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CONFERENCE PAPER

CLIMATE CHANGE: A U.S. PERSPECTIVE*

*Daniel Farber***

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ABSTRACT

Although the United States has not yet passed national legislation to reduce greenhouse gas emissions, there have been other important legal developments. The federal courts have directed the government to take action regarding climate change under existing laws, and state governments have made aggressive efforts to limit emissions. The federal government has begun to plan for adapting to climate change,

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and it has returned to the international bargaining table in order to play a constructive role in climate negotiations. Although the lack of national legislation is unfortunate, the American system of separation of powers allows other legal action to be taken despite the paralysis in Congress.

In comparison to Europe, the United States has been a notorious laggard in the area of climate change. The U.S. never ratified the Kyoto Protocol. For most of the first decade of this century, the White House was occupied by George W. Bush, a fervent opponent of action to limit greenhouse gas emissions. Even when the White House changed hands, the situation remained frustrating because of the inability of the new administration to pass climate change legislation through Congress.

Nevertheless, it would be a mistake to assume that U.S. law has ignored the issue of climate change. The American constitutional system diffuses power between Congress, the executive branch, the federal courts, and state government. When one or more of those institutions fails to act, others may step in to fill the breach. That is exactly what has happened with climate change. Due to the vigorous efforts of federal courts and of many state governments, important and constructive steps have been taken to address climate change.

The first part of this article discusses the activities of the federal courts concerning climate change and shows how they have pressed the federal executive branch to take action. The second part of the article discusses the role that state governments have played in creating climate policy. That section also introduces some of the constitutional issues regarding federalism that may restrict state regulation. Finally, the article discusses the evolving U.S. efforts climate change adaptation plans, and the evolving U.S. role in international, climate negotiations, particularly in relation to China. Because the U.S. and China are the two largest emitters, it is crucial to understand the differences between their positions.

I. THE FEDERAL COURTS

During the George W. Bush Administration, Congress and the executive branch took little constructive action regarding climate change. Nevertheless, the federal courts began to exert pressure for stronger federal action under existing environmental laws.

The United States Supreme Court decided its first case about climate change in 2007, *in Massachusetts vs. EPA*. The Court's ruling in this case was a major step forward. The federal air pollution law, the Clean Air Act, requires the government to set limits on any air pollutant from cars that may endanger human health or welfare. The Environmental Protection Agency (EPA) is the federal agency responsible for enforcing federal environmental laws, including the Clean Air Act. The Bush Administration argued that the federal government had no authority to regulate greenhouse gases under the statute, because greenhouse gases were not "pollutants" within the meaning of this statute. Moreover, the Administration said, even if it did have authority, it did not consider it wise to exercise that jurisdiction because doing so might undermine the effort to negotiate greenhouse gas reduction internationally with countries such as China. The Administration also argued that

the regulations might conflict with federal rules about fuel efficiency for cars. The state of Massachusetts and several other plaintiffs sued to force the government to regulate car emissions. By a vote of five to four, the Court rejected the Administration's arguments and held that the Environmental Protection Agency was required to set limits on greenhouse gas emissions from cars.

Before the Court could even consider these arguments, it first had to determine that the plaintiffs had standing to bring the case. In order to bring a lawsuit in federal court, a plaintiff must establish standing by demonstrating that the allegedly illegal action impacts the plaintiffs' concrete interests. Under U.S. law, standing has three requirements: (1) the plaintiffs must suffer an actual injury, (2) the injury must be caused by the defendant, and (3) the courts must be able to provide a remedy.

The first element is injury in fact. As to this element, the Court said that "[t]he harms associated with climate change are serious and well recognized." Indeed, a report that the EPA had praised as objective "identifies a number of environmental changes that have already inflicted significant harms, including 'the global retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of rivers and lakes, [and] the accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years ..."[1]

The Court noted that these effects posed a particular threat to the state of Massachusetts' interests: "If sea levels continue to rise as predicted, one Massachusetts official believes that a significant fraction of coastal property will be either permanently lost through inundation or temporarily lost through periodic storm surge and flooding events."[2] "Remediation costs alone, petitioners allege, could run well into the hundreds of millions of dollars."[3]

As to the second element, causation, EPA did "not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming."[4] EPA argument was that since automobiles are only one source of greenhouse gases and because the United States as a whole accounts for only a portion of these gases globally, the EPA regulation that the plaintiffs sought would not have a significant impact on global warming. The Court rejected this "erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum.[5]

Instead, the Court stressed that "[a]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop" but "whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed."[6] Moreover, the Court recognized that this particular first step would be far from insignificant: "Considering just emissions from the transportation sector, which represent less than one-third of this country's total carbon dioxide emissions, the United States would still rank as the third-largest emitter of carbon dioxide in the world,

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[1] Massachusetts v. EPA, 549 U.S. 497, 521 (2007).
[2] *Id*., at 523.
[3] *Id.*
[4] *Id.*
[5] *Id*., at 524.
[6] *Id.*

outpaced only by the European Union and China."[7]

Finally, the Court concluded that a judicial remedy would be meaningful even though the amount of emissions involved was small compared to total global emissions. "While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it."[8] As the Court noted, the government had strongly supported voluntary efforts to reduce greenhouse gases, and it would "presumably not bother with such efforts if it thought emissions reductions would have no discernable impact on future global warming."[9]

Summarizing the Court's holding on standing, Justice Stevens said that the plaintiffs had standing because the sea level rise "has already harmed and will continue to harm Massachusetts," the "risk of catastrophic harm" was remote but real, and the risk "would be reduced to some extent if petitioners received the relief they seek."[10]

On the merits, the Court then held that EPA had misapplied the Clean Air Act in several critical respects. EPA had argued that CO2 is not a "pollutant" within the meaning of the Clean Air Act. The Court found this view incompatible with the plain language of the statute. The Court also found that EPA had considered impermissible extraneous factors in making its determination.[11] The Court remanded to the EPA, ordering them to further consider their obligations under the correct statutory standards. The Court directed the EPA to make a determination of whether greenhouse gases from cars were a threat to human health or welfare.

In response to the Supreme Court's ruling, the EPA ultimately issued a finding that greenhouse gases endanger human health and safety.[12] EPA has begun developing regulations to reduce greenhouse gases based on this finding.[13] Designing these regulations presents difficulties, because the provisions of the Clean Air Act concerning emissions from factories and electrical generators do not fit very well with the kinds of controls needed for greenhouse gases. The statute is primarily designed to deal with local pollution problems, rather than global ones. However, EPA has been trying to design rules that are reasonably suitable and do not violate the statute. If Congress fails to take effective action, EPA may well end up creating the primary mechanism for controlling greenhouse emissions through this administrative process. Potentially, these regulations could provide the basis for a comprehensive federal regulation of greenhouse gas emissions. Obviously, it would be preferable for Congress to create a new legislative framework for greenhouse gases. Given political realities, however, EPA action may be the best available option.

Since *Massachusetts v. EPA,* several lower courts have had occasion to consider

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[7] *Id.,* at 524-25.
[8] *Id.,* at 525.
[9] *Id., at 526.*
[10] *Id.*
[11] *Id.,* at 533-34.
[12] *See* Environmental Protection Agency, Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act (Oct. 26, 2010), *available at* http://www.epa.gov/climatechange/endangerment.html.
[13] The proposed regulations are described on the EPA website. Environmental Protection Agency, Climate Change-Regulatory Initiatives (Oct 26, 2010), *available at* http://www.epa.gov/climatechange/initiatives/index.html.

standing in climate litigation. Some judges have applied climate standing generously.[14] On the other hand, the D.C. Circuit restricted *Massachusetts v. EPA* to its "unique circumstances."[15] The Supreme Court has continued its wobbling course on standing more generally, with the most recent development a restrictive opinion written by Justice Scalia in *Summers v. Earth Island Institute.*[16]

When deciding climate litigation on the merits, some lower court decisions have ruled in favor of innovative attempts to force reductions in greenhouse gas emissions. One federal appeals court has upheld the right to bring a lawsuit under tort law against emitters of greenhouse gases.[17] In another notable case, the court held that impacts on climate change are a sufficient basis to require the creation of an environmental impact statement before a decision can be made.[18]

II. ACTIONS BY THE STATE GOVERNMENTS

Perhaps surprisingly,[19] state governments have moved much more aggressively than the federal government to address climate change.[20] By 2006, every state had taken steps of some kind to address climate change.[21] California is in the lead with legislation aimed at reducing greenhouse emissions from automobiles and electrical generators, as well as an ambitious mandate to reduce emissions to 1990 levels by the end of the next decade.[22] A brief description of California's regulatory effort is useful to understand what can be achieved at the local level.

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[14] *See* Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 332, 344 (2d Cir. 2009) (extending standing both to state governments and to private land trusts); Comer v. Murphy Oil USA, 585 F.3d 855, 863-66 (5th Cir. 2009) (extending standing to private parties in nuisance case) (later vacated because the Fifth Circuit granted rehearing en banc but then lacked a quorum).

[15] Center for Biological Diversity v. U.S. Dep't of the Interior, 563 F.3d 466, 476 (D.C. Cir. 2009).

[16] 129 S. Ct. 1142 (2009) (denying standing because the plaintiffs could not identify a particular individual who would be affected by any specific future sale, although it was virtually certain that some member of the organization would be affected by some future sale).

[17] Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 332, 344 (2d Cir. 2009).

[18] Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 508 F.3d 508 (9th Cir. 2007).

[19] For speculation about the causes of this state-level response to climate change, see J.R. DeShazo & Jody Freeman, *Timing and Form* of *Federal Regulation: The Case of Climate Change,* 155 U. PA. L. REV. 1499, 1516-38 (2007); Kirsten H. Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?,* 38 URB. LAW. 1015 (2006).

[20] A survey of state efforts can be found in Pace Law School Center for Environmental Legal Studies, *The State Responses to Climate Change: 50-State Survey, in* GLOBAL CLIMATE CHANGE AND U.S. LAW 371 (Michael B. Gerrard ed., 2007) [hereinafter Pace Center]. State efforts are also described in Barry Rabe, *Race to the Top: The Expanding Role of U.S. State Renewable Portfolio Standards,* 7 SUSTAINABLE DEV. L. & POL'Y 10 (2007); Eleanor Stein, *Regional Initiatives to Reduce Greenhouse Gas Emissions, in* GLOBAL CLIMATE CHANGE AND U.S. LAW 315 (Michael B. Gerrard ed., 2007); David Hodas, *State Initiatives, in* GLOBAL CLIMATE CHANGE AND U.S. LAW 343 (Michael B. Gerrard ed., 2007).

[21] Hodas, *supra* note 20, at 343.

[22] Pace Center, *supra* note 20, at 375.

A. CALIFORNIA AS AN EXAMPLE

In California, efforts focusing specifically on climate change can be traced back to 1988, when a law required the first inventory of in-state greenhouse gas emissions.[23] Since then, California has continued to pursue a wide range of policies to reduce greenhouse gas emissions. In 2006, Governor Schwarzenegger signed into law the capstone of the state's climate policy, the *California Global Warming Solutions Act of 2006,* or A.B. 32.[24]

A.B. 32 sets a binding greenhouse gas emissions target, requiring California to reduce emissions to the 1990 level by 2020 and to make deeper reductions by 2050.[25] This law generated world-wide attention, including a statement by the British Prime Minister that its signing represented a "historic day for the rest of the world as well."[26] The Prime Minister and the Governor of California also entered an agreement to share best practices on market-based systems and to cooperate to investigate new technologies; similar agreements now exist between California and states and provinces in Australia and Canada.[27] In the November elections, a ballot initiative to suspend indefinitely the operation of A.B. 32 was soundly defeated, with 61% of Californians voting to keep A.B. 32 in effect.[28] The vote showed that there is significant grassroots support for climate change legislation, at least in California.

In implementing A.B. 32, the California state air pollution board has already developed nine "discrete early action greenhouse gas emission reduction measures"[29] designed to go into effect before the cap on carbon emissions is implemented. The early action items went into effect on January 1, 2010.[30] Four of these actions focus on reducing emissions of high global warming potential (GWP) gases, which are gases whose impact on the climate is hundreds or thousands of times greater than that of carbon dioxide. The nine discrete early actions are:

- Establishing a low-carbon fuel standard, per Executive Order S-01-07,[31] to reduce the greenhouse gas intensity of transportation fuels by 10 percent by 2020;[32]
- Reducing emissions from small containers of automotive refrigerants with high global warming potential;[33]

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[23] A.B. 4420, 1988 Cal. Stat Ch.1506.
[24] A.B. 32. 2006 Cal. Stat Ch. 488 (codified as CAL. HEALTH & SAFETY CODE §§ 38500-99 (West 2010)).
[25] Erwin Chemerinsky et al., *California, Climate Change, and the Constitution,* 37 ENVTL. L. REP. 10053, 10053 (2007).
[26] *Id.,* at 10654.
[27] *Id.,* at 10659.
[28] Margot Roosevelt, *Prop. 23 Battle Marks New Era in Environmental Politics*, L.A. TIMES, Nov. 4, 2010, *available at* http://articles.latimescomI20 10/nov/04/local/la-me-global-warming-20101104.
[29] CAL. HEALTH &SAFETY CODE § 38560.5(a-b).
[30] Sandra Emerson, *Environmental Rules, Regulations Enter into 2010,* INLAND VALLEY DAILY BULLETIN, Mar. 6, 2010.
[31] *Gov. Arnold Schwarzenegger,* Cal. Exec. Order No. S-01-07 (Jan. 18, 2007), *available at* http://www.arb.ca.gov/fuels/lcfs/eos0107.pdf.
[32] ALEXANDER E. FARRELL & DANIEL SPERLING, A LOW-CARBON FUEL STANDARD FOR CALIFORNIA, PART 2: POLICY ANALYSIS (Institute of Transportation Studies, University of California, Davis 2007), *available at* http://pubs.its.ucdavis.edu/downloadpdf.php?id=1084.
[33] California Air Resources Board, HFC Emission Reduction Measures for Mobile Air Conditioning (June 24,

- Increasing capture of methane from landfills.[34]
- Establishing aerodynamic efficiency standards for heavy-duty tractors and trailers to improve fuel efficiency - these standards are based on the U.S. Environmental Protection Agency's Voluntary SmartWay Program;[35]
- Creating a tire pressure program that allows owners of older vehicles to properly maintain, their tire pressure (note that the original regulations for this program were disapproved by California's Office of Administrative Law and a new effective date has been proposed for September 1, 2010);[36]
- Reducing diesel emissions from ports by providing electricity to berthed ships;[37]
- Setting a limit on emissions from pressurized gas dusters with high global warming potential;[38]
- Reducing emissions of perfluorocarbons (PFCs) from the semiconductor industry;[39] and
- Reducing sulfur hexafluoride (SF6) emissions in non-electric and non-semiconductor applications.[40]

B. STATE GREENHOUSE GAS REDUCTION STRATEGIES

In general, state efforts to address climate change have focused on two key sectors: electrical power generation and transportation. These sectors lend themselves to different regulatory approaches. Power generation and distribution are industrial activities that are already regulated through public utility laws and have a relatively few, large-scale emission sources. Power can be produced with a number of different fuels, with varying carbon intensities. On the other hand, transportation in the United States is largely in the hands of individual consumers, and the only available fuel for nearly all of them is currently gasoline, sometimes with small amounts of ethanol as an additive. The electricity sector and the transportation sector are discussed in more detail below.

