving towards enacting a climate change law on the federal level and some states and cities are already taking action separately. In Asia/Pacific, there are a number of different activities taking place, from revisions of the existing statute in New Zealand to Japan's legislation in support of the Kyoto Protocol supplemented by voluntary emission trading systems to the recently failed Australian climate change bill to China's attempts to establish climate change rules that do not stifle economic growth to aid from the Asian Development Bank for those areas affected by climate change, like Vietnam's low-lying Mekong Delta region.

Climate change law is heavily influenced by climate change science. As more data becomes available and scientific knowledge advances, climate change legislation should reflect that. But it must also take into account social and economic policies and the positions of various interest groups. This is clearly what happened for one of the early enactors of climate change law, New Zealand. Its climate change statute was recently relaxed due to the economic impact of the recession, potential competition from differing legislation by its neighbor Australia and to reflect the philosophies of the new governing parties. Yet it is not only neighboring-country laws that impact domestic legislation. The starting point for climate change law is a number of global agreements, beginning with the 1972 Stockholm Conference on the Human Environment. It was the 1992 UN Conference in Rio de Janeiro that resulted in the adoption of the important foundation agreement, the *United Nations Framework Convention on Climate Change* (UNFCCC). Part 1 of this article will examine these global agreements and the resulting Asian statutes and schemes. To assist the reader, following is a list of climate change acronyms.

Acronym	Meaning	Acronym	Meaning
COP / CMP	Conference of the Parties / COP Serving as the Meeting of the Parties to the Kyoto Protocol	UNFCCC	United Nations Framework Convention on Climate Change
		IPCC	Intergovernmental Panel on Climate Change
GHG	Green House Gases	KP	Kyoto Protocol
MRV	Measurement, Reporting and Verification	REDD	Reducing Emissions from Deforestation and Forest Degradation
CO2	Carbon Dioxide	CH4	Methane
ETS	Emission Trading Scheme	EITE	Emission Intensive / Trade Exposed
PFCs	Perfluorocarbons	N2O	Nitrous Oxide
SF6	Sulphur Hexafluoride	HFCs	Hydrofluorocarbons
JI	Joint Implementation	CDM	Clean Development Mechanism
AAUs	Assigned Amount Units	ERUs	Emission Reduction Units
CERs	Certified Emission Reductions	RMUs	Removal Units

Global Agreements

The objective of the UNFCCC is to timely stabilize atmospheric greenhouse gas (GHG) concentrations to prevent interference with the climate system so ecosystems can adapt naturally, food production is not threatened and economic development can proceed in a sustainable manner. It is based on the following five principles, as listed in Article 3:

1. Common but differentiated responsibilities, with developed countries taking the lead
2. Consideration for developing countries, especially if vulnerable to climate change
3. Precautionary measures should be taken, even without full scientific certainty
4. Measures should be appropriate for the national development of each country
5. Measures should not be disguised trade restrictions or discrimination

In Article 4, the commitments of the parties to the agreement are laid out. The first is that all parties will make available national inventories of GHG emissions by sources and removal by sinks. The second is implementing national (or regional) programs with measures to mitigate climate change from GHG. The third is to develop, apply and transfer appropriate technologies to control GHG. The fourth involves the management and promotion of GHG sinks and reservoirs. Following these are commitments in regards to cooperation on adapting to the impacts of climate change, considering climate change in national policies, cooperating and promoting data gathering, research, technology sharing and public awareness and to communicating the implementation of these commitments. Developed nations have additional commitments to develop and share their technologies, processes and funding with developing nations.

Under this agreement, GHGs are defined as “gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation.” The specific major gases that are included in this category was specified later as Carbon Dioxide (CO₂), Methane (CH₄), Nitrous Oxide (N₂O), Hydrofluorocarbons (HFCs), Perfluorocarbons (PFCs) and Sulphur Hexafluoride (SF₆). The *Montreal Protocol on Substances that Deplete the Ozone Layer* (adopted 1987) covered other gases to be controlled and eventually phased out. They include hydrocarbons based on chlorine or bromine, such as Chlorofluorocarbons (CFCs) and Hydrochlorofluorocarbons (HCFCs). The UNFCCC does not apply to those gases.

In Article 7, the parties agree to a Conference of the Parties (COP), the supreme body responsible for reviewing and promoting the implementation of the UNFCCC, which is to meet annually. In Articles 9 and 21, the Intergovernmental Panel on Climate Change (IPCC) is designated as a scientific body which can provide objective scientific and technical advice. The IPCC was established in 1988 by the UN and the World Meteorological Organization.

In Article 12, the parties agree to communicate their national inventories and implementation plans and for developed countries, the effectiveness of their policies and measures. Under Article 17, the parties may adopt protocols to the UNFCCC. After the agreement was signed and 50 countries had subsequently ratified it, it came into effect in 1994. However, specific limits for countries or a method

to enforce compliance was not provided for. Additionally, countries are split into these three groups. Annex I countries that must meet emissions targets and non-Annex I developing countries that have no mandated targets. Annex II countries have to fund the costs for developing countries (and are a subset of Annex I). After Rio, all decisions by the parties were made at annual COP (and eventually also CMP) meetings. Some of the meetings were more significant than others, as summarized below.

COP / CMP Decisions

COP-1 (1995) in Germany was concerned primarily with a series of procedural and administrative matters but the first decision (the “Berlin Mandate”) concerned strengthening the commitments of developed countries through the use of a protocol (1/CP.1). An analysis period of two years was agreed upon. At COP-2 (1996) in Switzerland, the parties decided that they considered the IPCC’s Second Assessment Report the “most comprehensive and authoritative assessment currently available of the scientific and technical information regarding global climate change” (6/CP.2). They also instructed their representatives to negotiate the text of a legally binding protocol in time for the next COP (the “Geneva Declaration”).

COP-3 (1997) in Japan adopted the binding “Kyoto Protocol” (KP) to the UNFCCC (1/CP.3), following on from the Berlin Mandate. To achieve their specified targets, countries are allowed to implement “policies and measures in accordance with its national circumstances” (Article 2 – A2). Developed countries make a commitment to reduce their GHG emissions at least 5% below the levels of 1990 during the period 2008 to 2012 and by 2005 have made demonstrable progress toward those goals (A3). Human-initiated changes to land-use and forestry activities since 1990 can be used as sinks to achieve the targets (A3).

Emission reduction units (ERUs) and certified emission reductions (CERs) (defined below) can also be used in reaching emissions targets. Commitments are met by having lower GHG emissions than are allowed in the respective annexes to the agreement (A4). ERUs can be obtained from Joint Implementation (JI) projects that aim to remove GHG emissions from sources or enhancing removal from sinks (A6). Sources are defined here as energy, industrial processes, solvent and other product use, agriculture and waste (Annex A). Annex I parties are required to submit an annual national inventory of sources and sinks and to show how they are complying with their commitments (A7).

A Clean Development Mechanism (CDM) is that which assists developing countries achieve sustainable development and developed countries to meet their commitments (e.g. renewal energy projects or energy efficiency improvement projects) (A12). CERs arise from such CDM projects as certified by COP-designated operational entities to have “real, measurable, and long-term benefits related to the mitigation of climate change” and “reductions in emissions that are additional to any that would occur in the absence of the certified project activity” (A12). The meeting of the parties to the protocol will take place during the annual meeting of the conference of the parties to the UNFCCC to review the implementation of and promote the protocol, starting after the protocol comes into force (A13). Emissions trading is permitted for fulfilling emissions commitments but is supplemental to domestic

actions on emission limitation and reduction commitments (A17). No reservations to the agreement's provisions are allowed (A26). Quantified emission limitations are listed for 39 countries and the EU, with only Australia, Japan and New Zealand in Asia (Annex B). After ratification/accession by 55 countries, the KP finally came into effect in 2005.

COP-4 (1998) in Argentina adopted the Buenos Aires Plan of Action (1/CP.4) that includes an approach to determine through a series of steps how the KP should be implemented. COP-5 (1999) in Germany continued the analysis of the KP mechanisms. COP-6 (first part) (2000) in the Netherlands and COP-6 (second part) (2001) in Germany were attempts to agree on outcomes of the Buenos Aires Plan of Action. The first session was not successful and was suspended until the next year. Agreements were reached in COP-6 that were not adopted until COP-7 on issues such as the use of agricultural land use and forest management as sinks, flexibility mechanisms and compliance processes.

COP-7 (2001) in Morocco brought the Marrakesh Accords, adopting what had been agreed in the previous sessions and creating proposed decisions for the first CMP. For example, flexibility mechanism accounting allows the use of Removal Units (RMUs) (KP A3), ERUs (KP A6), CERs (KP A12) and Assigned Amount Units (AAUs) (KP A17) to meet commitments under Article 3 of the KP (15/CP.7). RMUs are those from direct human-induced land-use change and forestry activities since 1990. AAUs are a country's assigned amount pursuant to KP A3. All four of these measures are equal to one metric ton of carbon dioxide equivalent. Emissions trading rules under KP A17 define a reserve required of ERUs, CERs, AAUs, and RMUs and if falling above or below commitments, can transfer or acquire these as needed from other national registries (18/CP.7). Unretired ERUs, CERS and AAUs may be carried over to succeeding commitment periods but not RMUs (19/CP.7).