1. THE ELECTRICITY SECTOR

Essentially, there are four ways to reduce carbon. emissions from electrical

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2010), *available at* http://www.arb.ca.gov/cc/hfc-mac/hfc-mac.htm.

[34] California Air Resources Board, Landfill Methane Control Measure (June 30, 2010), *available at* http://www.arb.ca.gov/cc/landfills/landfills.htm.

[35] California Air Resources Board, Heavy-Duty Vehicle Greenhouse Gas Emission Reduction Regulation (Oct. 2, 2010), *available at* http://www.arb.ca.gov/cc/hdghg/hdghg.htm.

[36] California Air Resources Board, Tire Inflation Regulation (Oct. 18, 2010), *available at* http;//www.arb.ca.gov/cc/tire-pressure/tire-pressure.htm.

[37] California Air Resources Board, Shore Power for Ocean-Going Vessels (Feb. 4, 2010), *available at* http://www.arb.ca.gov/ports/shorepower/shorepower.htm.

[38] California Air Resources Board, Greenhouse Gases in Consumer Products (June 17, 2010), *available at* http://www.arb.ca.gov/consprod/regact/ghgcp/ghgcp.htrn.

[39] California Air Resources Board, (April 23, 2010), *available at* http://www.arb. ca.gov/cc/semiconductors/semiconductors.htm.

[40] California Air Resources Board, SF_6 Reductions from Non-Electric and Non-Semiconductor Applications (Nov. 4, 2010), *available at* http://www.arb.ca.gov/cc/sf6nonelec/sf6nonelec.htm.

generation: (1) switching fuels at existing plants to those with a higher energy content (and hence lower emissions per unit of electricity generated; (2) increasing the share of electricity from existing renewable sources compared with the share produced from fossil fuels; (3) increasing the construction of carbon-neutral ("renewable") generating facilities while restricting fossil fuel generators; or (4) decreasing the total amount of electricity produced. States have used varying combinations of these techniques. In most cases, the result is less a strategy than a plethora of loosely related initiatives that are difficult to describe as a coherent policy. This section will merely touch upon some of the initiatives that that have been adopted by the states.

Renewable portfolio standards are an important option for state regulators. These programs require that a certain percentage of retail electricity sales be derived from renewable sources. The programs are quite diverse in their ambition and effectiveness.[41] California's program requires that 33 percent of electricity be generated from renewable sources by 2011.[42] Public benefit finds are another regulatory option that are similar to portfolio standards. Public benefit finds impost a surcharge on consumers, in order to create finding for investment in clean energy supply.[43]

Some of the most interesting initiatives are regional rather than state-based.[44] The best-known regional program is the Northeastern Regional Greenhouse Gas Initiative (RGG1), which includes eight states, and creates a cap-and-trade program for power plant emissions. There are also regional initiatives in New England, the Great Plains, the Southwest, and the West Coast.[45] Regional cooperation is feasible because two-thirds of Americans receive their power from regional transmission organizations.[46] Coverage is incomplete, however - five companies are virtually outside these agreements but account for a quarter of the electricity sector's emissions.[47] Approximately half of the states are involved in at least one regional initiative; this obviously leaves about half that are not.[48]

Because RGGI (pronounced "Reggie") is the most notable of these regional plans, it deserves a detailed discussion. RGGI is currently supported by the governors or legislators of eight eastern states.[49] In addition, the governor of California has announced plans to become a trading partner of RGGI.[50] RGGI is aimed at creating a multistate trading system, capping emissions at current levels until 2015 and then achieving a ten percent reduction by 2019.[51] Allowances will be initially allocated to generators on the basis of current emissions, but sources will also be allowed to offset emissions to a limited extent with verifiable reductions

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[41] Michael B. Gerrard, *Introduction* to GLOBAL CLIMATE CHANGE AND U.S. LAW 22 (Michael B. Gerrard ed., 2007).
[42] Hodas, *supra* note 20, at 356. Hodas provides a list of which electricity sources are considered renewable by various states.
[43] *Id.,* at 359.
[44] *See* Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach,* 14 N.Y.U. ENVTL. L.J. 54 (2005).
[45] Stein, *supra* note 20, at 316. For more on the systems other than RGGI, see *Id.,* at 336-330.
[46] *Id*., at 317.
[47] *Id.,* at 318.
[48] Hodas, *supra* note 20, at 347.
[49] Stein, *supra* note 20, at 321.
[50] *Id.*
[51] *Id.*

in other emission sources.[52] A continuing concern is leakage: the purchase of cheaper electricity from higher emitting sources outside the trading area.[53]

California's development of a cap-and-trade approach in cooperation with neighboring states demonstrates the potentials of regional cooperation. A.B. 32 requires a reduction in emissions, without mandating the use of a cap-and-trade program to achieve that goal.[54] However, the California Air Resources Board (CARB), the state agency responsible for implementing A.B. 32, has decided to implement a cap-and-trade system in 2012.[55] The California Air Resource Board recently released its draft proposal for the cap-and-trade system.[56] The system is designed to achieve a fifteen percent reduction in greenhouse gases by 2020, but it is also designed to take into account the needs of different industries and to allow a smooth transition into the more rigorous requirements. In developing its cap-andtrade program, California has worked closely with the Western Climate Initiative (WCI), a group of western U.S. states and Canadian provinces developing a regional cap-and-trade program.[57] The California cap-and-trade program is designed to link with the state- and provincial-level programs of other WCI jurisdictions.

However, there may be legal challenges to California's regulatory scheme. Industry may claim that the cap-and-trade system violates the dormant commerce clause or that parts of it are preempted by federal legislation relating to the wholesale market in electricity. We will consider some similar arguments relating to other California climate regulations.

Another prong of state regulation has been efficiency standards for electrical appliances. State appliance standards are normally subject to federal preemption, but the federal Department of Energy has proposed waiving preemption so that states can provide for higher energy conservation standards. At least ten states have set such standards, benefiting consumers in the process.[58] California estimates that by 2020 its standards will save consumers $3 billion and eliminate the need for three new power plants.[59] Electricity regulation can create significant federalism issues, which state need to directly address.[60] In adopting utility regulation for greenhouse gases, the California Public Utility Commission (PUC) has been very conscious of potential *federalism issues. Its Interim Opinion on Phase.I Issues: Greenhouse Gas Emissions Performance Standards*[61] discusses an array of potential legal objections to the standards. The rulemaking involves environmental performance

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[52] *Id.,* at 324-25.
[53] *Id.,* at 322.
[54] Juliet Howland, *Not All Carbon Credits Are Created Equal: The Constitution and the Cost of Regional Cap-and-Trade Market Linkage,* 27 UCLA J. ENVTL. L. & POL'Y 413, 419 (2009).
[55] *Id.*
[56] Felicity Barringer, *Cap-and-Trade, the California Way,* E&E NEWS PM, Oct. 29, 2010, *available at* http://www.eenews.net/eenewspm/2010/10/29/1/.
[57] Western Climate Initiative Governors' Agreement (Feb. 26, 2007), *available at* http://westernclimateinitiative.org/component/remository/func-download/12/chk.713c312597469dafef342956282e9f3/no_html.1/.
[58] Hodas, *supra* note 20, at 364. In addition to California, at least four states are considering implementing higher standards (New Hampshire, Massachusetts, Oregon, and Washington). *Id.*
[59] *Id.*
[60] For an overview of these federalism issues, see Kirsten H. Engel, *The Dormant Commerce Clause Threat to Market-Based Environmental Regulation: The Case of Electricity Deregulation,* 26 ECOLOGY L.Q. 243 (1999).
[61] Order Instituting Rulemaking to Implement the Commission's Procurement incentive Framework and to Examine the integration of Greenhouse Gas Emissions Standards into Procurement Policies, Decision No.07-01-039 (Jan. 25, 2007), *available at* http://docs.cpuc.ca.gov/published/FINAL.Decision/64072.htm.

standards for long-term supply contracts entered into by California power systems. The impetus for the rules is the risk that future greenhouse limitations could imperil supplies or requires costly retrofits that would be charged to consumers. Much of California's electricity comes from out of state, so the regulation clearly affects sales by out-of-state generators.

Opponents of the rule raised several legal objections to the PUC as the rule was being drafted, some of which probably will also be used to attack California's cap-and-trade scheme. First, opponents claimed that the California rule would conflict with foreign policy, which is exclusively under the control of the federal government. The PUC considered it "unclear how California, which is not proposing to sign any international agreement here, could be undermining such a policy."[62] Second, opponents also claimed the proposed rule was preempted by various federal statutes.[63] Under U.S. constitutional law, state laws cannot prevail over federal statutes. But the federal government does not regulate retail electrical firms, and the proposed regulation applied only to those firms (though it did limit their contracts with some generators via wholesalers). Third, opponents argued that the regulation would violate the dormant commerce clause, which guarantees free movement of goods and services throughout the United States.[64] The PUC rejected the claim that the rule would have a discriminatory effect on out-of-state coal-fuel generation plants. in the PVC's view, this claim failed because the rule "does not discriminate based on geographic origin."[65] Moreover, the regulation did not unduly burden interstate commerce.[66] The burden on some out-of-state producers[67] was reasonable in comparison with benefits, at least in the Commission's mind.[68]

This rule indicates the ability of states to take initiative in areas such as climate change. However, it also suggests that they can face substantial legal barriers in doing so, where their actions may conflict with national regulations or impair the free movement of goods and services. Nevertheless, with sufficient effort and careful design of regulations, states have a fairly large field for independent action.

2. THE TRANSPORTATION SECTOR

The transportation sector is a critical part of climate change regulation. In this area, California again has taken the lead. A statute known as A.B. 1493 or the "Pavley Act" required the state to set standards for greenhouse gas emissions from new cars. Beginning with the 2009 model year, the California Air Resources Board has a statutory mandate to reduce CO_2 emission from new car models by 30 percent.[69] The CARB must adopt regulations that achieve "the maximum feasible and cost-effective reduction of greenhouse

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[62] *Id.,* at 193.
[63] *Id.,* at 199.
[64] *Id.,* at 206.
[65] *Id., at 207.*
[66] *Id., at 213.*
[67] *Id., at 217-18.*
[68] *Id., at 220.*
[69] Kirsten H. Engel & Scott R. Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change,* 32 ECOLOGY L.Q. 183, 221 (2005). The statutory mandate is A.B. 1493, CAL. HEALTH &SAFETY § 43018.5(a) (West 2006).

gas emissions from motor vehicles."[70] The CARB may not, however, impose fees or taxes, ban sports utility vehicles or light trucks, or impose speed limits.[71] California is also moving toward adoption of a low-carbon fuel standard, which will encourage the use of biofuels and electrical vehicles.[72]

Federalism has been a significant issue in terms of vehicle regulation, particularly regarding the new car regulations authorized by A.B. 1493. The state's regulatory scheme has been challenged on several grounds. To begin with, the Clean Air Act prohibits any state from adopting regulations governing emissions from new vehicles. The sole exception is for California, which can be granted a waiver from preemption if the EPA determines that the state's standards are at least as stringent as the federal standards. If California sets stricter standards than federal law, other states are also allowed to adopt the California standards.[73] Originally, EPA contended that carbon dioxide was not an "emission" within the meaning of the statute, generating controversy about the application of the preemption and California waiver provisions.[74] Ultimately, EPA granted the waiver, but that decision is now the subject of litigation.

California also faces claims that its regulations are preempted by the federal. They are Corporate Average Fuel Economy ("CAFE") standards. The statute establishing the federal standards explicitly prohibits states from issuing any regulations that "relate to fuel economy standards."[75] Reducing carbon dioxide emissions from automobiles requires burning less gasoline. The question is whether the CARB can craft regulations that may indirectly have this effect without falling into the realm of regulation forbidden by the CAFE standards. In *Massachusetts v. E.P.A.,*[76] the Supreme Court emphasized that EPA's obligation to reduce greenhouse gases and the obligation to improve fuel efficiency are overlapping but distinct.[77] The Court was not directly addressing the issue of state preemption, but the Court's language does suggest that the Court views fuel efficiency rules and limitations on carbon dioxide emissions as two very different matters.

The first ruling relevant to the validity of the California program came in *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie ("Green Mountain Chrysler"[78])* There, a Vermont district court considered challenges to the state of Vermont's "California-adopted" vehicle emission standards brought by a consortium of auto makers. The court addressed the question of whether the tension between federal fuel economy standards and California's waiver from the EPA was reconcilable, or if it required the annulment of the state

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[70] *CAL. HEALTH &SAFETY § 43018.5(a).*

[71] *See* Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions,* 37 U.C. DAVIS L. REV. 281, 292 (2003).

[72] *See* DeShazo & Freeman, *supra* note 19, at 1527. For the relevant gubernatorial executive order, see *Gov. Arnold Schwarzeneger,* Exec. Order No. 5-01-07 (Jan. 18, 2007), *available at* http://gov.ca.gov/index.php?/print-version/executive-order/5172/.

[73] 42 U.S.C.§ 7543 (2006).

[74] Carlson, *supra* note 71, at 293-96. EPA also had the authority to reject the preemption waiver because California failed to establish "compelling and extraordinary conditions" justifying the waiver. *Id.,* at 296-97.

[75] *Id., at 303.*

[76] *49 U.S. 497 (2007).*

[77] *Id., at 530-32.*

[78] *508F. supp. 2d 295 (D. Vt. 2007).*

regulations.[79] The court held that the state greenhouse gas regulations encompassed much more than a fuel economy mandate, because the regulations included upstream emissions from refineries and other fuel sources.[80] The court also held that the challengers had failed to prove that the rules were technologically or economically infeasible.[81] The court rejected the argument that the California rules improperly intruded into the field of foreign affairs,[82] noting that the State Department had, in fact, praised state and local efforts in its reports to international agencies.[83]

California's program also passed muster in a separate challenge, *Central Valley Chrysler-Jeep, Inc. v. Goldstene ("Central Valley").*[84] Relying heavily on *Massachusetts v. EPA* for guidance about the relationship between the Clean Air Act and CAFE standards, a California district court ruled that if the California standards were approved by EPA, the Department of Transportation ("DOT") would have a duty to harmonize its CAFE standards with the California requirements.[85] The district court also relied on *Massachusetts* in concluding that policy promulgated by the executive branch could not override the congressionally mandated standards for California's waiver request.[86] The district court held that a claim of foreign policy preemption would require a showing that the state law conflicted with an international agreement, or at least a program that derived from international negotiations, neither of which was present.[87]

A full discussion of all the federalism issues raised by state transportation regulations would be too lengthy and complex to be included here. There is no doubt that states are using their powers aggressively, and that they will face serious legal challenges. Nevertheless, they have managed to keep climate mitigation alive in the United States when the federal government's policies have been less favorable.

III. CLIMATE ADAPTATION

Adaptation to climate change is unavoidable. The fact is that some degree of climate change has already begun, and further change is inevitable.[88] This section will survey some of the most likely impacts of climate change and the adaptation measures that may be required in the United States.

A. THE IMPACTS OF CLIMATE CHANGE

Sea level rise will have substantial impacts on the United States. It may well cause

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[79] *Id., at 356.*
[80] *Id., at 353.*
[81] *Id., at 357.*
[82] *Id.,* at 395.
[83] *Id.,* at 396.
[84] 529 F. Supp. 2d 1151 (ED. Cal. 2007).
[85] *Id*., at 1170.
[86] *Id*., at 1181.
[87] *Id.,* at 1186-89.
[88] Donald A. Brown, *The U.S. Performance in Achieving its 1992 Earth Summit Global Warming Commitments,* 32 ENVTL. L. REP. 10741 (2002).

dramatic losses in wetlands in the United States.[89] Because the slope of coastal areas on the Atlantic and Gulf Coasts is low, a forty centimeter rise in sea level could result in as much as sixty meters of beach erosion and may cost billions of dollars.[90] To get a sense of the potential economic impact, consider the following estimates regarding sea level rise: A half-meter sea level rise would place *$185* billion of property in jeopardy by 2100, and the cost of protecting developed areas from a half meter rise would be $115 to $274 billion.[91]

Flood risks can be intertwined with water supply issues, as in the California Delta, where potential levee collapses due to flooding would drastically impair water supplies for much of the state.[92] Meanwhile, in the Southwest, the future of the water supply is uncertain, with potentially major impacts on agriculture.[93] One research project surveyed twenty -our separate computer models, nearly all of which projected an increasingly and climate in the southwest.[94] This transition to more and conditions, which is already beginning, is likely to include periods of drought that will last longer than a decade.[95]

Water system adaptation measures can include a variety of responses.[96] Some involve use of longer-range predictions to guide water reservoir use. Managing water demand is another option, including increased use of market transfer among users or conservation and efficiency improvements.

It is also important to evaluate the risks to water infrastructure posed by more severe floods. The Stern. Report estimates that the cost of adapting infrastructure "to a higher-risk future could be *$15* - 150 billion each year *(0.05 - 0.5%* of GDP), with one-third of the costs borne by the U.S. and one-fifth in Japan."[97] The difficulty of adaptation varies directly with the pace of climate change and the potential increase in extreme events. "Extreme events such as floods and drought cause extensive damage to many parts of society, and thus a critical issue for adaptation is the degree to which frequency, intensity, and persistence of extreme events change."[98]

Public health impacts of climate change are also a concern.[99] By midcentury, the number of heat wave days in Los Angeles is expected to at least double the number from the late twentieth century. By the end of the century, the number of heat waves will quadruple.[100]

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[89] Cat Lazaroff, *Climate Change Could Devastate U.S. Wetlands,* ENV'T NEWS SERVICE, Jan. 29, 2002, *available at* http://www.ens-newswire.com/ens/jan2002/2002-01-29-06.asp.

[90] David Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation,* 28 COLUM. J. ENVTL. L. 1, 12-14 (2003).

[91] WILLIAM E. EASTERLING III ET AL., COPING WITH GLOBAL CLIMATE CHANGE: THE ROLE OF ADAPTATION IN THE UNITED STATES 14 (2004), *available at* http://www.pewclimate.org/docuploads/Adaptation.pdf.

[92] LOUISE BEDSWORTH & ELLEN HANAK, PREPARING CALIFORNIA FOR A CHANGING CLIMATE 8 (2008), *available at* http://www.ppic.org/content/pubs/report/R.1108LBR.pdf.

[93] *See* Jason Mark, *Climate Change Threatens to Dry Up the Southwest's Future,* EARTH ISLAND J., Nov. 18, 2008, *available at* http://www.alternetorg/story/103366/.

[94] Juliet Eilperin, *Faster Climate Change Feared: New Report Points to Accelerated Melting, Longer Drought,* WASH. POST, Dec. 25, 2008, *available at* http://www.washingtonpost.com/wpdyn/content/article/2008/12/24/AR2008122402174.htrnl?hpid=morehead lines.

[95] *Id.*

[95] LEVI D. BREKKE ET AL., CLIMATE CHANGE AND WATER RESOURCES MANAGEMENT: A FEDERAL PERSPECTIVE 29-31 (2008).

[96] *Id.*

[97] NICHOLAS STERN, THE ECONOMICS OF CLIMATE CHANGE 417 (The Stern Review 2007).

[98] EASTERLING ET AL., *supra* note 91, at 17.

[99] *See* LOUISE BEDSWORTH, CLIMATE CHANGE AND CALIFORNIA'S PUBLIC HEALTH INSTITUTIONS (2008).

[100] *Id.,* at 2.

The most vulnerable group (those over 65) will double as a proportion of the California population over the same time.[101] Higher ozone levels due to the increased temperature will cause additional deaths.[102] The probability of large wildfires is also expected to increase by 12-53% by the end of the century.[103]

B. GOVERNMENT ADAPTATION MEASURES

Adaptation covers a wide spectrum of responses "ranging from purely technological (e.g., sea defenses), to behavioral (e.g., altered food and recreational choices) to managerial (e.g., altered farm practices), to policy (e.g., planning regulations).[104] State and local governments are beginning to understand the need for adaptation. For instance, Chicago has issued a guide to adaptation for municipalities.[105] The guide considers a broad range of impacts including shoreline erosion, invasive species, health threats from heat waves and increased ozone, damage to key infrastructure, and flood damage.[106]

It is important to understand that climate change adaptation can overlap with mitigation efforts. For instance, green building can be a way of mitigating climate change through reduced energy use but it can also help adapt to climate change through more efficient water use or internal temperature control. The trend toward green building may push some regulatory decision making from the local level to the state level,[107] and it is easy to imagine that the federal government might step in to promote the move to green building. Similarly, water systems are a significant source of energy use, so water conservation efforts can both respond to climate change and help mitigate future change.

Adaptation poses serious challenges.[108] The federal government is beginning to seriously address these issues. President Obama appointed a task force composed of key federal agencies to investigate adaptation. The task force's preliminary report called for more research, a unified strategic vision, comprehensive risk assessment, and involvement of all levels of government.[109] On October 14, the White House's Climate Change Adaptation Task Force released its recommendations for how federal agencies can better prepare the United

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[101] *Id.,* at 3.
[102] *Id.,* at 7.
[103] *Id.,* at 10.
[104] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE WORKING GROUP II, CLIMATE CHANGE 2007: CLIMATE CHANGE IMPACTS, ADAPTATION AND VULNERABILITY 18 (2007), *available at* http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg2_report_impacts_adaptation_and_vulnerability.htm.
[105] MWH GLOBAL, CHICAGO AREA CLIMATE CHANGE QUICK GUIDE: ADAPTING TO THE PHYSICAL IMPACTS OF CLIMATE CHANGE (Julia Parzen ed., 2008), *available at* http://www.chicagoclimateaction.org/filebin/pdf/Chicago_Quick_Guide_to_Climate_Change_Preparation_June_2008.pdf.
[106] *Id.,* at 13.
[107] *See* Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States,* 93 MINN. L. REV. 231 (2008).
[108] These challenges are discussed in U.S. GOVERNMENT ACCOUNTABILITY OFFICE, CLIMATE CHANGE ADAPTATION: STRATEGIC FEDERAL PLANNING COULD HELP GOVERNMENT OFFICIALS MAKE MORE INFORMED DECISIONS (2010), *available at* http://www.gao.gov/products/GAO-10-113.
[109] INTERAGENCY CLIMATE CHANGE ADAPTATION TASK FORCE, PROGRESS REPORT OF THE INTERAGENCY CLIMATE CHANGE ADAPTATION TASK FORCE (2010), *available at* http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100315-interagency-adaptation-progress-report.pdf.

States to respond to the impacts of climate change.[110] The Task Force's report is a solid step forward in preparing the U.S. to deal with the challenges of climate change. The report includes five key recommendations.

First, according to the Report, adaptation needs to become a standard part of agency planning.[111] Agency adaptation plans should prioritize the most vulnerable people, places, and infrastructure. The plans should utilize ecosystem based approaches. Getting agencies to prepare these plans may be hard enough, but getting them to implement the plans is the crucial step.

Second, the government needs to ensure that scientific information about the impacts of climate change is easily accessible.[112] Without solid scientific information, public and private sector decision-makers cannot build adaptive capacity into their plans and activities. This effort would build on the U.S. Geologic Survey and its National Climate Assessment. Serious efforts need to be made if this information is going to be accessible to and understandable by the public at large.

Third, the government needs to address climate impacts that out across agency jurisdictions and missions.[113] Unfortunately, most of the main impacts of climate change, such as those that threaten water resources, public health, oceans and coasts, and communities, reach across the mission of any single federal agency. Important arenas for agency cooperation are the improvement water-use efficiency, strengthening public health systems, and developing an open-source risk assessment model.

Fourth, the U.S needs to support international adaptation.[114] The report calls for leveraging federal resources to help developing countries reduce their vulnerability to climate change.[115] One interesting recommendation is to enhance collaboration. on adaptation among national security agencies.[116] In addition, USAID issued a guidance document on integrating adaptation into foreign assistance programs. One virtue of the Report is its awareness of the potentially important role that the private sector can play in adaptation.

Fifth, the federal government needs to support adaptation efforts by state, local, and tribal officials.[117] As the report recognizes, much of the adaptation effort will be locally driven, with the federal government playing a supporting role. Developing metrics to evaluate adaptation efforts is one important step. Another is providing technical support for government units across the country.

The Task Force Report is not an adaptation plan. Instead, it is essentially a plan of how to *begin* adaptation planning. Nevertheless, this is an important first step to responding to those impacts from climate change that cannot be avoided by reducing emissions.

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[110] WHITE HOUSE COUNCIL ON ENVIRONMENTAL QUALITY, PROGRESS REPORT OF THE INTERAGENCY CLIMATE CHANGE ADAPTATION TASK FORCE: RECOMMENDED ACTIONS IN SUPPORT OF A NATIONAL CLIMATE CHANGE ADAPTATION STRATEGY (2010), *available at* http://www.whitehouse.gov/sites/default/files/microsites/ceq/Interagency-Climate-Change-Adaptation-Progress-Report.pdf.

[111] *Id.,* at 25-30.

[112] *Id.,* at 30-34.

[113] *Id*., at 34-44.

[114] *Id.,* at 44-48.

[115] *Id.,* at 47.

[116] *Id.*

[117] *Id.,* at 50-51.

IV. INTERNATIONAL NEGOTIATIONS BY THE UNITED STATES AND U.S. -CHINA RELATIONS

The U.S. did not ratify the Kyoto Protocol. However, with the election of President Obama, the U.S. has reentered climate negotiations. At Copenhagen, President Obama helped broker a political agreement, which "provides for explicit emission pledges by all the major economies - including, for the first time, China and other major developing countries - but charts no clear path toward a treaty with binding commitments."[118]

The U.S. believes that both developed and developing countries should commit to legally binding emissions limits, monitoring, and verification. Following the recent Tianjin meetings, U.S. Chief Climate Negotiator Todd Stern openly criticized China for what he perceived as backpedaling by China on the Copenhagen Accord, which included commitments from industrialized and developing nations aimed at limiting global temperature increases to two degrees Celsius and an agreement to work toward independent monitoring to verify countries' respective commitments.[119]

The U.S. believes that both developing and developed countries have the responsibility to act on emissions limits, monitoring, and verification; neither can act on a purely voluntary basis, The U.S. is pressing for adherence to the Copenhagen Accord's agreement that developed countries reduce their emissions on an absolute basis, below a baseline of 2005 and 1990 and that developing countries reduce their emissions on a relative basis.[120] In terms of its own responsibilities, the U.S. is maintaining its "international commitment to reduce emissions by 17 percent by 2020," despite the fact that Congress has yet to pass a climate bill.[121]

The U.S. thinks that developing countries should "commit to mandatory cuts [in emissions] and international verification.[122] Moreover, the U.S. challenges the contention, advanced by developing countries, that they only have voluntary obligations under Kyoto and the Framework Convention. Todd Stern does not interpret "common but differentiated responsibilities" to mean voluntary obligations. "The obligations for developed countries, especially under Kyoto, are certainly more specific, but developing countries have legally binding obligations to formulate, implement and publish their mitigation programs."[123] This finding is

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[118] ELLIOT DIRINGER, SUMMARY OF COP 15 AND CMP 5 PREPARED BY THE PEW CENTER ON GLOBAL CLIMATE CHANGE 1 (2009), *available at* http://www.pewclimate.org/docUploads/copenhagen-cop15-summary.pdf; Jim Efstathiou Jr., *China Spurns Pledges in Climate-Change Accord, U.S.'s Stern Says,* BLOOMBERG, Oct. 8, 2010, *available at* http://www.bloomberg.com/news/2010-10-08/china-spurns-pledges-in-cancun-climate-change-accord-u-s-s-stern-says.html.

[119] Efstathiou, *supra* note 118.

[120] Todd Stern, A New Paradigm: Climate Change Negotiations in the Post-Copenhagen Era, Remarks as Prepared at the University of Michigan Law School (Oct. 8, 2010), *available at* http://j.mp/SternUNFCCC1010; *see also* Todd Stern, Energy and Climate Change 2010: Back to the Future, Keynote Address as Prepared for the Brookings Conference (May 18, 2010), *available at* http://www.brookings.edu/'/rnedia/Files/events/2010/20100518_energy...dllmate/20100518_stern_prepared.pdf. This is Stern's assessment of the agreement at Copenhagen, and is up for interpretation.

[121] John M. Broder & Elisabeth Rosenthal, *Poor Prospects for New Climate Meeting,* N.Y. TIMES, Oct. 7, 2010, *available at* http://www.nytimes.com/2010/10/08/world/americas/Oflcliinate.html?j1.

[122] *US Envoy: Climate Deal Still Possible in Mexico,* ASSOCIATED PRESS, Oct. 22, 2010, *available at* http://www.goog1e.com/hostednews/ap/article/ALeqM5i2uARvffGzn3hVZXIJrMJRIkWQ?docld=ea757d8df57a4908999ebde4436f2 399.