Each Annex I party is required to establish and maintain a national registry to ensure the accurate accounting of the issuance, holding, transfer, acquisition, cancellation and retirement of ERUs, CERs, AAUs and RMUs and the carry-over of ERUs, CERs and AAUs and to maintain there a commitment period reserve not less than 90 per cent of the Party's assigned amount (19/CP.7). Additionally, land use, land-use change and forestry project activities under the CDM is limited to afforestation (land that had not been forested for the last 50 years and reforestation (of previously forested land) (11/CP.7). National system practices and quality assurance methods are described (20/CP.7) and compliance standards and processes for facilitation and enforcement are further defined (24/CP.7).

COP-8 (2002) in India, COP-9 (2003) in Italy and COP-10 (2004) in Argentina primarily involved sorting out the KP procedures, in regards to such matters as land use and forestry activities, national registries, technology transfer and funding. COP-11/CMP-1 (2005) in Canada was the first meeting after the KP had come into effect. As such, it was not only a conference of the parties to the original convention but also serves as the meeting of the parties to the KP (MOP or CMP). The parties decided to initiate a process to consider further commitments after the KP expires in 2012 (1/CMP.1). COP-12/CMP-2 (2006) in Kenya finalized some of the open issues.

At COP-13/CMP-3 (2007) in Indonesia, the parties adopted the Bali Action Plan (1/CP.13) and the fourth assessment report of the IPCC (5/CP.13). The Bali Action Plan was responding to the IPCC report, which found “unequivocal” warming of the climate and that “delay in reducing emissions significantly constrains opportunities to achieve lower stabilization levels and increases the risk of more severe climate change impacts.” Recognizing that deep cuts in emissions were required, the parties decided to launch a comprehensive process to enable a “full, effective and sustained” implementation of the UNFCCC to and beyond 2012 and to adopt a decision on such at its fifteenth session in Denmark. Developed countries were to consider “measurable, reportable and verifiable nationally appropriate mitigation commitments or actions,” while developing countries were to consider “nationally appropriate mitigation actions ... in a measurable, reportable and verifiable manner.” COP-14/CMP-4 (2008) in Poland encouraged negotiations towards an “agreed outcome” for the parties to decide on at COP-15.

The recent COP-15/CMP-5 (2009) session in Denmark resulted in the Copenhagen Accord. The parties agreed that developed countries would provide up to \$100bn of funding per year by 2020 for developing countries’ mitigation actions, restated the importance of forests and deforestation on GHG emissions and the need to allocate funding to promote forests, especially in developing countries through REDD projects. Goals were set for the parties: for developed countries, they must submit quantified targets for 2020 while developing countries are required to implement mitigation actions, to be domestically measured, reported and verified and reported every two years in their national communication.

Asia/Pacific Climate Change Laws

The UNFCCC has entered into force in all of the main Asian countries: Afghanistan, Australia, Bangladesh, Bhutan, Brunei, Cambodia, China, East Timor, India, Indonesia, Japan, North Korea, South Korea, Laos, Malaysia, Maldives, Myanmar, Mongolia, Nepal, New Zealand, Pakistan, Papua New Guinea, the Philippines, Singapore, Sri Lanka, Thailand and Vietnam (Taiwan is not a member). For the KP, almost all of these Asian countries have ratified it, with the exception of Afghanistan. Beyond their concurrence to global agreements, Asian countries have passed or proposed legislation to encourage conservation and the development and implementation of energy efficient technologies. The following highlights the climate change and emission trading statutes of leading GHG-emitting countries in Asia.

Australia

At the end of 2009, the *Carbon Pollution Reduction Scheme Bill (2009)* just failed to get passed in the Australian parliament. As the government intends to reintroduce this bill and because it was watched by so many stakeholders in the climate change law arena, it is useful to review the details of this bill.

First are its three objectives:

- To give legal effect to Australia’s obligations under the UNFCCC and the KP
- To support the development of an effective global response to climate change

- To take action towards meeting specified targets (either those in international agreement or Australia's own targets) in a "flexible and cost-effective" manner.

The key points of the bill:

- It creates a scheme to reduce emissions under a national regulator setting an annual cap, with a national emissions registry used plus various recording-keeping duties.
- Those responsible for GHG must surrender eligible emission units for each ton of GHG equivalence they emit, import, manufacturer, supply or produce
- The local emission units will be capped and mostly provided through an auction but some may be given away or sold at a fixed price and are generally transferrable.

In setting the annual cap, besides the UNFCCC and KP obligations, consideration must be given to reports from an expert advisory committee and the following:

- Stabilization of atmospheric GHG concentrations is in Australia's national interest
- Comprehensive global action where all major economies commit to substantially restrain GHG emissions and commit to GHG reductions comparable to Australia's
- Economic implications of national scheme gateways, including the carbon price
- Voluntary action to reduce Australia's GHG
- Estimates of GHG emissions that are not covered (directly or indirectly) by the carbon pollution reduction scheme.

There is special assistance (e.g. free emission units) to maintain the international competitiveness of activities termed "emissions-intensive trade-exposed" (EITE) as well as to the transition of coal-fired electricity generation, for qualified reforestation projects to the holder of the carbon sequestration rights and for destruction of synthetic GHG. The national registry will keep track of issuance, transfer and retirement of Australian emission units, Kyoto emission units and non-Kyoto international emission units and balances thereof. The bill also addresses the legal nature of the Australian emissions units, which are considered personal property and so assignable, transmissible by will or operation of law. Equitable interests in Australian emissions units are not impacted by this law.

New Zealand

Unlike Australia, New Zealand has had a climate change bill for some time. It is not one of the top GHG emitters in Asia, but its legislation is worth understanding due to its long standing existence. The *Climate Change Response Act (2002)* was one of the first laws of its type, with New Zealand being exposed earlier to the effects of climate change, with a large ozone hole manifesting itself nearby. Its objectives are to give effect to New Zealand's obligations under the UNFCC and the KP and to provide for an emission trading scheme (ETS). It was subsequently revised by the *Climate Change Response (Emissions Trading) Amendment Act (2008)*. The following is based on both.

There are provisions for a registry containing three sources: local (New Zealand), Kyoto and approved overseas emission units and types based on the KP: AAUs, CER units, ERUs and RMUs. The purpose of

the registry is to provide for accurate accounting, the exchange of information with overseas registries and for all those with responsibilities under this law to carry them out. Besides the holdings of emission units, the registry will have a register showing transactions including: issue, transfer, retirement, surrender, conversion, carry-over, replacement and cancellation of units. The transfers can be within the register or to overseas registers. The law also calls for an inventory agency that is to provide an annual report with estimates of human-induced GHG by source and the removal by sinks.

Generally, parties are required to be participants in the ETS with registry holding accounts (to receive New Zealand units or surrender units) for the following types of activities. Participants receive one New Zealand unit for each ton from their removal activities and free units go to those in trade-exposed industries (“carbon leakage”) or exposed to increased costs for this scheme, while the allocation plan considers eligible participants. New Zealand units are created after consideration of international obligations and domestic goals. Participants must monitor and report on emissions and removals and surrender one unit for each ton of emissions from the following activities:

- Deforestation
- Owning liquid fossil fuels
- Importing or mining coal or natural gas or refining petroleum or burning oil
- Producing iron, steel, aluminum, glass, gold or importing/manufacturing SF6 or HFC
- Importing or manufacturing fertilizer utilizing nitrogen or slaughtering animals
- Operating a waste disposal facility

Parties may be participants if they are engaged in the following activities:

- Forest removal activities
- Storing of CO2 after capture
- Exporting or destroying HFCs or SF6
- Purchasing liquid fossil fuels, coals or natural gas
- Purchasing synthetic fertilizer containing nitrogen for own use
- Raising ruminant animals whose quantities or emissions exceed a prescribed amount

This ETS came into force in September 2008. Other than forestry activities, these provisions have not yet come into effect for other sectors. In late 2009, the new conservative government pushed through changes to this law with the *Climate Change Response (Moderated Emissions Trading) Amendment Act* (2009). The changes include:

- Delaying unit surrender obligation dates
- Set transitional phases where firms can pay a fixed \$25 / ton if not meeting targets
- Free allocation of NZ units on intensity basis (GDP) to agricultural and fishing sectors
- Sector-specific transition phase surrender of one unit per two tons of CO2 emitted
- Flexibility to later move agriculture obligations from the processor to farm level
- NZ ETS units cannot be traded outside New Zealand
- No overall cap on emissions and allocations will be phased out over 80 years.