[123] Stern, Energy and Climate Change 2010: Back to the Future, *supra* note 120, at 2.

based on what he calls textual exegesis, and an argument about need for 1992 agreements to evolve given present realities.

In this vein, the U.S. challenges the developing vs. developed, country framework as presently interpreted. The framework, according to Todd Stern, "does not prevent differentiation among developing countries or among developed countries."[124] For example, the U.S. thinks that China should not be treated the same as Chad, when China is now the world's largest emitter, is the second largest *historic* emitter, will be *60%* largest than the *U.S.*by *2020,* and has even surpassed France in *per capita* emissions. Instead, you need to start with all the major emitters, both developed and developing, accounting for some 85% of global emissions and build out from there.[125]

From a pragmatic position, U.S. negotiators think that, in order to receive domestic support for any agreement, it must also require action "from China and the other emerging markets."[126]

The fixture path of international negotiations will depend significantly on whether the United States and China, the world's two largest emitters, are able to reach agreement. However, China's views are different from those of the United States. It is important to examine those differences because they are the now the fundamental barriers to international action on climate change.

China and the U.S. have very different perspectives on who should bear the burden of greenhouse gas reductions. China argues that the U.S. and other wealthy nations, who are larger historic contributors to greenhouse gas emissions, should submit to larger emissions cuts than developing countries.[127] After Copenhagen, China voluntarily submitted an emissions target of *40-45%* per unit of GDP by 2020 compared to the 2005 level; increase the share of non-fossil energy in its primary energy consumption to around 1.5% by 2020; and increase forest coverage by 40 million hectares and forest stock volume by 1.3 billion cubic meters by 2020 from 2005 levels.[128]

China has joined Brazil, South Africa, and India (BASIC), in calling for "developed nations to commit to more ambitious emission reduction targets for the second commitment period of the Kyoto Protocol" and for non-Kyoto developed countries (i.e. the United States) to "undertake comparable emission reduction targets under the United Nations Framework Convention on Climate Change (UNFCCC)."[129]

At the same time, "China rejects an internationally binding limit on its greenhouse gas emissions [for itself] ... because it contributed less to the problem historically, its emissions per-capita are still relatively low and it needs leeway to grow its economy."[130] Recall that the United States believes strongly in the need to include developing countries in emissions

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[124] *Id.*
[125] Stern, A New Paradigm: Climate Change Negotiations in the Post-Copenhagen Era, *supra* note 120.
[126] *Id.*
[127] *US Envoy: Climate Deal Still Possible in Mexico, supra* note 122.
[128] Krittivas Mukherjee, *China Reiterates Goals for Curbing Climate Change,* REUTERS, Jan. 29, 2010, *available at* http://www.reuters.com/article/idUSLDE60S21N.
[129] *BASIC Members Urge Developed Countries to Meet Obligations,* XINHUA NEWS, Oct. 11, 2010*, available at* http://news.xinhuanetcom/english2010/china/2010-10/11/c_13551854.htm.
[130] Chris Buckley, *China Greenhouse Gas Growth "Daunting": U.S. Envoy,* REUTERS, Oct. 22, 2010, *available at* http://www.alertnet.org/thenews/newsdesk/T0E69LO35.htm.

limitations. China's chief climate negotiator has said that it is unreasonable to expect rising economies to put an absolute cap on their emissions since it will limit their economic growth."[131] Nevertheless, China has also recognized the desirability of limiting emissions in order to prevent climate change that would be destructive to China as well as other countries; The U.S. is likely to demand a clearer commitment, however, rather than simply an expression of good intentions.

Contrary to the United States position, China also rejects the requirement of independent monitoring verification of its progress. In rejecting such monitoring and verification, China stands alongside Brazil, South Africa, and India, to form (BASIC), the largest developing countries.[132] Xie Zhenhua noted that 'We fully support to increase the transparency of all countries' mitigation action." But that "what we are opposed [to] is some countries asking developing countries [to take] domestic actions or international consultation and analysis by stricter standards which should be applied to developed countries. This is truly against the principle of common but differentiated responsibilities."[133] The U.S. seems to see the responsibilities as more common and less differentiated, while china has the opposing view.

Despite these major differences from the U.S. position, China is beginning to show signs that may be favorable to negotiations. On a related but ancillary note, there is evidence that China is taking steps toward greater transparency and improving capacity, according to analyst Damien Ma:

> Sun Cuihua, the Deputy General-Director of the Climate Change Coordination Office in China's National Development and Reform Commission announced at a side event that China is currently working on a centralized database of GHG emissions, which would include emissions data from Chinese municipalities and provinces and would eventually become open for the public. Although no specific timeline was given for completion, this is a major announcement, considering the most recent publicly-available data for GEIG emission levels of Chinese provinces dates back to 1994.[134]

Finally, another possible source of tension between the U.S. and China involves border adjustments Sonic groups within the United States seek border adjustments so that imports from countries with weak emissions limits will not have an unfair competitive advantage. China and other developing countries reject proposed tariffs on goods that "border adjustments" for countries who do not agree to binding emissions caps, which they view as

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[131] Tini Tran, *Climate Talks in Tianjin, China Make Little Progress,* HUFFINGTON POST, Oct. 6, 2010, *available at* http://www.huffingtonpost.com/2010/06/climate-talks-in-tianjin-_n_752714.html.

[132] International Centre for Trade and Sustainable Development, *Tianjin Climate Meeting Delivers Little, Overshadowed by US-China Spat,* BRIDGES WKLY. NEWS TRADE DIG., Oct. 13, 2010, at 3, *available at* http://ictsd.org/i/news/bridgesweekly/86988.

[133] Lisa Friedman, *Negotiations: China Says Developing Countries Are Being Held to 'Stricter Standards',* CLIMATE WIRE, Oct. 5, 2010, *available at* http://www.eenews.iiet/climatewire/2010/10/05/3.

[134] Damien Ma, *Account of the Tianjin Climate Talks,* ATLANTIC, Oct. 15, 2010, *available at* http://www.theatlantic.com/international/archive/2010/10/account-of-the-tianjin-climate-talks/64649/.

unilateral protectionist measures by developed countries.[135] India noted that this would violate the UNFCCC's principle of "common but differentiated responsibilities."[136]

Despite these disagreements with China and other developing countries, in the latest round of negotiations, the U.S. has been supporting some important steps forward:

> Most notably, a plan to pay developing countries with large forested areas to save those areas from development was moved forward. Other key areas emerged include technology transfer, a shared vision for long-term cooperative action, oversight of the $30 billion fast-track adaptation fund, and financial considerations tied to capacity building.[137]

Nevertheless, crucial areas of conflict remain, particularly with respect to disagreements between the U.S. and China. Tensions are real:

> One day after U.S. Climate Change envoy Todd Stem, speaking in Michigan, criticized China for refusing to take on more responsibilities than smaller developing countries, China's top climate change negotiator Su Wei, speaking in Tianjin, said the U.S. was trying to deflect attention from its own inaction on the climate.[138]

Frustration about the inability of the U.S. to pass national climate legislation is understandable, and this frustration is shared both in the U.S. and abroad. Moving forward will require a willingness to consider opposing viewpoints about the responsibilities of developed countries, underdeveloped countries, and rapidly developing countries. Discussions may be difficult, but it is in the interest of the entire world to reach some understanding. It is also critical that the United States demonstrate an ability to curb its own emissions as it asks others to do the same.

Although there are strong differences of viewpoints, compromise between the U.S. and China seems to be possible in terms of the target emissions for various countries. The differences over whether reductions are voluntary and about monitoring are also serious, but it should be possible to devise mechanisms for transparency that respect the sovereignty of all countries while still providing a basis for credible commitments. What matters is not the formality of whether commitments are "enforceable" under international law but whether they are strong enough that other countries can rely upon them.

V. CONCLUSION

For advocates of decisive action on climate change, the United States has provided

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[135] International Centre for Trade and Sustainable Development, *supra* note 132.
[136] *Id.*
[137] *U.N. Talks in Tianjin Make Gains on Forestry, Post-Kyoto Plan, but U.S.-China Rift Remains,* INTERNATIONAL ENV'T REP., Oct. 9, 2010.
[138] *Id.*

considerable frustration. First, the Bush Administration resisted any meaningful action for eight years. Even under the Obama administration, inaction in the U.S. Senate has prevented comprehensive national legislation. As a result, the usual channels for making major national policies have been blocked.

Nevertheless, American climate law is far from dormant. The Supreme Court has pushed the EPA into regulating climate change under existing air pollution laws. In the meantime, state governments have acted individually and in groups to address climate change.

From the point of view of environmental advocates, the situation remains frustrating in some respects. And from the point of view of the legal process, it seems regrettable that the national legislation has left a vacuum to be filled by the states, the federal courts, and administrative agencies. Nevertheless, it is a sign of the adaptability of the American legal system that even the absence of national legislation has not prevented fruitful, progress on such a major issue as climate change. However, much remains to be done. The U.S. and the Chinese need to find common ground in addressing climate change. The United States also needs a clear legal commitment to address climate change at the national level in order to be able to help advance international negotiations, so that the entire planet can benefit from a global strategy to address climate change.

KEYWORDS
U.S. law, climate change, climate change adaptation, international law

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CHINA'S LAW DEVELOPMENT IN THE CLIMATE CHANGE ERA*

*Mingde Cao***

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ABSTRACT

China as the largest emitter of GHGs in the world is confronting energy shortage air pollution and political pressure from international society, and its economy is still on the fast track. In order to cope with these issues, China has made a lot of laws and policies as its positive response to climate change. These laws and policies include traditional command and control approach and market-based approaches such as cap and trade mechanism and carbon tax. In comparison, market-based approaches

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are more effective in climate change era. Among them, carbon tax may be more suitable than cap and trade approach because of its many advantages and China's current circumstances. From the perspective of engaging in international negotiations in this arena, China shall insist the principle of historical responsibility and principle of common but differentiated responsibility in sharing international obligation on climate change, though its position is inviting some severe criticisms from EU and its member states.

I. INTRODUCTION

The annual CO2 emission of China in 2007 reached high amount of 6071 Metric tons, accounted for 24% of the total emissions of the world, while that amount of U.S. was 5769 Mega tons, accounted for 21%.[1] Thus, China surpassed U.S. for the first time and became the largest emitter in the globe. According to the newly released information of International Energy Agency(IEA), the annual CO2 emission of China in 2008 was 6508.24 Mega tons, and the carbon emission intensity was 0.60 kg CO2/2000 USD, while the amount of US was 5595.92 Mega tons and 0.48 kg CO2/2000 USD respectively.[2] Moreover, China is also the second largest oil consumer behind the United States. China emerged from being a net oil exporter in the early 1990s to become the world's third-largest net importer of oil in 2006.[3] China's oil consumption growth accounted for about a third of the world's oil consumption growth in 2009.[4] China is also the world's largest producer and consumer of coal, an important factor in world energy markets.[5] The coal consumption accounts for 74 percent of total energy consumption in China in 2008, and oil consumption accounts for 15 percent (see graphics 1 below). The above figures illustrate the significance of the proposition and mitigation and adaptation actions from China, and accounts for why China has attracted much criticism from the EU and its member states. There is also the great pressure and momentum of CO2 emission reduction both from international and domestic society.

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[1] http://www.iea.org/index.asp.

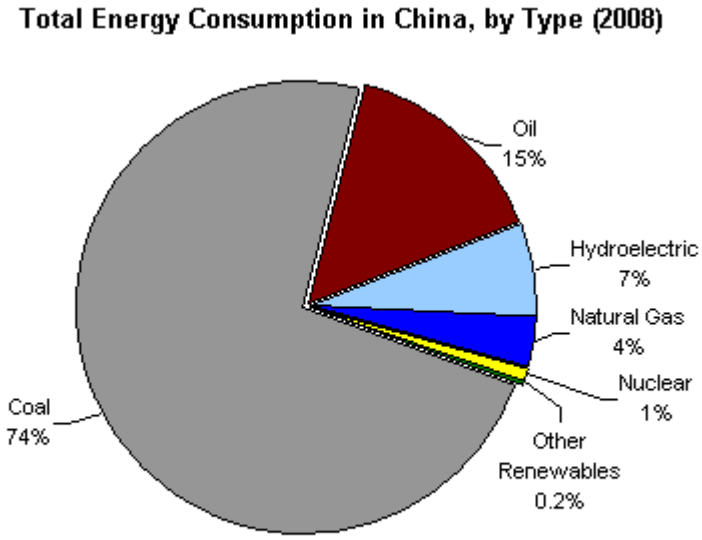
[2] http://www.iea.org/stats/indicators.asp?COUNTRY_CODE=CN,http://www.iea.org/stats/indicators.asp?COUNTRY_CODE=US

[3] U.S. Energy Information Administration Independent Statistics and Analysis, Country AnalysisBriefs:China, *see also* http://www.eia.doe.gov.

[4] *Id.*

[5] *Id.*

Graphics 1



Source: EIA International Energy Statistics 2008

This article aims to explore the development of environmental law and policy in China to respond to climate change issues. Part I introduces the outlook of China's law and policy to mitigate and adapt to global warming. Part II examines the approaches especially market-based approaches to dealing with climate change in China. Part III describes China's Position and Strategy to Engage in International Society.

II. CHINA'S LAW AND POLICY RESPONDING TO CLIMATE CHANGE

A. THE SOCIAL ECONOMIC BACKGROUND OF CHINA'S CLIMATE LAW AND POLICY

The Chinese government attaches great importance to climate change issues as it has always done.[6] With a huge population and a low level of economic development, China still faces a rather arduous task of development. By the end of 2008, the total population in the mainland was 1.328 billion. In 2008, with a per capita GDP of US$ 3268, China was still ranked among the low to mid-income countries.[7] China also has 40.07 million rural residents living under the poverty line at the end of 2008, and the rate of urbanization was 45.7 percent in 2007(see table 1 below).[8] Based on the provincial statistics, total energy consumption of China in 2008 was 2.85 billion tons of coal equivalents (tce), 4 per cent over 2007, with per capita energy consumption being 2.15 tce. CO2 emission per unit of energy was much higher than the world average level.[9] Although China has declared the ambitious target for emission reduction of carbon intensity by 40-45 per cent by year 2020 on the basis of 2005, it is almost

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[6] Natinal Development and Reform Commission (NDRC), China's Policies and Actions for Addressing Climate Change: the Progress Report 2009, at 7.
[7] *Id.*
[8] *Id.*
[9] *Id.*

an impossible mission to accomplish.

Table 1, China's National Circumstances in 2008

Indexes	2008
Population (million, year-end figure)	1328
Rate of urbanization (%)	45.7
GDP (billion RMB yuan)	30,067
Economic structure (Ratios of primary, secondary and tertiary industries	11.3 : 48.6 : 40.1
Per capita GDP (USD, converted at current price and the annual average exchange rate)	3,268
Rural poverty population (million) 40.07[10] move this to next column	
Total energy consumption (billion tce)	2.85
Per capita energy consumption (tce)	2.15

NDRC, 2009

On the one hand, China needs to consume much more energy. On the other hand, it faces great pressure for CO2 emission reduction. China's economy is on the fast track now. According to precise predictions by some scholars, the total amount of China's GDP will reach RMB 51.9 trillion by 2020. If China keeps this economic growth rate, or holds the present CO2 emission intensity, it needs about 15.1 billion tones CO2 emission credits. While the emission target advocated by EU is to keep the concentration level of CO2 at 550 ppm in the atmosphere by year of 2050, and total emission world-wide should be controlled at under 40 billion tones, the maximum emission amount of China will be 10.4 billion tons, accounting for 26 percent of the total emission of the world. Consequently, China will face shortage of 4.7 billion tones emission credits if it does not take any climate mitigation and adaptation measure. Furthermore, if it accepts the 450 ppm emission reduction goal and its allocation proposal, China would be confronted with tougher situation and greater pressure. Either way, China cannot do business as usual or instead we should take aggressive emission reduction actions domestically.

Table 2 Total emission amount of the world and its increase percentage of China at different concertration levels 2050

Different concertration levels(ppm)	Total emission amount of the world (Billion tonnes CO2)	Emission amount when China's emission accounts for 26% of total emission(Billion tonnes CO2)[11]	Annual increase percentage from 2005 to 2050 of China (%)
450	26	6.76	0.7
550	31	8.06	1.3

[10] By the updated data, the rural poverty line is 1,196 RMB yuan per capita annual income.

[11] 26 percent is the maximum emission rate that China has had at present among the main indicators of emission reductions in the globe.

650	44	11.44	2.7
750	51	13.26	3.5

Weizhong Wang et al. 2002

B. CHINA'S LAW AND POLICY RESPONSE TO CLIMATE CHANGE

China stresses the importance of climate change issues, and has passed numerous laws and regulations to solve these problems. For examples, China has made and enforced the Renewable Energy Law, Energy Conservation Law, Cleaner Production Promotion Law, Circular Economy Promotion Law, Forest Law and Grassland Law, Air Pollution Prevention Law. And it is going to pass? Energy Law, and revise Coal Law, Power Law, etc to further stimulate the exploration and utilization of clean and low carbon energies. Moreover, China also has made a lot of policies to deal with climate change issues. For instances, China's National Climate Change Programme, and the Eleventh Five-year Plan of National Economic and Social Development, White Paper: China's Policies and Actions on Climate Change 2008, and Resolution on Climate Change by the Standing Committee of NPC, the top legislature.

China insists on the principles of mitigation and adaptation, and focuses on the following issues to cope with future climate change from the perspective of policy.

1. ADOPTING MORE STRINGENT AIR POLLUTION STANDARDS

In *Massachusetts V. EPA* case, the United States Supreme Court ruled that the CO2 emitted from a moving source constituted as a pollutant. This set the precedent that CO2 from the tailpipe of vehicles is to be regarded as a pollutant, and ended the debate on this issue among environmental law scholars by judicial decision. It also caught attention of Chinese scholars in legal circles. In China, the Ministry of Environmental Protection (MEP) of PRC also has administrative discretion to make more strict air pollution standards to control the GHGs emissions according the Air Pollution Prevention Law of PRC.

Table 3 China's air pollutants emission standards involving greenhouse gases

Title of emission standard	Series number of standard	Involving pollutant
Emission standard of coalbed methane	GB21522-2008	coalbed methane, gas
Emission standard of pollutants from electroplating	GB21900-2008	Nox, Fluoride
Emission standard of pollutants from synthetic and artificial leather	GB21902-2008	VOCs, particulates
Emission standard of air pollutant for bulk gasoline terminals	GB20950-2007	Oil and gas
Emission standard of air pollutant for gas station	GB20952-2007	Oil and gas
Emission standard of pollutant for coal industry	GB20426-2006	SO2

Emission standard of air pollutant for cement industry	GB4915-2004	SO2, NOx, Fluoride
Emission standard of air pollutant for coal-fired plant	GB13223-2003	SO2, NOx
Emission standard of air pollutants for coal-burning oil-burning gas-fired boiler	GB13271-2001	SO2, NOx
Emission standard of cooking fume	GB18483-2001	
Emission standard of air pollutants for industrial kiln and furnace	GB9078-1996	SO2, Fluoride
Emission standard of air pollutants for coke oven	GB16171-1996	SO2
Integrated emission standard of air pollutants	GB16297-1996	SO2, NOx, Fluoride, NMVOCs

2. OPTIMIZING THE STRUCTURE OF ENERGY CONSUMPTION AND EXPLORING GREEN ENERGY

China heavily depends on fossil fuels, and is one of the few countries which mainly rely on coal consumption in their energy resources.[12] China is encountering great challenge to adjust its energy structure. Whether it is reasonable for its energy structure is critical to the economic development of China, and also to its emission reduction.

In order to solve this problem, China plans to reduce energy consumption per unit of GDP by 20% by 2010 on the basis of 2005 according to the eleventh five year plan of China. And the renewable energy consumption will account for at least 15% in the total energy consumption. In order to achieve this goal, China not only regulates the greenhouse gases emission from stationary sources, such as industrial sectors, but also regulates moving sources, namely, automobile sector. China has made much energy consumption standards for automobiles including mandatory fuel economy standards for vehicles (see table 4 below). This is because over the past decade, GHG emissions from the transport sector have increased at a faster rate than any other energy-using sector, especially in quickly developing countries such as China and India. This trend is expected to continue over the next few decades.[13] In 2009, 13.79 million motor vehicles were manufactured and 13.64 million motor vehicles were sold in China, the country thus surpassing Japan as the largest automobile maker and overtaking the United States as the biggest automobile market in the world.[14] Therefore, the energy consumption standards are not sufficient to reduce greenhouse gases emission from transportation sector. To build massive public transportation will be a better alternative. In large cities, more subways and light railways are being built. In rural areas, the construction of more small hydro-stations is also good solutions to provide clean electricity for local residents. Nuclear power has also been taken into account in terms of emission

[12] See supra 3, also graphic 1.
[13] IPCC, 2007. *Climate change 2007: Mitigation*. Cambridge University Press, Cambridge.
[14] Mingde Cao, Yixiang Xu, Climate protection and motor vehicles regulations: Evaluation of motor vehicle regulations in China in the context of greenhouse gas management, 34(4)Natural Resources Forum 266, 267(2010).

reduction even though it is still a controversial issue.

Table 4 Energy use and emissions per passenger-kilometer for various transport modes

	Energy use MJ	Emissions (g)						
		CO2	SO2	PM	CO	HC	NOx	Lead
Car	1.69–5.04	102–306	0.23–0.69	0.09–0.28	3.4–10.1	0.57–1.67	0.44–1.32	0.018–0.053
Bus	0.31–0.94	24.2–96.8	0.01–0.04	0.04–0.14	0.08–0.32	0.008–0.030	0.14–0.54	0.001–0.004
Motorcycle	0.76–1.51	64–128	0.04–0.08	0.20–0.40	6.3–12.5	1.13–2.25	0.08–0.15	0.016–0.032
Bicycle	0.18	4.7	0.01	0.06	Unknown	Unknown	Unknown	0
Bicycle styleE2W[1]	0.14–0.27	15.6–31.2	0.07–0.14	0.07–0.14	0.007–0.014	0.027–0.053	0.010–0.020	0.145–0.290
Scooter style E2W	0.18–0.36	20.2–40.5	0.09–0.17	0.10–0.19	0.009–0.017	0.032–0.064	0.014–0.027	0.210–0.420

Source: Cherry *et al*. (2009).

3. BUILDING DOMESTIC CARBON MARKET AND EMISSION TRADING SYSTEM

China is exploring the building of a domestic carbon market and emission trading system. What can be predicted is that the carbon market will be a key issue in the future negotiations. This comprehensive approach may be adopted to build carbon market and emission trading system. This will change the existing carbon trade system, which is based on projections only. Thus, China plans to implement this carbon emission trading system domestically in some cities, and this experiment may provide the experience of the procedure and method of carbon market and also exchange data for international carbon market. No doubt, it is important for China to participate in international carbon market rule-making.

4. PROMOTING INTERNATIONAL COOPERATION IN DEALING WITH CLIMATE CHANGE

Climate change is now a clear priority of international politics. It is a sensitive political issue in international arena, and will shape the new international order in the near future. There are many mutual interests between U.S. and China in this field. Up until now, U.S. has been the sole super power in the world, but China is clearly regarded as a new emerging power. As the two largest CO2 emitters in the world, it is crucial for these two nations to figure out how to coordinate with each other in the future negotiations. The rest of the world is expecting the passage of the U.S. and Chinese clean energy and energy safety bills or climate change bills, and more intensive GHGs emission reduction from U.S., this is American challenge. While China is still facing the great pressure from western European states and some small island states, they have also been asked to take more ambitious target to curtail GHGs emission in the upcoming discussions. At the same time, China is envisaging facing a shortage of energy supply and severe environment pollutions.

III. CHINA'S POSSIBLE OPTIONS TO ADDRESS THE CHALLENGE OF CLIMATE CHANGE

A. FROM COMMAND AND CONTROL TO MARKET-BASED MECHANISM

From both domestic and international experience of environmental crisis management, the measures to solve environmental problems which the environment administrators in China have adopted can be divided into two categories; one is the traditional command and control regulatory measure, the other is the application of market-based mechanisms to protect environment gradually. The typical example of traditional command and control approach is the best available technology (BAT), while the latter is best illustrated by market-based mechanisms includes cap and trade and carbon tax, etc.

The main approach for environment management was the traditional command and control regulatory measure from 1950s to 1990s in China. China's Environmental Protection Law which was enacted in 1979 was the only environmental law which has been made by National People's Congress (NPC) before 1980. As the first generation of an environmental protection strategy command and control approach, it was relatively reasonable.[15] The main environmental problems before 1980 were four main traditional pollutions: air pollution, water pollution, environmental noise pollution, and solid waste pollution. After the adoption of Reform and Openning up policy in 1978, China's economy has entered into the fast track, and environmental pollutions began to loom large. China has paid much more attention to environmental laws and regulations since the 1980s, and more than 30 environmental laws have been made by NPC to tackle with environmental pollutions and ecological destructions. The measures provided by these laws reflect a significant transition from a traditional command and control approach to that of a market-based approach; this was accompanied by the transition from plan economy to market economy in China at the same time. Some studies show that traditional form of command and control regulation existed had many defects, and this was reflected through best available technology.[16] First, uniform BAT requirements wasted billions of dollars annually by ignoring variations among plants and industries in the cost of reducing pollution by ignoring geographic variations in pollution effects.[17] Second, BAT controls, and the litigation they provoked, impose disproportionate penalties on new products and processes.[18] Third, BAT could not encourage developing new environmental friendly strategies. Fourth, due to hundreds of thousands of pollution sources, BAT imposed massive information gathering burdens on administrators and entailed high cost of compliance.[19] Lastly, a BAT strategy was inconsistent with intelligent priority setting.[20] In short, traditional form of command and control approach resulted in a very high cost of compliance and enforcement, discouraged the investment to new technologies, and wasted too much money and economic resources.

Because of the above mentioned limitations of traditional command and control

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[15] Bruce A. Ackerman & Richard B. Stuart, *Reforming Environmental Law*, 37 Stan. L.Rev.1333, 1361(1985).
[16] *Id*., at 1362.
[17] *Id.*, at 1335.
[18] *Id*., at 1335, 1336.
[19] *Id.*, at 1336.
[20] *Id.*, at 1337.

regulation in resolving environmental issues, many countries began to shift to market-based mechanisms much more than before. For instance, US government is now using over one hundred different economic incentive mechanisms to address environmental problems according a report from the Environmental Law Institute.[21]

Theoretically, market-based mechanisms have the following advantages: first, the well designed market-based mechanisms can reach win-win strategy; on one hand they guarantee the market participant's freedom of choice, on the other hand setting social environment protection goal also can be reached. Second, the market-based mechanisms have the advantage of cost-effectiveness and technological innovation. Instead of mandating uniform pollution reductions on a national basis, market-based approaches use economic incentives to encourage polluters to reduce their pollution in the most cost-effective manner.[22] Third, the market-based can eliminate the information-gathering burden from command and control on the government.[23] Fourth, market-based approaches sometimes may increase the revenue generated by environmental programs; for example with environmental taxation. Fifth, market-based approaches are helpful to ensure effective compliance and enforcement of environmental laws and regulations.[24] Sixth, market-based approaches are helpful to identify the priorities of environmental policies, for the environmental risks it is facing are complicated and always changing, so we need to design a reasonable order of priorities to encourage the development of environmental friendly technology, innovation and investment. Lastly, the market-based approaches may be applied to both upstream as well as downstream products. The so-called upstream products refer to oil coal and gasoline, etc, while the so-called downstream products refer to the large quantities of motor vehicle manufacturing plants which are difficult to oversee.[25]

In comparison with command and control regulation based on technology instead of the total amount of pollution, the market-based approaches is based on the total amount of pollution rather than the pollution control technology, and thus may save large sums of money as well as stimulate technical innovations and improve the administrative efficiency. For all of these reasons, the market-based approaches are becoming the main strategy to deal with environmental problems because of its obvious advantages. This trend has already been already reflected in more recent environmental laws and regulations in China, especially those enacted after 2000. Examples are the Clean Production Promotion Law of PRC 2002, Renewable Energy Law of PRC 2006, and Circular Economy Promotion Law of PRC 2008, etc.

B. THE ADVANTAGES AND DISADVANTAGES OF CAP AND TRADE AND CARBON TAX

Market-based approaches have been adopted by the Kyoto Protocol as better solutions to resolve climate change issues because of their advantages in dealing with environmental

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[21] Stephen M. Johnson, *Economics v. Equity: Do Market-Based Environmental Reforms Exacerbate Environmental Injustice?* 56 Wash. & Lee L. Rev. 111, 113 (1999).
[22] *Id*., at 113.
[23] *Id.*, at 113.
[24] William Drayton, *Economic Law Enforcement*, 4 Harv. Envtl L. Rev.1, 4 (1980).
[25] Richard B. Stewart, Jonathan B. Wiener, Reconstructing Climate Policy: beyond Kyoto, American Enterprise Press, Washton DC, 67-68(2003).

problems. Many developed nations are using or plan to use environmental taxation or cap and trade mechanism to reduce greenhouse gases emissions in order to implement Kyoto Protocol. Market-based approaches may be the best overall solution to cope with the challenges of global climate change.[26]

The traditional form of command and control approach focused on a single pollution sector, while market-based approaches can distribute the cost of emission reductions among the sectors economy-wide effectively. However, deciding which particular kind of market-base approach should be chosen is very controversial. Some think the cap and trade approach is the best option to mitigate climate change, while others hold carbon tax is. The question then, is which approach is the best choice? What are the advantages and disadvantages of cap and trade or carbon tax respectively?