Japan

The *Japan Voluntary Emission Trading Scheme* (JVETS) started in 2005. Its objectives are to support CO₂ reduction activities by businesses in Japan through subsidies and to accumulate knowledge and experience about emissions trading. In addition, this helps to create the infrastructure and processes required for a registry system, trade matching system, emission management systems and the monitoring and reporting by participants and verification by third-party verifiers (MRV). The MRV is done in accordance with international standards (ISO 14064).

Under JVETS, Japan's government issues local allocations (JPAs) and jCERs (Japan CERs) from local reduction projects and also allows CERs from global CDM projects to retire actual emission obligations. If after applying JPAs, jCERs and CERs the voluntary emission targets are still not met, then the subsidy must be returned to the government. JVETS phases last about two and a half years, covering three phases. It starts with application and approval, subsidy granting, verifying the prior three-years' emissions and implementing the new facilities (set-up phase).

Next is the actual measurement year (commitment phase) and then the calculation and measurement and retirement of allowances (adjustment phase). The phases run concurrently, with the first occurring in 2005, with 31 participants and seven trading brokers with 24 trading transactions (the commitment period of April 2006 – March 2007). In 2006, this had increased to 61 participants with targets and 12 brokers, with 51 trading transactions (in both years, participants met their targets only due to the ability to buy units). In 2007, the third phase began and the fourth phase in 2008 (the commitment periods ends in March 2010). From 2009, JVETS is an option under the *Domestic Integrated Market: Experimental Emission Trading Scheme* for companies without a Voluntary Action Plan (where companies set voluntary caps based on intensity or absolute quantity). The program has now grown to 500+ participants with targets and upwards of 100 brokers.

It is not only the national government which is pursuing GHG emission reductions. The Tokyo metropolitan government has its own ETS. Unlike the national system, this is a mandatory program targeting buildings and factories with third-party verification required but not using ISO standards. In addition, Japan has laws such as the *Promotion of Global Warming Countermeasures* (1998 revised to 2006) and *Rational Use of Energy* (1979 revised to 2006) addressing the different GHGs and their annual reporting requirements but which do not have monitoring or reporting guidelines or the requirements for independent verification.

China

China's climate change policy, as outlined in *China's National Climate Change Programme* (2007), will importantly look at GHG emissions on an intensity basis (CO₂ emission per unit of GDP) rather than as an absolute national cap. As caps address in part prior emissions, China views emissions per unit of GDP as an appropriate technique to balance economic growth with controlling emissions. Although China is now a leading GHG emitter globally, it is not an UNFCCC Annex I country with obligations

during the 2008-2012 commitment period under the KP. Its stated principles for dealing with climate change include:

- Addressing climate change within the framework of sustainable development
- Following the UNFCCC principle of “common but differentiated responsibilities”
- Placing equal emphasis on both mitigation and adaptation
- Integrating climate change policy with other interrelated (social / economic) policies
- Relying on the advancement and innovation of science and technology
- Participating in international cooperation actively and extensively

Also, due to its immediacy, there is more of a local focus on pollutants like sulfur dioxide that cause acid rain rather than GHG. Besides setting administrative rules for pollution at a national level, various Chinese cities, among them Beijing and Shanghai, are planning ETSs to assist with acid rain pollutants. The national government may include such an exchange in its next five year plan. In addition, the Chicago Climate Exchange is partnering with China National Petroleum Corp. to create the Tianjin Climate Exchange.

South Korea

The Republic of Korea is considering an ETS in 2010, as part of a three-year program, with more than 600 participants, including local governments and retail stores. It will issue emission certificates that can be traded for those who exceed their emission targets. It has been addressing climate change since its first National Action Plan for UNFCCC in 1999. Like China, it plans to address climate change through both mitigation and adaption. Mitigation actions include: restructuring the energy supply and demand, increasing the role of nuclear energy, removal of GHGs by sinks and revitalizing the carbon market. Adaption actions include strengthening capacity and sectoral adaption plans. Korea has also established a national GHG inventory system and a national GHG registry. It has just recently passed *The Basic Law on Low Carbon and Green Growth* (2009), which provides a legal framework for addressing climate change and meeting its self-imposed target of reducing GHG 4% by 2020 (from 2005 levels). Among other provisions, it calls for the introduction of annual GHG reporting and for the introduction under separate law of a cap and trade system.

The following table summarizes the status of key climate change provisions under existing or proposed laws or voluntary schemes for the three Asian Annex I countries (and also uses the EU as a reference). This table will be revised, clarified and further filled out in Part 2 of this article.

Key CC Provisions	AU	NZ	JP	(EU)	CN	KR	ID	IN
Annex I Country or Region	Y	Y	Y	Y	N	N	N	N
ETS Local Unit Designation	AEU	NZU	JPA	EUA				
Nationally-set Reduction Targets	Y	Y	Y	Y				
Obligation Reduction Types:								
- Kyoto Units	Y	Y	Y	Y				
- Other International Units	Y	Y	N	Y				
- Fixed Price Option	Y	Y	N	N				
Assistance (EITI and Transition):								
- Free Allocations	Y	Y	Y	Y				
- Intensity Basis	Y	Y	Y/N	N				
- No Cap	N	Y	Y	N				
- Obligation unit / ton CO2	N	Y	N	N				
- Partial Investment Funding	N	N	Y	N				
Local Units Exportable	Y	N	N	Y				
Auction (for majority of units)	Y	N	N	Y/N				
Sinks Allowed	Y	Y	Y	N				
All Kyoto Sectors/Gases Covered	Y	Y	N	N				

(End of Part 1. Part 2 of this article will appear in the next issue of ALN).

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Climate Change and India

By Akil Hirani



Climate change has been at the centre of mainstream political debate in the weeks and months preceding and following the United Nations Conference on Climate Change at Copenhagen (the “Copenhagen Conference”). Even though the Copenhagen Accord (the “Accord”) was brokered by a small group of countries, and has not been adopted as a document by the Conference of Parties (the “COP”), the Accord represents a major shift in international climate change negotiations. For the first time, the developing countries, including, Brazil, South Africa, India and China (the “BASIC Countries”) have agreed to undertake emissions reduction targets and report mitigation actions. Part I of this article is an introduction to the carbon credit generation and trading scenario in India and Part II discusses the impact of the Accord on India’s position in climate change negotiations and carbon credits trading.

I. Carbon Credits Generation and Trading

The Kyoto Protocol (the “Protocol”) marked the introduction of the carbon credits mechanism. The Protocol which came into force on 16 February 2005, and has been ratified by 184 countries,¹ is perhaps the most comprehensive attempt yet by the international community to tackle, at an inter-governmental level, the complex issue of climate change. The Protocol classifies countries into Annex I (developed) and Non-Annex I (developing) countries, and sets quantitative emissions targets for developed countries, which they can achieve by using market-based mechanisms prescribed under the Protocol. These mechanisms include, emissions trading, clean development mechanism (the “CDM”) and joint implementation.

Generation of Carbon Credits

Under the CDM prescribed by the Protocol, a developed country is allowed to sponsor a project that helps reduce net greenhouse gas emissions in a developing country. The cost of undertaking a project in developing countries (such as India and China) is much lower, and globally, the emissions reduction impact is the same. Under the CDM, a developed country receives credits or Certified Emission Reductions (“CER”) for undertaking a project in a developing country, helping it to meet its emissions reductions targets. The operation of CDM is monitored by the CDM Executive Board, established by the COP, at the global level and by Designated National Authorities at the national level. India has established the National CDM Authority (the “NCDMA”) as the Designated National Authority. Upon completion of CDM projects, the CDM Executive Board issues CERs which can either be traded on commodity exchanges or sold through Emission Reduction Purchase Agreements (“ERPA”).