1. THE ADVANTAGES AND DISADVANTAGES OF CAP AND TRADE (MOVE THIS TO CENTER)

1.1 THE ADVANTAGES OF CAP AND TRADE

The Cap and trade approach has become the approach favored by the decision-makers of environmental policies since it was successfully employed in resolving acid rain problem in the United States.

Theoretically, the cap and trade approach has the following advantages: First, for environmentalists, it is effective in guaranteeing environmental quality, because it can lower the emission cap gradually. Second, for industrial groups, cap and trade may create a new market for carbon credits, from which the companies with lower cost of emission reductions can make profits. Third, for economists, cap and trade approach can internalize the societal cost which is caused by carbon emissions. Fourth, for politicians, cap and trade approach can avoid the complicated permits system and not impose any new sort of tax on fossil fuels.[27] Fifth, as the other market-based approach, cap and trade approach is most helpful for enabling companies to reach their emission reduction goal at lower cost. Sixth, the cap and trade approach can constrain the rent-seeking behavior of environment protection agencies, and it benefits the public by showing willingness to pursue environment protection and enlarge the scale of the grassroots movement of environment protection.[28] Lastly, the cap and trade approach can enhance the feasibility and enforcement of emission reduction through the emission cap control and flexibility of its price.

Theoretically, no matter how one allocates the initial emission allowances, companies will pay the lowest cost of emission reduction from economic perspective through free exchange emission allowances among them.

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[26] Yucheng Shi & Hui Wang,On the Function of Market Mechanism in the Course of Alleviating Greenhouse Gas Discharge, 5 Presentday Law Science 89, 89(2008).

[27] Reuven S. Avi-Yonah, David M. Uhlmann, Combating Global Climate Change: Why a Carbon Tax Is a Better Response to Global Warming Than Cap and Trade, 28 Stan. Envtl. L.J.3, 5(2009).

[28] Mingde Cao, Study on cap and trade mechanism, 4 Law Science 100, 103(2004).

1.2 THE DISADVANTAGE OF CAP AND TRADE APPROACH

Cap and trade approach also has some distinct disadvantages though it has some advantages as motioned above. First, it is difficult to set an emissions cap. This is because it is almost impossible to reach the best environmental pollution level given currently available technology. Second, the emission allowances usually have been distributed to polluters for free, so it leads to no incentives for companies to innovation. Third, cap and trade approach exists offsetting provision, it leads to no guarantee to reach the emission reduction goal. Fourth, the societal cost of cap and trade creates uncertainty. If the cost of emission reduction is too high, the policy-makers will face pressure to raise the emission cap. Fifth, in comparison with cap and trade regimes in the past, current carbon cap and trade regime is more complicated, because carbon cap and trade regime involves massive emission sources, while the amount of emission sources which the old cap and trade regime involved was relatively small. For instance, the surpher dioxide cap and trade system of US was specifically for the 111 heavies polluters. Sixth, Cap and trade approach is difficult to be implemented because it needs to design the method for allocating the emission allowances, and needs to monitor and enforce the sophisticated system. Seventh, some hold that cap and trade approach has very limited power to stimulate technological innovations.[29] Lastly, the cap and trade approach is subject to causing hot spots in some areas, therefore it is inconsistent with environmental justice.

2. THE ADVANTAGES AND DISADVANTAGES OF CARBON TAX

2.1 THE ADVANTAGES OF CARBON TAX

Carbon taxes impose on oil coal and natural gas from the dimension of the practice in China at present. Carbon tax has the following theoretical advantages. First, it can provide price signal for externalities and therefore corrects market failures, unlike other market instruments. Second, the rate of carbon tax is determined according to the societal cost of carbon emission, therefore it is consistent with the "polluters pay" principle. Third, carbon tax can promote the behavior of carbon emission reduction, therefore it encourages enterprises to save energy and reduce emission. Fourth, carbon tax can increase revenue, which can be used to fund R&D of alternatives. Fifth, carbon tax rate could be adjusted according to the effectiveness of enforcement and new situations. Sixth, the carbon tax approach does not need to create a new agency to implement and enforce it compared with the cap and trade approach.

For all of these reasons some countries are using or considering to use carbon tax approach tackle with climate change issue. For example, Canada has a pilot program to use carbon tax to combat global warming.[30] Some Chinese scholars have also advocated that China should also use it as a tool to mitigate climate change.

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[29] David M. Driesen, *Sustainable Development and Market Liberalism's Shotgun Wedding: Emissions Trading Under the Kyoto Protocol,* 83 Ind.LJ.21,51(2008); see also David M. Driesen, Economic Instruments for Sustainable Development in Environmental Law for Sustainability: A Critical Reader 303(Stepan Wood & Benjamin J. Richardson eds, 2005).

[30] David G.Duff, *Tax Policy and Global Warming*, 51 Can. Tax.J2063, 2090(2003).

2.2 THE DISADVANTAGES OF CARBON TAX

Although carbon tax has its many advantages, governments still faces some problems when it imposes a carbon tax on enterprises. First, a carbon tax has political obstacles.[31] Nobody likes to see or use the word tax, because it reflects political power. The government's imposing a tax or increasing tax is the option of no choice. Second, it is difficult to set the tax rate. If the tax rate is too high, the emission reduction will exceed the political commitment, while if the tax rate is too low, the emission reduction will not meet the political commitment. Third, for enterprises a carbon tax will cause higher cost than the traditional administrative mandate, for the cost of carbon tax is imposed directly to consumers. Fourth, even environmental NGOs would not like to see the existence of carbon tax; they prefer to talk about the benefit and significance of environment protection rather than the cost of environment protection. Lastly, there exists uncertainty about the true benefit of carbon tax as the total volume of emission varies under the carbon tax regime.

C. CARBON TAX: CHINA'S POSSIBLE OPTION

As we know, there is no perfect method through comparison with cap and trade system and carbon tax, because the only certainty is that the uncertainty of global climate change. Hypothetically, it is difficult for us to determine which one should be superior: is it the environmental benefit certainty or the environmental cost certainty?[32] Some hold that environmental benefit certainty should be our priority from the perspective of environmental protection. But it might be unreasonable to overemphasize the environmental benefit certainty, because even a well designed policy ultimately will impose annual costs on the order of hundreds of dollars, so the costs should be accounted for if effective and sensible policies are to be designed and implemented.[33] Meanwhile, the benefits of any policy are to reduce greenhouse gases emission worldwide and long term, while the cost of any policy adopted by one country will be largely confined to its own and immediate. For this reason it is more important to focus on the costs rather the benefits.[34]

How does apply cap and trade system or carbon tax hold up under such uncertainty? Which approach is more efficient? Namely, when do we control price of emission reduction and when do we control the emission cap? From a purely theoretical perspective, the marginal cost increases quickly as the amount of emission reduction increases, while the marginal benefit declines slowly as the amount of emission reduction goes down. Therefore the most important issue for the government is to control price. If this is indeed the case government should impose pollution taxes which will give the freedom for enterprises to decide to the amount of emission reduction according to their individual situations. Otherwise, the government should control emission allowances. The price of emission allowances will

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[31] Helmuth Cremer, Philippe de Donder Firouz Gahvari, *Political Sustainability and the Design of Environmental Taxes,* 11 Int'L Tax & Pub.Fin.703, 703(2004).

[32] Qiaosheng Wu & Jinhua Chen, *On policy of global climate change,* 9 Soft Science of China 30, 33(2003).

[33] Robert N. Stavins, *A Meaningful U.S. Cap and Trade System to Address Climate Change,* 32 Harv. Envtl. L.Rev.293, 296(2008).

[34] Reuven S. Avi-Yonah, David M. Uhlmann, *Combating Global Climate Change: Why a Carbon Tax Is a Better Response to Global Warming Than Cap and Trade*, 28 Stan. Envtl. L.J.3, 36(2009).

be determined through allowances exchange among enterprises.[35]

The Chinese government cannot avoid the uncertainty issue because it cannot get the information of marginal cost of emission reduction from individual enterprises when it makes policy. Under this condition of uncertainty, the question then becomes: What kind of climate change policy should China adopt? Academicians in China have raised three possible solutions, each describing a very different approach to the problem of emissions and climate change.

Carbon tax will not work, and is not a practical solution, for China's situation. The reasons for this are as follows:

> First, Prices are not "set" by the market, so there is no foundation to adopt carbon tax approach as an incentive to encourage companies to reduce greenhouse gases emission. Second, Imposing carbon tax would deteriorate the economy of China, though it may lower the emissions of greenhouse gases. Third, Carbon tax cannot resolve the GHG emission issues of China.[36]

> The Second proposal is that the cap and trade system conforms to China's interest. Keep reference for the following reasons: First of all, the Cap and trade system is more consistent with China's interest. China praises the clean development mechanism (CDM) provided by Kyoto Protocol which adopted cap and trade approach, CDM is a most natural emission reduction mechanism to China. Secondly, the Cap and trade mechanism is more flexible than carbon tax, especially in the aspect of allocating emission allowances. It allows more consideration to the common but differential responsibility principle which is adopted by United National Framework Convention on Climate Change (UNFCCC). Given the needs of industrialization and developing economy from developing countries, more emission allowances will be distributed to them. Thirdly, the Cap and trade system is not implementing as it will lead to trade frictions in comparison with carbon tax.

> The third proposed policy is a mixture of fixed tradable long term emission permits with flexible short term emission permits. This is appealing for several reasons: Fist of all, the Cap and trade approach is inefficient, and carbon tax is politically infeasible, because climate change has too much uncertainty with the characteristics of world wide scope. Secondly, this mixture policy gives incentives to companies to lower their emission reduction cost on the one hand, and it avoids unnecessary transfer and allows the flexibility of allowance distribution. This mixture policy is a sort of flexible cap and trade method.

> From the discussion above, it is not difficult to find that some scholars think that cap

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[35] See *Martin* L.*Weitzman*, *Prices vs. Quantities*, 41Rev.of Econ.Studies477, 477(1974).

[36] Qiaosheng Wu & Jinhua Cheng, *Policies Study on Global Climate Change, 9* China Soft Science 14, 19(2003).

and trade system may be suitable for China. But from international and domestic situations, carbon tax would be more consistent with China's interest. There are reasons why this is the case, and why China should still consider this approach:

> First, the influence caused by carbon tax is exaggerated. Although a carbon tax imposed on products leads to a price hike and will therefore weaken the price competitive force of China's export goods, other nations will also begin to take corresponding measures to deal with climate change from the disposition of international society towards climate change issues. Under these circumstances, a carbon tax will not have much influence on export goods because of the price hike of goods from other countries.
>
> Second, the cap and trade mechanism is inconsistent with the China's position of international negotiation on climate change. Climate change issues are already beyond one environmental and climate area, and begin to expand to political economic and development arena.[37] From China's stance in international climate change negotiations in recent years it is clear that China always tries to avoid binding emission reduction restriction because it is regarded as a constraint to China's economy development. If China adopts nationwide cap and trade system while at the same time it refuses it during international negotiation, this situation will not be in China's long-term best interests.
>
> Third, the price of energy is not set by the market in China, but rather by the government, and this is not compatible with the proffered approach. .
>
> Fourth, a carbon tax is more consistent with China's interest in foreign trade. As far as the impact on international trade caused by cap and trade system or a carbon tax, the former tend to invite adverse effects on exports because cap and trade systems are different among nations and each nation has its own provisions when it makes cap and trade system. The best solution is to create a global cap and trade regime, but at present, this is not infeasible. Global cap and trade system involves the distribution of initial allowances among nations. There is big gap in this issue and is hard to coordinate among nations.

In contrast, carbon tax has fewer impacts on trade compared with cap and trade system, while carbon tax can be effectively coordinated according to the border adjustment tax.

As the increasing worry about climate change remains a significant issue, and the poor performance of Kyoto Protocol in dealing with global warming requires that the issues again be revisited, the intensive negotiations will undoubtedly be witnessed in the coming

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[37] Yucheng Shi & Hui Wang, *On the Function of Market Mechanism in the Course of Alleviating Greenhouse Gas Discharge*, 5 Presentday Law Science 89, 94(2008).

years to this issue.[38] China as a largest emitter in the world; although it can deny any binding legal obligation to reduce emissions, it cannot morally refuse efforts to reduce emission reductions. Among many emission reduction mechanisms available to China, the market-based mechanisms are definitely the ideal choices to combating climate change. In the market-based options, carbon tax is definitely more consistent with the political economic environmental and diplomatic interests of China.

IV. CHINA'S POSITION AND STRATEGY TO ENGAGE IN INTERNATIONAL SOCIETY

A. SOME CRITICISMS FROM WESTERNERS TOWARDS CHINA'S STANCE ON CLIMATE CHANGE

There are still some different views, even criticisms, from Westerners towards China's stance. The author just lists some of the objections voices against China's policy which were presented at a recent from international conference he attended.

At the Climate Change Conference which was held during Oct. 6-9 2008 in Helsinger Denmark, Shyam Saran, the climate change special envoy of Indian Prime Minister emphasized that Indian green house gas emission Per Capita was much lower than the world average. He held that every citizen had the right to consume a certain amount of energy. India, would not to commit binding GHGs emission reduction obligation.[39]

The chief negotiator of Environmental Agency of Japan disputed the notion that the Per Capita GHGs emission was a domestic issue other than international one. He held that the new framework of international GHGs emission regime should include U.S. and basic countries, namely Brazil South Africa India and China. If those nations were excluded that would severely influence the result of GHGs emission reduction world-wide. Moreover, he divided the developing countries into two categories; one category was the developed developing countries, the other that of under-developed developing countries.

Some representatives from international organizations praised China's efforts to enforce the laws and regulations relating to GHGs emission reduction domestically and achieved great results. But they also pointed out that there were no sufficient evidences to support the achievement because that the emission reduction was not under the monitoring or supervising of international organizations. They suggested that china's GHGs emission reduction should be under the supervision of international emission reduction framework, thus its emission reduction credits would be measurable and reportable and verifiable, and the mitigation and adaptation actions would be more transparent.

In the fifth International Law Annual Conference of India which was convened during Dec.7-10, 2007. Doctor Ben Saul who was from the International Law Center in Sydney of Australia held that the "polluters pay" principle should apply as a basic principle in international environmental law in solving climate change issues. This principle, it was felt,

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[38] William D· Nordhaus, *Life after Kyoto: Alternative Approaches to Global Warming Policies*, 6 Comparative Economic & Social Systems 17, 25(2009).

[39] Shyam Saran, climate change special envoy of Indian Prime Minister, Address at Helsinger International Climate Change Conference (Oct. 7, 2008).

should be considered the basis of identifying the liability of trans-boundary environmental pollution.[40]

Ved P. Nanda, Professor of Denver University gave a presentation titled "the Evolution of the Basic Principles of International Environmental Law" in the fifth International Law Annual Conference of India. He reiterated the "no harm" principle which had been established by *Trail Smelter Arbitration* case. He further argued that the no harm principle of using state territory was one of the four pillars of contemporary international law; the other three basic principles were the non-discrimination treatment principle, the equal treatment principle and the national treatment principle.[41] The author indicated the importance of insisting on the common but differentiated responsibility principle and the historical responsibility principle in dealing with climate change, and stressed that these two should be considered as the main principles in global climate change issues. He further argued regarding to the allocation of GHGs emission quotas among nations that we should take the comprehensive elements into account. The equity should be regarded as the guiding principle in developing a global response to climate change.

This legal imperative arises out of Article 3 of the UNFCCC by establishing equity as a guiding principle. It requires Parties to protect the climate system "on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities."[42] Therefore, the allocation of GHGs emission credits is not fair if it is determined only on the basis of production from industries; Consumption of products should also be considered. The calculating of GHGs emission is currently only based on manufacturing of products and the consumption of them is ignored; this is inconsistent with the guiding principle of equity. Therefore, when calculating the amount of emissions reduction the factor of goods consumption should be incorporated. Theoretically, it is also the environmental social responsibility of consumers. Lastly, Professor Bobert Percival said that if China insisted this principle that could imply that China would be responsible for the rest of carbon emission, it would be a progress. But the represents from EU predicted it could cause trade sanctions to Chinese goods by western countries, and the frictions and conflicts between China and EU member states.[43]

B. THE PRINCIPLE OF HISTORICAL RESPONSIBILITY AND COMMON BUT DIFFERENTIATED RESPONSIBILITY

How should China response to climate change from perspective of international law? China should insist the principle of historical responsibility and principle of common but differentiated responsibility in sharing the responsibility of climate change. There are several reasons for this. First, the climate change problem currently is the result from the GHGs emission generated mainly by developed nations. Therefore developed nations should be

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[40] Ben Saul, Address at the fifth International Law Annual Conference of India(Dec.7, 2007).

[41] Ved. P. Nanda, Keynote Address at the fifth International Law Annual Conference of India: The Evolutions of the Basic Principles of International Environmental Law (Dec.7, 2007).

[42] Article 3, UNFCCC.

[43] Robert Percival, Address at Southwest University of Political Science and Law: Globalization of Environmental Law (May 13, 2009).

responsible for the environmental results caused by their behavior and pay the cost of them. This is the starting premise and foundation for international negotiations. The emission history of developed nations is more than 200 years long, their accumulative emission volume is high, otherwise, China only has about 30 years emission history since it has adopted Opening and Reform policy from 1978, and its accumulative emission volume is relatively low. Secondly, China should insist on the principle of common but differentiated responsibility; that is, both developing and developed countries share the same responsibility to protect climate resource of the earth. This is the common responsibility for all countries. With regard to the differentiated responsibility between the developed and developing nations, it should be interpreted to mean that developed nations should help developing nations to mitigate and adapt to climate change in the aspects of technology transfer and financial assistance, and support their capacity building.

C. SOME SPECIFIC PRINCIPLES IN ALLOCATING EMISSION REDUCTION OBLIGATION

For all of these reasons, the following specific principles may be considered as the criteria to allocate GHGs emission reduction obligation.

First, per capita emission is the right principle. Although China per capita emission already exceeds the world average emission level, China per capita emission level is still much lower than that of developed states comparatively. For instance, the U.S. per capita emission level is almost 4 times more than that of China.[44]

Second, meeting citizen basic needs is the second principle. The GHGs emission of China is mainly to meet the fundamental energy and material needs of its citizens, while emission from developed states is mainly for their citizens luxury consumption. The nature of two sorts of needs is different. This point is extremely important to China, because China has a rural population of 900 million who, consume relatively little energy and natural resources. Thus, their contribution to global warming is minimal. For Chinese government, it is a crucial part of securing citizens human rights to meet their basic needs of energy and natural resources.

Third, principle of equity should be considered. China nowadays is a world factory and produces all sorts of products and supplies for western countries with already severe domestic pollution issues. Some have criticized these developed nations for transferring their heavy pollution industries to developing nations including China, and because they have done so it is unfair that they now constrain developing nations GHGs emission in return.

Recently, European and northern American countries establish trade sanctions on some products manufactured in China, for instance, anti-dumping and anti-subsidiary or imposing punitive tariff on Chinese goods. These measures caused much attention and discussion among the public in China. Imposing carbon taxation on some products coming from European and northern American countries might be considered, as a countermeasure to retaliation. From a legal perspective, China cannot levy carbon taxation accordingly on the same kind of foreign products if China does not have that sort of tax, otherwise it could

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[44] Erin Ryan, Hopenhagen or Nopenhagen? eryan@wm.edu, envlawprofessors@lists.uoregon.edu, (Dec. 16, 2009) (on file with author).

constitute a violation to the principle of non-discrimination and national treatment of WTO.

Fourth, The Principle of a "double track" regime should be applied. This is the precondition for China's participating in the international climate change negotiations. China insists a double track regime of emission reduction and as a developing nation status. That is to say, developed states shall commit binding emission reduction goals under the UNFCCC and Kyoto Protocol while allowing developing states take voluntary domestic emission reduction measures at the same time. China is a non-annex I country of UNFCCC, and a party of Kyoto Protocol, and is unwilling to commit a binding emission reduction goal; just a voluntary one China would continue to go forward along with the path of a double track framework which has been established by Kyoto Protocol and Bali Action Plan. The American government under the Obama Administration is unwilling to ratify Kyoto Protocol and would rather to commit emission reduction goal under the framework of UNFCCC.

V. CONCLUSION

China now is encountering the great pressure of GHGs emission reduction both from domestic and international sources in the current era of climate change. In order to deal with climate change issues, China has made many new laws and policies to curtail GHGs emission and stimulate the development and utilization of renewable energy recent years as a response. Among those measures to mitigate and adapt to climate change, command and control approaches such as emission standards are still functioning, while more market-based approaches will likely be chosen in coming years. In comparison with cap and trade mechanisms, a carbon tax is a more feasible measure for China to implement and enforce because of its many advantages, and may be a possible option in the near future. In regard to international climate negotiations, China as a developing country shall insist the principle of historical responsibility and principle of common but also insist on differentiated responsibility as a general principle, and will not to commit a binding emission reduction goal as its industrialization and urbanization processes have not been completed. In the long run China would like to have more stringent emission standards and market-based approaches to reach its ambitious voluntary GHGs emission reduction target.

KEYWORDS
China, Climate Change, Carbon Tax, Cap and Trade

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ARTICLE

The Korea-EU FTA: Implications for the Enforcement of Korean and European Competition Law

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ABSTRACT

On 1 July 2011 the Free Trade Agreement between the European Union and the Republic of Korea will become effective. The pact dedicates Chapter 11 to competition and requires the contract parties to undertake to apply their respective competition laws so as to prevent the benefits of the trade liberalization process in goods, services and establishment from being removed or eliminated by anti-competitive business conduct or anti-competitive transaction, and to remedy or remove distortions of competition caused by subsidies. This article is an investigation

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on the impact of the Korea-EU FTA for Korean and European competition law enforcement. It shows that the FTA contains enforcement rules that go beyond the "Competition Agreement" between Korea and the European Community of 2009. Accordingly, Chapter 11 FTA broadens the scope of matters which now are subject to "prompt discussion" in consultation procedures between Korea and the EU at the request of either party. Furthermore, as far as the competition matter concerns subsidies, the full range of dispute settlement mechanisms under the WTO Agreements remains available. This article also argues that rights under Chapter 11 FTA can be enforced by individually concerned European companies (i.e. private enforcement) under the European "Trade Barrier Regulation." It has been established by prior proceedings under the Trade Barrier Regulation that subsidies can amount to an obstacle to trade with adverse effect on a European company operation in Korea, and the Trade Barrier Regulation has already been an effective tool for companies to initiate an investigation by the European Commission against alleged unlawful subsidization of Korean companies under the WTO Agreements. It will therefore serve as such a tool when facing stricter rules on subsidies of Chapter 11 FTA. As far as other anticompetitive actions are concerned, the Trade Barrier Regulation will also be available in principle, but its final measures will be limited to cooperation and consultation procedures outlined in Chapter11 FTA.

I. INTRODUCTION

The EU and the Republic of Korea maintain comprehensive competition rules and authorities who are given the means to effectively enforce them. The Free Trade Agreement (FTA)[1] between the two parties now dedicates a separate chapter to "competition" in a broad sense and to enforcement of competition law and policy.

About five months before the negotiations on the FTA between Korea and the European Union were successfully closed, on 23 May 2009, the two parties signed another – less controversial – pact: The Agreement between the European Community and the Government of the Republic of Korea concerning cooperation on anti-competitive activities ("Competition Agreement"), covering each other party's competition law and policy and – by supremacy of EU law – impacting the application of national competition laws of each European member state.

Once the Korea-EU FTA comes into force, it will have even more crucial effect on the future application of both Korean and European competition law. The treaty addresses in its Chapter 11 such distinct areas as anticompetitive agreements (cartels), abuse of dominant position and mergers – while in parallel the Competition Agreement will still remain in force. Moreover, the FTA for the first time addresses the subject of subsidies at bilateral level.[2]

This article not only investigates the impact of the Korea-EU FTA for Korean and European competition law enforcement under the parties' obligations to maintain in their respective territories comprehensive competition laws and effectively prevent anti-

[1] Free Trade Agreement, EU-S. Korea, EUR. PARL. DOC. (COM 2010(0137)) [hereinafter FTA].

[2] Since parties of the FTA are Korea, the EU and the EU member states, it can be argued that the agreement is in fact a multilateral pact.

competitive business conduct and anti-competitive transactions,[3] but also addresses the question whether rights under Chapter 11 FTA can be enforced by individually concerned European companies (i.e. private enforcement).

II. AGREEMENTS BETWEEN KOREA AND THE EU ON COMPETITION LAW AND COMPETITION POLICY

A. THE AGREEMENT BETWEEN THE EUROPEAN COMMUNITY AND THE GOVERNMENT OF THE REPUBLIC OF KOREA CONCERNING COOPERATION ON ANTI-COMPETITIVE ACTIVITIES

The Competition Agreement[4] can be seen as an important step in the effective application of competition rules and the fight against anticompetitive behavior in the global economy. In view of the significant growth in international trade and the fact that the Korean and European economies are becoming increasingly interlinked, risk that anticompetitive practices affect more than one market and the likelihood that one competition authority's action has implications for others increases.[5]

The purpose of this Agreement is to contribute to the effective enforcement of the competition laws of each party through promoting cooperation and coordination between the competition authorities of the parties and to avoid or lessen the possibility of conflicts between the Parties in all matters pertaining to the application of the competition laws of each party (similar agreements already exist between the EU and the US, Canada and Japan).[6]

The main areas of cooperation provided for by the bilateral Competition Agreement therefore concern the notification of enforcement activities that may affect the interests of the other jurisdiction, mutual assistance (including the possibility for one authority to ask the other to undertake enforcement action), coordination of enforcement activities, exchange of non-confidential information and organization of regular bilateral meetings between the parties' competition authorities. These are the European Commission (respectively the competent national authorities of the EU member states) and the Korean Fair Trade Commission (Article 1 para 2 b Competition Agreement).

The application of the Competition Agreement requires either "anticompetitive activities" or "enforcement activities" carried out by a party's competition authority. The Competition Agreement defines as (and thereby limits its scope to) anticompetitive activities as "any activities that may be subject to sanctions or other relief measures by competition authorities under the competition laws of one of the Parties or both Parties" (Article 1 para 2 a leg cit). Accordingly, such activities comprise cartels (Article 101 TFEU,[7] Article 19

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[3] *Cf.* FTA, *supra* note 1, art.11.1, para.1f.

[4] Agreement Concerning Cooperation on Anti-Competitive Activities, May 23, 2009, European Community-S. Korea, 2009 O.J. (L 202) 35 [hereinafter Competition Agreement].

[5] *Cf.* Competition: Commission Welcomes Conclusion of Cooperation Agreement Between EU and Republic of Korea, European Commission Press Release, IP/09/827, May 25, 2009.

[6] Competition Agreement, *supra* note 4, art. 1, para. 1.

[7] TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION, 2010 O.J. (C 83) 47 (before the Treaty of Lisbon

MRFTA[8]) and abuse of a dominant position (Article 102 TFEU, Article 3-2 MRFTA) – commonly referred to as "antitrust law." It also includes concentrations of companies that may restrict competition (Council Regulation (EC) No 139/2004, Article 7 MRFTA) – commonly referred to as "merger control." There is also a reference to special or exclusive rights granted to undertakings. It does, however, not cover anticompetitive subsidies.[9]

The term 'enforcement activities' means any application of competition laws by way of investigation or proceedings conducted by the Korean Fair Trade Commission or the European Commission (Article 1 para 2 e leg cit). From an "enforcement perspective," the areas of significant importance are Article 3 (enforcement cooperation), Article 4 (coordination of enforcement activities) and Article 8 (consultations) of the Competition Agreement.

Enforcement cooperation is reached by Korea's and the EU's obligation to render assistance to the competition authority of the other party in its enforcement activities (basically by providing information that has negative effect on the other party's competition law or is relevant to its enforcement activity) to the extent consistent with the laws and regulations of the party rendering the assistance and the important interests of that party, and "within its reasonably available resources."[10]

Coordination of enforcement activities requires Korea and the EU to "consider coordination of their enforcement activities to the extent compatible with their respective laws and regulations" where their competition authorities are pursuing enforcement activities with regard to related matters. Subject to appropriate notification to the competition authority of the other party, the competition authority of either party may, at any time, limit the coordination of enforcement activities and proceed independently on a specific enforcement activity.[11]

Finally, a consultation mechanism provides that Korea and the EU consult with each other at least once a year, upon request of either party, on any matter which may arise in the implementation of the Competition Agreement. However, this consultation remains restricted to general matters (i.e. exchange information on their current enforcement efforts, on priorities in relation to the competition laws of each party, on economic sectors of common interest, discussion of policy issues of mutual interest and other matters of mutual interest relating to the application of the competition laws of Korea and the EU).[12]

B. THE FREE TRADE AGREEMENT BETWEEN THE EUROPEAN UNION AND THE REPUBLIC OF KOREA

The text of the Korea-EU FTA was initialed between the European Commission and Korea on 15 October 2009 and was signed on 6 October 2010. The date of provisional application will be 1 July 2011, provided that the Korean National Assembly will have

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took effect known as EC TREATY art. 82).