The CDM has helped India generate significant revenue flows in the recent past and promises a huge potential in the future. Three hundred and ninety-eight (398) out of the total one thousand four

¹ http://unfccc.int/kyoto_protocol/items/2830.php

hundred and fifty-five (1455) projects registered by the CDM Executive Board are from India.² More than twelve-hundred (1200) CDM projects have been approved by the NCDMA, facilitating an investment of more than Rs.150,000 Crores.³

Trading of Carbon Credits

The Government of India's notification dated January 4, 2008⁴ declared carbon credits as tradable commodities, paving the way for futures trading in CERs. Currently, the Multi Commodity Exchange of India, and the National Commodity and Derivative Exchange, allow trading of CERs. Generally, the buyers of CERs are Annex I countries that have to meet their commitment levels under the Protocol. However, as foreign entities are not allowed to trade on commodity exchanges in India, trading of CERs has shifted towards privately concluded contractual agreements such as EPRA. An EPRA provides a documented framework within which CERs are bought, sold, acquired, and transferred from CDM projects. Although there is a model agreement provided by the International Emissions Trading Association, the key terms in an EPRA are generally negotiated between the parties to the transaction.⁵

Criticism of the Protocol

The impact of the Protocol is severely limited due to its rejection by the world's largest emitter of greenhouse gases - the United States of America. The American administration withdrew from the Protocol in 2001⁶ citing the exemption to developing countries (primarily, China and India) from the Protocol's mandatory timetables and targets as justification for its withdrawal. Jurists argue that this justification is fundamentally flawed, and against all the basic principles of climate change negotiations.⁷ It is noteworthy that the United States' per capita green house gas emissions was nineteen (19) times more than India's in 2006.⁸ The per-capita argument put forth by the developing countries has never been accepted by the developed countries and it appears a certain section of the Indian administration is in favour of abandoning the per capita argument, even though there are differences amongst various Indian negotiators.⁹

II. Impact of the Copenhagen Accord

Considering the above stance of the developing and developed nations on climate change, the position of the United States at the Copenhagen Conference was hardly surprising. As emissions from developing countries now contribute a significant percentage of the global emissions, there has always been pressure on India to accept targets on reduction of greenhouse gas emissions. The Protocol,

² <http://www.cdmindia.nic.in/>

³ <http://www.cdmindia.nic.in/>

⁴ *NCDEx launches CER carbon credit futures cf.*, <http://www.rediff.com/money/2008/apr/11cer.htm>

⁵ <http://www.ieta.org/ieta/www/pages/index.php?IdSitePage=593>

⁶ *Bush firm over Kyoto stance*, Mar 29, 2001,

<http://edition.cnn.com/2001/US/03/29/schroeder.bush/index.html>

⁷ Paul Kevin Waterman, *From Kyoto To ANWR: Critiquing The Bush Administration's Withdrawal From The Kyoto Protocol To The Framework Convention On Climate Change*, *Transnational Law and Contemporary Problems* (2003)

⁸ http://unstats.un.org/unsd/environment/air_co2_emissions.htm

⁹ Nitin Sethi, *Jairam bid to rework stand on climate?*, *The Times of India*, Feb 22, 2010; <http://timesofindia.indiatimes.com/india/Jairam-bid-to-rework-stand-on-climate/articleshow/5600961.cms>

which is set to expire in 2012, did not require India to undertake mandatory mitigating actions. However, the developed countries have been pushing hard for placing legally binding targets on India and China due to their high net emissions. The United States has to some extent succeeded in this endeavour by pushing through the Accord.

Key Elements of the Accord

The Accord provides that Non-Annex I parties, including India, are required to submit emissions reduction targets in accordance with Appendix II of the Accord, and to report their green house gas inventories and their mitigation actions.¹⁰ These mitigation actions are subject to measurement, reporting and verification through national communications. The Accord also provides for *“international consultation and analysis under clearly defined guidelines that will ensure that national sovereignty is respected.”* The inclusion of this particular proposal has sparked off a major debate, with the opposition political parties in India alleging that the Government has compromised the sovereignty of the country. In retrospect however, the negotiators on behalf of the BASIC countries should be complimented for successfully defending the inclusion of terms like “scrutiny” and “examination”, which the United States was attempting to bring in to the Accord.¹¹ However, the fact remains that India has undertaken to submit its national emissions targets and its mitigation actions. This is a significant shift from its earlier longstanding position.

Binding Nature of the Accord

The Accord has also been in the news due to the debate regarding its legal status. The Accord is considered to be a political agreement, rather than a legal agreement because it was not adopted by the COP.¹² A small group of countries objected to the Accord, and therefore, it could not be adopted as a COP decision. However, COP had decided to “take note” of the Accord. According to UNFCCC Executive Secretary Yvo de Boer, it *“is a way of recognizing that something is there, but not going so far as to associate yourself with it.”*¹³ Countries, which wish to associate with the Accord can inform the UN Secretariat. India has communicated mitigation actions to the UN Secretariat, and its proposal to cut emissions by 20-25% by 2020. However, India’s communication to the UN Secretariat makes no reference to its association to the Accord.¹⁴ Moreover, India has been constantly emphasizing the non-binding nature of the Accord. Also, at the Delhi Sustainable Development Summit, the Indian Prime Minister clearly stated India’s position on the Accord and clarified that, *“(the) Copenhagen Accord, which we fully support and will take forward, is a catalogue of voluntary commitments and not a set of legal obligations.”*¹⁵

¹⁰ unfccc.int/resource/docs/2009/cop15/eng/l07.pdf

¹¹ Priscilla Jebaraj, *India stops U.S. attempt to sneak “scrutiny” into climate talks*, The Hindu, Feb 28, 2010; <http://beta.thehindu.com/news/national/article123555.ece>

¹² Daniel Bodansky, *The Copenhagen Climate Change Conference: A Post-Mortem*, <http://ssrn.com/abstract=1553167>

¹³ <http://www.wri.org/stories/2009/12/taking-note-copenhagen-accord-what-it-means>

¹⁴ <http://www.usclimatenetwork.org/policy/copenhagen-accord-commitments>

¹⁵ *Copenhagen accord a voluntary commitment, cannot be legalised: PM*, The Times of India, Feb 6, 2010; <http://timesofindia.indiatimes.com/india/Copenhagen-accord-a-voluntary-commitment-cannot-be-legalised-PM/articleshow/5540464.cms>

Fall in Carbon Prices

The Accord has had an adverse impact on carbon prices as no legally binding targets were formulated during the Copenhagen Conference. Further, the European Union did not increase its target of emissions reduction from the current 20%. This led to carbon prices plunging in the EU carbon market by nearly 10% in the aftermath of the Copenhagen Conference.¹⁶ Settlement prices on the European Climate Exchange closed at €12.44 per tonne on 22 December 2009, down from €13.34 on 18 December 2009, the final day of the Copenhagen Conference.¹⁷

Effect on CDM Projects

Additionally, the COP failed to reach any agreement regarding the continuance of the CDM at the Copenhagen Conference. Hence, the future of CERs generated through CDM projects is in jeopardy. The CDM Executive Board is in favour of continuing the CDM process till 2020. However, India and China generated CERs may not be allowed to be carried forward after 2012.¹⁸ This suggestion has been put forward by the least developed countries to persuade investors to move away from India and China, which have managed to corner most of the CDM projects.

Conclusion

With most developed countries and developing countries like India and China pledging mitigation actions under the Accord, the future of carbon trading is likely to improve. Ideally, the COP should push hard for a legally binding agreement being adopted before 2012 as countries and businesses will be more reluctant to invest in green technology without a legally binding agreement between nations. The problem of climate change is no longer a problem concerning only the scientific community; it has already started affecting millions of people around the globe. Hence, political consensus on a legally binding international agreement to cut emissions is crucial.

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¹⁶ Chris Flood, Fiona Harvey, *Carbon prices fall in wake of Copenhagen*, Financial Times; http://www.ft.com/cms/s/0/c1a7aade-ee98-11de-944c-00144feab49a.html?ncllick_check=1

¹⁷ Michelle Thomas, Jonathan Woodward, *Copenhagen: Copenhagen? Unfortunately not*, European Lawyer, 92, 7 (2010)

¹⁸ Lianna Brinded, *UN seeks alternatives to CDM*; <http://www.risk.net/energy-risk/news/1594728/un-seeks-alternatives-cdm>

Financing Renewable Energy in Vietnam - The Basics

By Oliver Massmann, Giles Cooper, Mark Oakley, Phan Thi Mai



For Vietnam to cope with its increasing electricity demand, it will need to add approximately 4,000 megawatts (MW) of generation capacity to the national grid each year. Given the rapid depletion of Vietnam's gas and crude oil reserves (which may be exhausted within 20 to 30 years), pundits predict that by 2020 Vietnam will have to import 100 million metric tons of coal per year to fuel its power plants. It is clear that Vietnam will become dependent on fossil fuel imports unless and until it is able to unlock its rich renewable energy potential.

Although the current electrical capacity generated by renewable energy power plants is negligible, Vietnam is blessed with significant renewable energy resources which could be exploited as an alternative source of energy for the benefit of Vietnam. Although the current legal and regulatory framework for renewable energy is far from perfect, the government, and more particularly the Ministry of Industry and Trade, has adopted a constructive and supportive policy towards renewable energy, which together with the political and financial support from international institutions, has made this sector increasingly attractive for foreign investors.

Abundant Clean Energy Resources

Vietnam has abundant clean energy resources: its panoply of streams, fountains and nine major rivers make it one of the top fourteen countries for water energy resources; its prime coastal areas boast wind potential ranging from 860 – 1,410 kilowatt-hours (kWh) per square meter per year and 800-1,000 kWh per square meter per year respectively; its subequatorial climate offers solar resources with solar radiation from 3 to 4.5 kWh per square meter per day in winter and around 4.5 to 6.5 kWh per square meter per day in summer. In light of the above, some experts even claim that Vietnam could fully meet its electricity demand by renewable energy.

The government has gradually created a legal framework with a view to fostering the development of renewable energy in Vietnam. The new legislation does not impose any restrictions on foreign investors investing in the renewable energy sector and implements a more favorable tariff for renewable energy power plants with installed capacity of up to 30 MW. Pursuant to this legislation, Electric of Vietnam ("EVN"), the state owned electricity company (and only off taker), will purchase the power produced from these plants at approx. US\$ 0.11/kWh during peak hours of dry seasons. Corporate income tax will be levied on the project companies at a rate of 10% and will be applied for a

period of 15 years and in some special circumstances can be extended up to 30 years. All equipment and machinery imported to create fixed assets will be exempt from import duties for solar and wind energy projects. In addition, Clean Development Mechanism (CDM) projects are entitled to price subsidies for each product unit when the selling price is lower than the production cost.

...but Challenges Await...

In spite of Vietnam's undoubted renewable energy potential, foreign investors face significant challenges when committing capital to Vietnam's renewable energy generation capacity including but not limited to: (i) the country's lack of secure legal framework; (ii) protracted negotiations for power purchase agreements with EVN; and (iii) the lack of a feed-in tariff essential for successful renewable energy projects.

A feed-in tariff is a favorable price paid by power companies to purchase all electricity from eligible renewable energy producers in their service area for a period of about 15 to 20 years for each unit of electricity fed into the grid. Payment for these renewable energy plants is normally financed by distributing costs among all consumers and sometimes covered by a national fund for renewable energy. The combination of favorable tariff payments and purchase obligations enables feed-in tariffs to operate in monopoly or oligopoly markets.

At present, Vietnamese law does not provide for any feed-in tariff. Article 31 of the Electricity Law stipulates that generation price (e.g. purchasing price from a power plant) with a definite term shall not exceed the tariff approved by the relevant state authority. EVN still relies on an out-of-date tariff under Decision No. 2014/QĐ-BCN in 2007 with tariffs for hydroelectric plants ranging from US\$ 2.00 to US\$ 5.00 and US\$ 3.50 to US\$ 4.70 for combined cycle gas turbine plants. Although the favorable tariff for small renewable energy plants is implemented, the price of US\$ 0.11/kWh only applies during peak hours of rainy seasons. Power purchased during other times costs US\$ 2.50/kWh.

The principal reason impeding EVN from purchasing power at higher prices is the low electricity retail price. Although from 2010 onwards, the retail price will be based on market price, residential retail prices will still be subject to a fixed tariff issued annually. Meanwhile, a fixed ceiling price is applicable to customers in industry and in the service sector. In the short term, a substantial increase in the retail price is not feasible due to risks that it may lead to social unrest within the country.

EVN's monopoly is one of the main reasons preventing investors from entering the renewable energy sector. EVN is currently the *de facto* single off taker and it controls the power distribution, transmission, load dispatch and retail sectors. It is hard to guarantee fair competition in the electricity generation sector as EVN, while acting as the single purchaser, also has numerous subsidiaries which are power production companies. Complaints have been made by expensive oil-fired gas thermoelectricity or gas turbine plants that the National Load Dispatch Centre or A₀, an EVN subordinate body empowered with load dispatch of the whole national system, does not mobilize electricity from these facilities even when there is a severe shortage of electricity in the grid.

There are a number of administrative burdens which investors must overcome when initiating a power project in Vietnam. A power plant project must comply with the national or provincial master plan of the country. If a project is not listed in either of these master plans, a project will require the approval of the Prime Minister or the Ministry of Industry and Trade. As a further point, it is necessary for foreign investors to sign an in-principle power purchase agreement (PPA) with EVN prior to obtaining an Investment Certificate. PPA negotiations and applications for investment certificates and power operation licenses can last for months or even years.

How Can Investors Survive?

Renewable energy projects will not be feasible in Vietnam until the feed-in tariff is issued. 2010 is expected to be a positive year with the possible adoption of significant renewable energy legislation, notably the national Master Plan on renewable energy and the Feed-in Tariff Decree. The adoption of such documents will reveal the message of the government towards renewable energy development.

At this stage, a clear and feasible strategy on investment form is a pre-requisite for investment in this emerging sector. Project finance ("limited-recourse" finance) is a classical but effective approach for large-scale financing projects. Although no large-scale renewable energy projects have been carried out in Vietnam so far, there have been a number of large-scale financing Build/Own/Transfer (BOT) power projects in the thermal power sector (notably Phu My 2.2 and Phu My 3) which could serve as precedents to the renewable energy sector. In addition, favorable tariff and other financial incentives can be negotiated on a case-by-case basis for BOT projects.

Certified Emissions Reductions (CERs) trading can be taken into consideration as there is still a high demand for CERs from projects with high sustainable value to the local community. Focus should be placed on CDM Projects with low or medium valuation, verification and delivery risks. However, CERs trading should not be treated as a priority financing option as the underdeveloped legal framework on CDM projects and the lack of accurate and official statistics to establish a baseline determining future emissions without a registered project still hinders the validation procedure significantly. It is noted that among 85 projects uploaded for validation in Vietnam, only eight (8) projects have been validated so far and even among these eight projects, only one project (Rang Dong oil field associated gas recovery and utilization) has been granted CERs.

In an emerging market like Vietnam, thorough planning and an in-depth understanding of local laws and licensing procedures are a pre-requisite for successful investments. With renewable energy, there is no exception.

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Intellectual Property Law in Asia – Protection and the Internet

By Thomas Shaw



As the economies of the world continue to become more services oriented, the principal investments of corporations are now weighted towards the development of intangible assets, such as intellectual property, instead of for tangible assets, such as plant and equipment. This is even more so for when companies are primarily selling goods and services over the Internet. As I discussed in the last issue,¹ most Asian countries have now implemented electronic commerce statutes that provide a legal foundation for doing business over the Internet. Using this electronic interaction business model requires protecting intellectual property

developed and deployed to provide e-commerce services.

Most Asian countries have now ratified or acceded to a number of global agreements that protect intellectual property by laying out a minimum set of standards and provides the ability to effectively register their intellectual property in multiple countries simultaneously. But the global agreements acceded to and the domestic implementations vary across the Asia/Pacific region. Corporations doing business electronically in Asia, either in one of the countries in the region or from outside the region, need to understand how to protect their intellectual property in each country and the unique issues related to doing business on the Internet.

The area of intellectual property law includes patents, trade or service marks, copyrights and trade secret laws. Trade or services marks are those insignia that identify the origin of goods (trademarks) or services (service marks), be it a place, person or company (e.g. a manufacturer), to distinguish it from another product or service. Copyrights protect original works of authorship. Patents are new or useful products or processes or improvements thereof. Trade secrets are business knowledge kept confidential to maintain a business competitive advantage (e.g. recipes). As the area of intellectual property law is very large and complex, this article will focus on those areas of intellectual property law that arise most often when using the Internet for business, namely trade and services marks (collectively “trademarks”), copyrights and domain name registrations, as interpreted by global agreements and local Asia statutes applicable to the corporations that own them.

Global Agreements

The World Intellectual Property Organization (WIPO) is an agency of the United Nations created in 1967 to promote the protection of intellectual property “throughout the world through cooperation among states and in collaboration with other international organizations.” Under WIPO, there are conventions and treaties for both trademarks and copyrights. The principal trademark agreements are the *Paris Convention for the Protection of Industrial Property* (1883 last amended 1979), the *Madrid*

¹ Thomas Shaw, *Asia/Pacific e-Commerce Law – 2010 Primer for Corporations*, Asia Law News (newsltr. of the ABA Sec. Intl. Law) Volume 1 Issue 1 (Winter 2010).

Agreement Concerning the International Registration of Marks (1891 last amended 1979) and the *Protocol relating to that Agreement* (1989 last amended 2007), the *Trademark Law Treaty* (1994) and the *Singapore Treaty on the Law of Trademarks* (2006).

For copyright, the principal agreements are the *Berne Convention for the Protection of Literary and Artistic Works* (1886 last amended 1979), the *Rome Convention* (1961), the *WIPO Copyright Treaty* (1996), the *WIPO Performances and Phonograms Treaty* (1996) and the World Trade Organizations' *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) (1994).

Trademarks

For trademarks, the Paris Convention calls for non-discrimination between domestic and foreign mark holders under domestic laws (Article 2 – A2). Indication of trademark registration is not required for protection (A4). A mark can be filed in any signatory country even though it is not in effect in the country of origin (A6). Imitation or translation of well known marks used for identical or similar goods likely to cause confusion must be refused registration or cancelled (A6^{bis}). All marks registered in a country of origin (place of commercial establishment, domicile or nationality) shall be accepted for registration and protected in all other contracting countries except when they infringe on third party rights, are “devoid of any distinctive character,” consist exclusively of designations of the goods’ “kind, quality, quantity, intended purpose, value, place of origin or the time of production,” have become customary in language or trade or are against “morality or public order” or are of a nature to “deceive the public“(A6^{quinqueis}). Service marks must be protected but registration is not mandatory (A6^{sexeis}). Collective marks can be registered and should be protected (A6^{bis}). Remedies include seizure of infringing imported goods (A9).

The Madrid Agreement and the related Protocol allow for protection in all contracting countries by registering a mark internationally with WIPO (A1). the main provisions of the Agreement include: classification of the goods or services to which the mark attaches (A3); protection from the date of registration with WIPO (A4); a registration term of ten years renewable for a further ten years that becomes independent of the national mark after five years (A6); and recording of changes in ownership or contact information or the good or services the mark is attached to (A9). The practical implications for a corporation without offices in each country where it does Internet business is getting protection just by filing an international registration after a domestic registration. But there are caveats. First, the international marks need to be the same as the domestic registration, which may make localization for individual countries difficult. Second, the countries where the international mark is effective are selected when applying, which means additional countries will need to be added as infringements are discovered in non-selected countries. Third, not all countries are members of the Madrid system and so individual country registrations may still be needed.

The Trademark Law Treaty (TLT) was created to streamline the trademark registration, modification and renewal processes. It applies only to visible marks, not holograms, sound or olfactory marks (A2). Contracting states may require that applicants show actual use of the mark among a short list of

demanded requirements (A3). The duration of the initial and renewal terms are to both be ten years (A13). Contracting parties must comply with the Paris Convention (A15).

The Singapore Treaty (SG) was created to further modernize the registration procedures. It applies to any marks (including three-dimensional, holographic, sound, olfactory and other non-traditional marks) that can be registered under domestic law (A2). It allows the use of electronic communications (A8) and provides for relief when failing to meet required deadlines (A14). There are new procedures for the recording of trademark licenses (A17). It allows for reservations for special kinds of marks (e.g. defensive) (A29).

Copyrights

For copyrights, the Berne Convention protects literary, scientific and artistic works, including derivative works and collections, in all contracting countries (A1). Authors, foreign and domestic, should be treated the same under domestic law (A5). Beyond economic rights, authors have moral rights to claim authorship and prevent modifications / distortions of the work (A6^{bis}). The basic term of protection is the life of the author plus 50 years (A7). The economic rights include: the rights to translate, reproduce in another form, adapt and publicly perform / recite, with exceptions for attributed quotations, news reporting and teaching (A8-14). The principal remedy is confiscation (A16).

The WIPO Copyright Treaty (WCT) extends protection to the digital realm, by including computer programs (A4) and databases (A5) as literary works. Additional economic rights include the right of distribution (A6), rental (A7) and communications to the public (A8). Countries are to provide protection against the circumvention of technological measures that authors use to protect their economic rights (A11) or those who remove or alter electronic rights management information (A12). The Rome Convention covers the rights of performers, producers of audio-only recordings (“phonograms”) and broadcasters and the WIPO Performances Treaty (WPPT) extends this to the digital realm, as the WIPO Copyright Treaty does for copyrights.

Asia/Pacific Trademark and Copyright Laws

In Asia, among the twelve largest economies, there is a consistent trend of ascension to or ratification of the oldest conventions, Paris (trademarks) and Berne (copyrights). But there is no consensus on the other conventions and treaties, as the following table shows. Some of this may be due to the recent availability of the convention or treaty, such as the Singapore treaty which was available for ratification only recently. Even in countries with a common legal heritage such as Australia and New Zealand, there is a wide disparity in approval of these conventions and treaties, as Australia has approved all of them and New Zealand only the two oldest. The following tables describes the ratifications or ascensions by these twelve Asia/Pacific countries. Notes: Accession to the WPPT is in essence a replacement for accession to the Rome convention. For “*” countries, the TRIPS agreement contains some of the WCT provisions (e.g. programs).

Country	Trademark				Copyright			
	Paris	Madrid	TLT	SG	Berne	Rome	WCT	WPPT
Australia	√	√	√	√	√	√	√	√
China	√	√			√		√	√
India	√				√		*	
Indonesia	√		√		√		√	√
Japan	√	√	√		√	√	√	√
Malaysia	√				√		*	
New Zealand	√				√		*	
Philippines	√				√	√	√	√
Korea (Republic)	√	√	√		√	√	√	√
Singapore	√	√		√	√		√	√
Thailand	√				√		*	
Vietnam	√	√			√	√	*	
U. S.	√	√	√	√	√		√	√

Beyond their concurrence to global conventions and treaties are the domestic statutes that Asian countries have implemented for trademarks and copyrights. For those countries that have ratified the above agreements, these statutes have to at least include those minimum provisions but may go further. The following lists the statutes in each country, then reviews the key provisions of domestic statutes of three countries (Australia, China and India) and finally summarizes the local law provisions beyond those required by the global conventions.

Country	Trademark Statute (original dates)	Copyright Statute (original dates)
Australia	Trade Marks Act (1995)	Copyright Act (1968)
China	Trademark Law (1982)	Copyright Law (1990)
Hong Kong	Trade Marks Ordinance (2003)	Copyright (1997)
India	Trade Marks Act (1999)	Copyright Act (1957)
Indonesia	Marks Law (2001)	Copyright Law (2002)
Japan	Trademark Law (1959)	Copyright Law (1970)
(South) Korea	Marks Law (1949)	Copyright Act (1989)
Malaysia	Trade Marks Act (1976)	Copyright Act (1987)
New Zealand	Marks Act (2002)	Copyright Act (1994)
Philippines	Intellectual Property Code (1997)	
Singapore	Marks Act (1998)	Copyright Act (1987)
Taiwan	Trademark Law (2003)	Copyright Law (2002)
Thailand	Trademarks Act (1991)	Copyright Act (1994)
Vietnam	Law on Intellectual Property (2005)	
U.S.	Lanham Act (1946); ACPA (1999)	Copyright Act (1976); DMCA (1998)

Australia

The Trade Marks Act provides the registered owner the exclusive right to use and to remedy infringement of a non-generic trademark from the date of registration. A trademark is any combination of “letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent” that is inherently adapted to distinguish and be affixed to its goods or services from others and able to be represented graphically. Distinctiveness can be acquired by prior use. To be registered, a trademark must not cause a likelihood of confusion (substantially identical or deceptively similar) with an existing trademark, involve a scandalous matter or be contrary to law. A registration can be opposed on specified grounds, such as false geographic information or lack of intent to use. Infringement occurs when someone uses a trademark that is “substantially identical with, or deceptively similar to” a trademark for identical or similar goods as so classified during registration. Collective, certification and defensive trademarks are available. Relief includes damages, accounting for profits, injunctions and seizure. The initial term is 10 years.

The Copyright Act provides for both economic and moral rights for authors. Protected are literary (include computer programs and databases), artistic, musical and dramatic works, sound recordings, films, radio and television broadcasts. Copyright protects the original expression of ideas and information, not the idea and information themselves. Copyrights do not require registration or publication but are protected automatically “from the time an original work is created.” Works are owned by the author, unless they are a work for hire (e.g. during employment). The economic rights for works are to: reproduce, publish, communicate publicly (broadcast or online), perform publicly, to adapt and to commercially rent (the last three don’t apply to artistic works). Infringement occurs when a substantial part of the work has been reproduced without permission, when technical prevention measures are circumvented or when electronic rights management information is removed. Exceptions for “fair dealing” include research/study (if less than 10% of the content of a book), reporting of news or review or for computer backup and filming/photographing/ drawing works in public places. Relief includes damages, accounting for profits, injunctions and seizure. The term is the author’s life plus 70 years.

China

The Trademark Law allows for exclusive use of trademarks, service marks, collective marks and certification marks. This can use any visible combination of “words, devices, letters, numerals, three-dimensional symbols or combination of colors” that is so distinctive as to be “distinguishable” and not generic. Distinctiveness can be acquired through use. Imitations or translations of well-known marks are not allowed even for dissimilar goods. Trademarks are not allowed for misleading geographical information. Trademark owners are responsible for the quality of the respective goods. Foreign enterprises can apply based on bilateral or multilateral agreements or based on reciprocity. An application may be opposed. Relief includes damages, injunctions and seizure of the goods and related instrumentalities. The initial term is 10 years.

The Copyright Law protects the works of both Chinese and foreigners, for works of literature, art, natural science, social science, engineering technology in written or oral form, musical, dramatic, *quyi*, choreographic and acrobatic works, works of fine art and architecture, photographic, cinematographic and graphic works and computer software. This does not include laws, news or formulas. The rights include publication, authorship, alteration and integrity (moral rights), reproduction, distribution, rental, exhibition, performance, presentation, broadcast, communication, cinematography, adaption, translation and compilation. The copyright belongs to the author unless it is a work for hire, in which case the author may only retain the moral rights. Exceptions include private study or research, news reporting and library or archive copies. It is also a violation to knowingly circumvent technological copy protection measures or remove/alter electronic rights management information. Relief includes damages, injunctions, seizures of illicit copies and tools used to make such copies and fines. The term is author's lifetime plus 50 years.

India

The Trade Marks Act requires the trademark be distinctive when registering. It does not allow trademarks that have become customary, are obscene, contains certain names or emblems or hurt religious susceptibilities. Combinations of colors are allowed but not certain types of shapes. Trademarks that are identical or similar to well-known trademarks are not allowed even for dissimilar goods or services. Certification and collective trademarks are allowed. Registration provides for the exclusive right to use the trademark in relation to the goods or services specified and to seek relief from infringement but relief is not available for unregistered trademarks. There are special provisions for textiles. Relief includes damages, accounting for profits, injunctions and seizure. The initial term is 10 years.

The Copyright Act protects original literary, dramatic, musical and artistic works, cinematograph films and sound recordings. The economic rights include those to reproduce, issue copies to the public, publicly perform, adapt, translate and rent. Moral rights also exist. There are exceptions for private research, criticism, computer backups, news reporting, recitations and educational uses. Authors own the copyright, except on works for hire. The term is author's life plus 60 years.

Asia/Pacific Statutory Provisions

Each of the Asia/Pacific countries has unique provisions in their domestic trademark and copyright statutes, especially for procedural rules but also for the more substantive parts. The following table highlights the more common substantive provisions beyond those mandated by the global conventions and treaties. The table is indicative only but provides corporations a high-level understating of some of these substantive differences that exist among the domestic statutes in the region. In addition to the local statutes, there are typically clarifying rules and regulations issued by the local regulatory bodies and interpretations from cases decided by local courts that impact the legal analysis (as such the use of local legal counsel is advised). In addition, trademarks may be impacted by provisions in other domestic laws. For example, a number of countries in the region (e.g. Australia, China, Japan, New Zealand and South Korea) have unfair competition statutes. These laws usually address areas such as

passing off, trade secret protection and trade names. But they may also have trademark-related provisions. For example, in Japan the Unfair Competition Protection Act (1993) prohibits, among other things, use of famous trademarks without the need for consumer confusion (as is typical in providing for trademark dilution). In South Korea, the Unfair Competition Prevention and Trade Secret Protection Act (1961 later amended) has similar provisions that address trademark dilution.

For trademarks, differences are found in whether a country allows all non-traditional marks (including smell or sound), requires actual use (as opposed to just intended use), bars use of a mark upon goods that are not identical or similar, allows distinctiveness to be acquired (as opposed to being only inherent), whether defensive trademarks are allowed (or were allowed in the past) and potentially the length of the initial term of the trademark registrations. There are also local rejection factors in almost every country, often related to marks that could be interpreted as impinging country founders/rulers or religions or minorities. For copyrights, differences exist in what types of works are locally recognized, whether programs and databases are covered, whether technical measures and electronics rights management safeguards are protected and for the copyright term. Finally, there are differing local considerations for what are allowable “fair use” exceptions to infringement.

Trademark Provisions	AU	CN	HK	IN	ID	JP	KR	MY	NZ	PH	SG	TH	TW	VN
Non-traditional Signs	√		√						√					
Actual Use Required						√				√				
Dissimilar Goods		√	√	√	√			√	√	√	√	√		√
Acquire Distinctiveness	√	√	√	√				Y	√	√	√	√		√
Defensive Trademarks	√		√			√		Y	√				√	
Term (initial)	10	10	10	10	10	10	10	10	10	10	10	10	10	10
Copyright Provisions	AU	CN	HK	IN	ID	JP	KR	MY	NZ	PH	SG	TH	TW	VN
Special Local Works		√			Y									
Computer Programs	√	√	√	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Databases	√		√	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Technical Measures	√	Y	√		Y	Y	Y	Y	Y		Y		Y	Y
Elect. Rights Mngt.	√	Y	√		Y	Y	Y	Y			Y		Y	
Term (author's life plus)	70	50	50	60	50	50	50	50	50	50	50	50	50	50

As shown by the distribution in the table, Asia/Pacific domestic statutes for trademarks and copyrights are sufficiently similar in major substantive provisions. They differ primarily in procedural aspects, for inclusions and exceptions based on local culture and tradition and for certain rights following on from the global conventions and treaties have been acceded to and reflected in domestic statutes. Finally, besides accession or ratification to the global conventions and treaties and domestic statutes, there are bilateral treaties between countries that impact intellectual property rights. For example, the Australia/U.S. Free Trade Agreement (2004) contains extensive obligations for protection and enforcement of copyright. In August 2009, Japan and China signed a Memorandum of Understanding for cooperation and protection of intellectual property rights, especially on the Internet.

Trademarks and Copyrights on the Internet

When doing business on the Internet, corporations will utilize their trademarks and copyrights to market and deliver services. The dispersed and anonymous nature of Internet sites and customers, the manner of intellectual property registration and the ease of duplication of digital information can lead to a number of issues not faced elsewhere. The issues corporations may encounter doing business on the Internet, some of which are increasingly important and others that are becoming less so, include:

- Domain name cyber-squatting
- Trademark infringement / dilution
 - Domain names
 - Website meta-tags
 - Search engine advertising keywords
 - Auction sites
 - Virtual worlds
 - Social networks
- Copyright infringement
 - Linking / framing
 - Lack of copyright registration / notice
 - Blogging / tweets / other visible mediums

Domain Names

Domain names are sometimes registered not to pursue business but merely as a means of extracting payment from those with legitimate business reasons for the domain name such as having a trademark, so called “cyber-squatting.” Because the registration agreement requires submission to ICANN (Internet Corporation for Assigned Names and Numbers) processes, trademark-owning corporations can pursue cyber-squatters under the Uniform Dispute Resolution Policy (UDRP). To be successful, the corporation must prove the domain name is identical or confusingly similar to the registered trademark, the alleged cyber-squatter has no rights or legitimate interests in the domain name and it was registered in bad faith. The remedy is the transfer or cancellation of the domain name. This process can be used by corporations in Asia against cyber-squatters located anywhere. For example, in October 2009, WIPO ruled for an Indian bank Kotak Mahindra Bank, who had six years previously trademarked “Kotak.”² The domain name 'kotakbank.com' had been registered by a South Korean individual, whom WIPO's Arbitration and Mediation Centre found had registered the domain name in bad faith, chosen for its potential commercial value to mislead users on the Internet familiar with the Kotak mark. In addition, Asian countries use local domain registrar practices and in Vietnam, Korea and Japan, cyber-squatting by statute is an unfair business practice. In addition to these reactive measures, companies must also take appropriate preventive measures, such as the registration of all similar names, all top level domains and possible variations including new non-Latin character domains plus regularly monitor Internet sites and the global registration process for possible infringement.

² *Kotak Mahindra Bank v. Y. G. Jo*, WIPO Arbitration and Mediation Centre, 2009.

Trademark

Trademark infringement on the Internet can occur in many forms. Domain names can infringe a trademark by being identical or confusingly similar or where statutes allow, diluting the power of famous marks. Similarly, competitor trademarks displayed on a commercial website can cause a likelihood of confusion or dilute famous marks. Another possible infringement comes from non-visible use of a competitor's trademark on a website in the form of meta-tags. This is done to increase a company's Internet ranking on the displayed search results. Litigated cases in the U.S. have turned on whether: the meta-tags were being used in commerce, "Initial interest" confusion of users (reaching a website different than they were searching for) would constitute a trademark violation and there is a nominative use exception (selling without implying endorsement).³ This may no longer be of such importance, due to the changing factors used by search engines to rank websites.

Areas of more current concern are trademark infringement in social networks, auction sites, virtual worlds and search engine keywords. Trademarks may end up on social networks such as on a Facebook Wall, which is an issue for corporations both for its own trademarks that are infringed by others using identical or confusingly similar marks to sell their products on a social network and for any infringing behavior by the corporation's own employees using others' trademarks on such sites. Similarly, online auctions sites such as eBay have been pursued for auctions of counterfeit goods. The results of European and US courts in significant cases were in opposition, with a French court stating that eBay was liable for counterfeits auctioned on its site⁴ while the US court ruling that eBay had done enough and it was up to the trademark holders to police their own trademarks.⁵ In virtual worlds, the buying and selling of virtual goods with real world trademarks can cause real world infringement, as real money can be made from these sales. Corporations can choose to bring suit, as one recently did⁶ or like many, have now started to create their own virtual presences in virtual worlds, such as sellers on Second Life, so that they can stay in control of the trademark use.

The biggest area of trademark litigation may be around purchase of Internet search terms. When purchasing search keywords, for example from a Google, Yahoo! or Baidu (China), it is possible under certain conditions to purchase search terms that are the trademarks of competitors and to use them to trigger their own ads in the "Sponsored Links" displayed on a search result screen. The trademarks may even appear in the text of the displayed ad. Because Google as of mid-2009 allows, with restrictions, these trademark keyword purchases to occur without follow-up investigations in most countries in the world (exempted in Asia were China, South Korea, New Zealand, Australia, Taiwan and Macau), corporations in Asia must now understand the implications for their trademarks. Courts across the region are being asked to analyze whether they believe that this policy violates their trademark laws. Elsewhere, courts in Europe and the US so far have not found these purchased

³ *Playboy Enterprises, Inc. v. Terri Welles*, Case No. 98-CV-0413-K (IFS) (S.D. Cal. 1999)

⁴ *LVMH v. eBay* (Paris Commercial Court) 2008.

⁵ *Tiffany (NJ) Inc. v. eBay, Inc.*, No. 04-cv-04607 (S.D.N.Y., July 14, 2008).

⁶ *Taser International v. Linden Lab*, 2:09-cv-00811-ROS (Az. D.C. 2009)

keywords to be trademark violations, but for varying reasons. In the US, using the same analysis as above, the likelihood of confusion may turn on whether the competitor's trademark appears in the sponsored link ad or not.⁷ In Europe, the latest rulings by the Advocate General to the European Court of Justice, on appeal from France's highest appeals court found that the selling of the trademarks as keywords would not cause a likelihood of confusion and that actual evidence of damage to trademarks caused by the advertisements may be required for recovery.⁸ In September 2009, an Indian court granted a temporary injunction against Google to prevent the use of a local corporation's trademarks as keyword search terms for its competitors.⁹

Copyright

Copyright infringement is typically shown by possession beyond what would be fair use (or another exception). This may be found not when a company's website includes a link to another website but could be found if the content of another website is framed on a corporation's own website. Copyright registration and notice to website users, while not required to protect a copyright, may be required to take advantage of statutory provisions protecting copyrighted material on websites. In the use of blogs, tweets or other visible mediums where user-generated content is entered, copyrights can be violated by the placing of copyrighted material of others into a corporate-sponsored site or by the insertion of the corporation's own copyrighted materials in the websites of another.

In their terms of use, corporate websites should make it clear what website material can be copied and if other sites can frame some part or all of its website. In employee acceptable use policies, the same considerations must be covered for copyrighted materials use on a corporation's websites. In Asia, there are numerous cases of copyright violations on the Internet but the outcomes have become more predictable in recent years. For example, in China last year, one Beijing company sued another who had posted a version of its new movie onto the defendant's website and subsequently won damages and deletion of the movie.¹⁰ In December 2009, the translation of Dan Brown's latest book was illegally posted online by members of an English to Chinese translation team but it was deleted soon after request from the local publisher.¹¹

Conclusion

Multi-country intellectual property law is complex and doing business on the Internet raises additional issues. Companies doing business in Asia must be aware of how they can protect their intellectual property while taking advantage of the possibilities of the Internet. Fortunately, in recent years there has been a move, under the guise of U.N. treaties and conventions, to not only promote common provisions in domestic statutes covering trademarks and copyrights but to address the new technologies of the digital age that aid in both the protection and the infringement of trademarks and

⁷ *Gov't. Employees Ins. Co. v. Google, Inc.*, 2005 WL 1903128 (E.D. Va. 2005).

⁸ *Google France, Google Inc. v Louis Vuitton Malletier* Cases 236/08, 237/08, 238/08 (European Court of Justice) 2009.

⁹ *Consim Info Pvt Ltd. v. Google India* (Madras High Court) 2009.

¹⁰ *NuCom Online (Beijing) v. Toudu.com*, (Shanghai No. 1 Secondary People's Court) 2008.

¹¹ "Best-seller yanked from Web" China Daily, 12-01-2009.

copyrights. The ability to register trademarks internationally and the recognition of copyrights without registration in most every country has made it much easier to protect these valuable corporate assets. But Internet use of intellectual property requires constant diligence, as corporations must not only watch for violations of their trademarks and copyrights by an increasing number of users but must also raise awareness among and monitor the activities of their own employees to ensure there are no violations of the trademarks and copyrights of others. Legal protections plus constant vigilance plus current knowledge of any statutory changes provides corporations in Asia with the necessary foundation on which to maintain the value of their investments in intellectual property used on the Internet.

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Committee Co-Chairs' / Co-Editors' Messages

By William A. Herbert and John Wilson, Co-Editors

Greetings, Ayubowan and Vanakkam.

This is the Spring 2010 issue of the Asia/Pacific Committee's Asia Law News (**ALN**).

We hope you enjoyed the Winter issue of **ALN**. In the co-editors' message, we touched upon the topic of disasters and had a picture of the Maldivian Government staging a media event – a meeting of its Cabinet underwater. This was a dramatic way of getting the point of view of the Maldives across to the world about the potential consequences of climate change. While the scientific debate rages on, as promised in our Winter issue message, this Spring issue offers you, our readers, articles on climate change law generally and on some specific countries in the Asia/Pacific region.

The newsletter kicks off with a two-part article by Thomas Shaw whom we have invited to be the guest editor for these next two issues of **ALN**. Mr. Shaw, who edits several other ABA newsletters, brings his editorial as well as legal expertise to our efforts to grow this publication and our committee.

In part one of his Asian climate change law article, Mr. Shaw examines the history up to date of the international legal framework governing climate change. He then summarises the legal position in various countries in the Asia/Pacific region. The article is an excellent introduction and primer to the topic and we thank Thomas Shaw for his hard work and support.

The second part of this article will cover additional topics on climate change law in Asia, including what regional and private organizations and individual countries are doing statutorily and otherwise to respond to this very important issue. This will appear in the Summer issue of **ALN**.

In addition, our committee is organizing a brown bag teleconference on the topic of climate change law in Asia, so we hope our readers find our special focus on these issues both relevant and useful.

Following on from this lead article, we have an article from Akil Hirani, managing partner of Majmudar & Co., International Lawyers in Bombay, India. His article analyses the Indian legal framework for climate change and the current thinking inside India and related actions being taken. This provides a wonderful insight into the perspectives of one of the leading developing countries on climate change.

We also have an article by four lawyers from the Vietnam offices of Duane Morris on financing renewable energy in Vietnam. Clearly, if carbon dioxide emissions are to be reduced globally, one of the important aspects of this will be countries relying less on fossil fuel for their energy requirements and exploiting renewable energy opportunities.

Variety is the spice of life, as the clichéd saying goes, and we also offer our readers an article on Intellectual property laws in the Asia/Pacific region, authored by Thomas Shaw.

Let us know if you enjoy the topics that we are covering and the new format for this issue, which we are deploying to make the newsletter more readable and easy to use.

By Mohammad A. Syed and Albert Yu Chang, Co-Chairs

Our committee is in the middle of several initiatives. One initiative is a plan to grow the committee membership, both in size and in participation. To do so, we are planning several outreach projects, as we will further communicate to you in the coming weeks and months.

A second initiative is to increase communication on legal developments in Asia, at both the regional and national levels. This newsletter is part of that effort and so are the brown bag programs. We just completed our first such program, "Doing Business with Japan, Part 1 – Outbound." There were participants from the U.S. and Asia for this program moderated by Robert Brown and featuring panelists Sara Sandford and William Herbert. Our upcoming programs are shown below. We would welcome your suggestions on additional topics to discuss.

Upcoming Brown Bag Programs (Teleconferences)

Doing Business with Japan Part II - Inbound

Date: TBD

Climate Change Law in Asia

Date: TBD

A third initiative is our committee's participation in ABA programs, including the following.

2010 Spring Meeting, New York, NY

[Legal Process Outsourcing – A Reality Check: \[How\] Has It Affected Your Practice?](#)

April 14, 2010 9:00 – 10:30 AM (U.S. EDT)

[Legal Empowerment of the Poor: The UN's Newest Call to Action](#)

April 14, 2010 11:00 – 12:30 PM (U.S. EDT)

[Conflicts Between Sharia and International Human Rights Law and Norms Regarding Sexual Orientation and Gender Identity](#)

April 15, 2010 09:00 – 10:30 AM (U.S. EDT)

These are the initiatives that we started but we would welcome suggestions from the committee members on any other projects you believe would enhance the value of the committee to you. We also welcome your participation in any of the projects. The objectives of our committee are as follows:

To bring together attorneys and other legal professionals who have a common interest in affairs of the Asia / Pacific region to: (i) develop awareness of common issues; (ii) serve as a sounding board for legal issues in the region; (iii) educate one another about regional legal issues; (iv) serve as a forum for attorneys who are interested in the region to meet and work together; and (v) sponsor programs on key legal issues affecting the region.

We would appreciate suggestions on activities that may help to meet these objectives. Or just to reach out to ask questions or find out how to participate. Feel free to contact either of us at any time.