[8] Monopoly Regulation and Fair Trade Act (S. Korea).

[9] Competition Agreement, *supra* note 4, art. 1, para. 2.

[10] *Cf.* Competition Agreement, *supra* note 4, art. 3.

[11] *Cf.* Competition Agreement, *supra* note 4, art. 4.

[12] *Cf.* Competition Agreement, *supra* note 4, art. 8.

ratified the agreement accordingly before that date.[13] The European Parliament gave its consent to the FTA on 17 February 2011.[14] It should be noted that, due to the FTA's legal range, parties of the FTA are not only Korea and the EU but also the EU member states individually (whereas the Competition Agreement was concluded as a truly bilateral pact). The EU member states will still have to ratify the agreement according to their own laws and procedures, however this is considered a mere formality given the conclusion of the debate in the Council (the main decision making body representing the EU member states' governments) and will not affect the provisional application of the FTA from 1 July 2011.

"The EU-Korea FTA is the most comprehensive free trade agreement ever negotiated by the EU."[15] It aims to eliminate import duties and to liberalize trade in services covering all modes of supply. The FTA includes provisions on investments both in services and industrial sectors, strong disciplines in areas such as the protection of intellectual property (including geographical indications), public procurement, competition rules, transparency of regulation and sustainable development. Specific commitments to eliminate and to prevent non tariff obstacles to trade have been agreed on sectors such as automobiles, pharmaceuticals or electronics. The pact comprises of 15 chapters, several annexes and appendixes and three protocols (the most important of which is the protocol on rules of origin). The FTA dedicates Chapter 11 to "competition."

1. COMPETITION RULES OF CHAPTER 11 OF THE FTA

Chapter 11 Section A FTA refers to competition in the stricter sense, whereas Section B newly introduces provisions on subsidies. According to Article 11.1 FTA, Korea, the EU and its member states "undertake to apply their respective competition laws so as to prevent the benefits of the trade liberalisation process in goods, services and establishment from being removed or eliminated by anti-competitive business conduct or anti-competitive transactions." The terms of application of Chapter 11 FTA are widely consistent with those of the preceding Competition Agreement.

Like the Competition Agreement, Article 11.2 FTA defines as relevant competition laws the provisions on cartels (Article 101 TFEU, Article 19 MRFTA), abuse of a dominant position (Article 102 TFEU, Article 3-2 MRFTA) and merger control (Council Regulation (EC) No 139/2004, Article 7 MRFTA). Reference is made to special or exclusive rights granted to undertakings. However, the latter area is now especially treated under Article 11.4 FTA. In addition, Article 11.5 FTA aims to restrict abuse of state monopolies.

Article 11.3 FTA requires Korea, the EU and its member states to maintain authorities responsible for, and appropriately equipped for, the implementation of these competition laws, without mentioning the European Commission and the Korean Fair Trade Commission by name.

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[13] The pact needs to be approved by the Korean parliament by no later than June in order to go into effect as scheduled; rules related to the implementation of the FTA must also pass the National Assembly by then (*cf.* EU Commission Welcomes European Parliament Backing for Free Trade Deal with South Korea, European Commission Press Release, IP/11/194, Feb. 17, 2011).

[14] European Parliament Reading, EP T7-0063/2011.

[15] EUROPEAN COMMISSION, EU-SOUTH KOREA FREE TRADE AGREEMENT: A QUICK READING GUIDE 1 (2010).

Chapter 11 FTA (Article 11.1 para 3) also explicitly outlaws the following activities as restricting competition, in so far as they may affect trade between the parties, because they are "incompatible with the functioning of the FTA":

> - agreements between enterprises, decisions by associations of enterprises and concerted practices, which have as their object or effect the prevention, restriction or distortion of competition in the territory of either party as a whole or in a substantial part thereof;
> - any abuse by one or more enterprises of a dominant position in the territory of either party as a whole or in a substantial part thereof; and
> - concentrations between enterprises, which significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position in the territory of either Party as a whole or in a substantial part thereof.

As for public enterprises and enterprises entrusted with special or exclusive rights, Article 11.4 FTA binds them to the before mentioned principles and laws, "in so far as the application of these principles and competition laws does not obstruct the performance, in law or in fact, of the particular tasks assigned to them." Pursuant to Article 11.5 FTA the parties will adjust state monopolies of a commercial character so as to ensure that no discriminatory measure regarding the conditions under which goods are procured and marketed exists between natural or legal persons of the parties.

Finally, Section B introduces subsidies into the competition chapter. Korea, the EU and its member states "agree to use their best endeavours to remedy or remove through the application of their competition laws or otherwise, distortions of competition caused by subsidies in so far as they affect international trade, and to prevent the occurrence of such situations" (Article 11.9 FTA). Subjects are "specific subsidies" pursuant to the conditions of Article 2 of the SCM Agreement[16] and shall be prohibited in so far as they adversely affect international trade of the parties (Article 11.11 FTA). The prohibition applies to subsidies received only after the date when the FTA enters into force.[17]

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[16] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL TEXTS: RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 275 (1999), 1867 U.N.T.S. 14.

[17] Exempt are fisheries subsidies, subsidies related to products covered by Annex 1 of the Agreement on Agriculture and other subsidies are exclusively covered by the Agreement on Agriculture, FTA, *supra* note 1, art. 11.15.

III. IMPLICATIONS BY THE FTA FOR KOREAN AND EUROPEAN COMPETITION LAW ENFORCEMENT

A. HANDLING OF DISPUTES – "COOPERATION" AND "CONSULTATION"

What generally makes a Free Trade Agreement valuable to its contractual parties is the binding nature of its provisions and the possibility to enforce rights or settle disputes over the applications of rights awarded by the FTA. The Korea-EU FTA provides for such a mechanism in Chapter 14. Article 14.2 FTA defines the scope of Chapter 14: It applies "to any dispute concerning the interpretation and application of the provisions of the FTA unless otherwise provided." The dispute settlement procedures may lead – after unsuccessful consultations – to a binding ruling of an arbitration panel.

With regard to Chapter 11 FTA however, such dispute settlement procedures remain unavailable to the parties. Article 11.8 FTA states: "Neither Party may have recourse to Chapter Fourteen (Dispute Settlement) for any matter arising under this Section." Rather, Article 11.6 para 2 FTA takes reference to "cooperation" in relation to the enforcement activities of the European Commission and the Korean Fair Trade Commission under the Competition Agreement between Korea and the EU by enforcement cooperation, notification, consultation and exchange of non-confidential information. Basically this means that – while Article 11.1 FTA explicitly prohibits cartels, abuse of dominant position and anticompetitive mergers, and Articles 11.4 f FTA provide for binding rules on public enterprises and state monopolies – enforcement of the prohibition appears impossible. The FTA remains – in this regard – on the level of a bilateral declaration of intent and a toothless understanding on cooperation.

However, a more promising approach is made available through Article 11.7 FTA. Accordingly, in the absence of more specific rules in the Competition Agreement a party will have to enter into "consultations" regarding representations made by the other Party, "to foster mutual understanding or to address specific matters that arise under this Section," if the other party requests such consultations. In its request, the other party shall indicate, if relevant, how the matter affects trade between the parties and the parties shall promptly discuss any questions arising from the interpretation or application of the FTA's competition provisions.

Although at the first sight these "consultations" appear similar to what is known from Article 8 Competition Agreement, the FTA competition consultation provision does go beyond that. It does not simply apply to information exchange on economic sectors, enforcement issues, policy issues and other competition issues of mutual interest,[18] but also refers to "specific matters that arise under this Section" (i.e. Chapter 11 Section A FTA). The scope of topics which can be brought up in such consultations is now broadened to actual matters that are deemed to impair fair competition within either Korea or the EU. Furthermore, it does not refer such matters to an annual consultation meeting (Article 8 para 2 Competition Agreement); rather each party has the right to request "prompt discussion" of the matter.

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[18] *Cf*. Competition Agreement, *supra* note 4, art. 8, para. 2 a-d.

As far as the specific matter concerns subsidies, "consultation" procedures of Article 11.7 FTA do not apply. This follows from the legal systematic of Chapter 11 FTA as well as from Article 11.7 para 2 FTA which refers to Section A of Chapter 11 FTA only. Since subsidies are not subject of the Competition Agreement, its cooperation provisions cannot apply to subsidies. Article 11.12 FTA only subjects the parties to annual reporting on transparency issues and allows a party to request further information on subsidy schemes and individual cases treated by the other party. A monitoring and review procedure is established by Article 11.14 FTA, and subsidy matters can be referred to the Trade Committee[19] which can only decide by mutual agreement.

Article 11.13 FTA contains a reference to the WTO-Agreement and the Agreement on Subsidies and Countervailing Measures. Accordingly, WTO trade remedies and dispute settlement mechanisms remain available and form the main resort for applying the FTA's provisions on subsidies. This means that where the FTA sets up stricter rules on subsidies, the parties can be made obey them through current WTO bodies and procedures. It should be noted that particularly the WTO law on subsidies has developed a standard of recognition similar to that of national laws and has forced back national law on a large scale.[20]

As a consequence, a sort of mandatory procedure which Korea or the EU can follow when either party is confronted with an (alleged) infringement of the – generally binding – rules on competition (in the areas of antitrust, merger control, state monopolies and public enterprises) is limited to Article 11.7 FTA ("consultations"). However, the fact that the FTA prohibits anticompetitive actions – based on well-established European and Korean law and jurisdiction – *per se* by Chapter 11 FTA must be seen as a positive advancement and gives hope that further trade integration will lead to stronger legal integration with binding enforcement rules. Also, subsidies do not remain limited to discussion in the Trade Committee but are subject to the WTO dispute settlement mechanism.

B. PRIVATE ENFORCEMENT OF FTA COMPETITION RULES UNDER EU LAW

EU enterprises facing barriers to trade in countries outside the EU generally do not have rights to participate in WTO dispute settlement procedures even though they are companies which regularly suffer. The European Trade Barrier Regulation[21] established procedures to ensure effective exercise of the EU's rights under international trade rules – at the request of private enterprises. International trade rules are primarily those established under the auspices of the WTO and laid down in the Annexes to the WTO Agreement, but they can also be those laid down in any other agreement to which the EU is a party and which

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[19] The Trade Committee consists of representatives of the EU and representatives of Korea. Its objective is – among others – to supervise and facilitate the implementation and application of the FTA and to seek appropriate ways and methods of forestalling problems which might arise in areas covered by the FTA or of resolving disputes that may arise regarding the interpretation or application of it (without prejudice to Dispute Settlement mechanism and Mediation mechanism). It further may consider amendments to the FTA, adopt interpretations of its provisions and make recommendations or adopt decisions as envisaged by the FTA, *supra* note 1, arts. 15.1, 15.4; article 15 also applies to the competition section, section A.

[20] CHRISTIAN PITSCHAS & HANS-JOACHIM PRIEß, WTO-HANDBUCH 29 (2003).

[21] Council Regulation 3286/94, 1994 O.J. (L 349) (laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization).

sets out rules applicable to trade between the EU and third countries. Thus, the mechanism aims to provide procedural means to request that the EU institutions react to obstacles to trade adopted or maintained by third countries which cause injury or otherwise adverse trade effects, provided that a right of action exists, in respect of such obstacles, under applicable international trade rules.[22]

The original text provided, however, that such procedure should only be admissible if the obstacle to trade alleged therein was the subject of a right of action established under international trade rules laid down in a multilateral or plurilateral trade agreement. Since the enactment of the Trade Barrier Regulation the EU has concluded a number of bilateral agreements which contain substantive rules on trade between the EU and countries outside the EU that go significantly beyond WTO rules. Consequently, this restriction has been removed by an Amendment[23] in 2008. Although it could be debated whether the Korea-EU FTA is a multilateral agreement in terms of the Trade Barrier Regulation in the version before the Amendment of 2008, since then there is no doubt that private enterprises can pursue a procedure under the Regulation in case of infringement of the Korea-EU FTA in general. The reliance by EU enterprises on bilateral agreements to bring complaints under the Trade Barrier Regulation can be expected to contribute to monitoring the respect of the obligations contained in the FTA and to tackling barriers to trade.[24]

Private enforcement of FTA provisions based on the EU Trade Barrier Regulation depends on the following prerequisites (cf. Article 4 leg cit):

> - There must be an "obstacle to trade," i.e. a trade practice adopted or maintained by a third country (i.e. Korea) in respect of which international trade rules (i.e. the FTA) establish a right of action (Article 2 para 1 leg cit). The Regulation does not protect against private actions which have the effect of obstacles to trade. Thus, actions taken by a Korean company would not be covered. However, if a party of the agreement supports, promotes or tolerates such actions where it is obliged to take actions against them under the FTA, such actions will be attributed to the party itself.[25]
> - The obstacle to trade must result in "adverse trade effects that have an effect on the market of a third country," i.e. effects in respect of a product or service, to EU enterprises on the Korean market or any other third country, and which have a material impact on the economy of the EU or of a region of the EU, or

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[22] *Id.*

[23] Council Regulation 125/2008, 2008 O.J. (L 40) (amending Council Regulation 3286/94; laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization).

[24] The idea that the supervision of observance of international trade agreements is not a governmental task alone but also one for business associations is becoming more and more accepted among the concerned industries. By statutory rules such as U.S. Trade Act of 1974 §§ 301 sqq or the EU Trade Barrier Regulation, private market participants are granted the right to enforce their interests in the international flow of trade by themselves on the level of international law. It can be assumed that in many cases the lodging of a complaint alone will have the effect that the concerned country outside the EU takes satisfactory measures when faced with a formal investigation by the European Commission.

[25] PITSCHAS & PRIEß, *supra* note 20, at 774.

on a sector of economic activity therein (Article 2 para 4 leg cit). Relevant assessment criteria are among others the volumes of the concerned imports and exports, prices of competitors (especially situations of price dumping), and the development of production capacity, storage, sales numbers, profits, employment or investment.[26] The fact that the complaint was lodged by an enterprise association is an indication for a material impact on the economy of the EU or a region of the EU.[27]

- The complaint must contain sufficient evidence of the existence of the obstacles to trade and of the adverse trade effects (Article 4 para 2 leg cit).

The complaint shall be submitted to the Commission, which shall send a copy to the EU Member States (Article 5 leg cit). Where, after consultation, it is apparent to the Commission that there is sufficient evidence to justify the initiation of an examination procedure and that it is necessary in the interest of the EU, the Commission will notify Korea, initiate an examination procedure, carry out investigations (if deemed necessary), may hear the concerned parties, give the opportunity to rebut the allegations and draw up a final report (Article 8 leg cit). Any commercial policy measures may then be taken which are compatible with existing international obligations and procedures (Article 12 para 3 leg cit).

Where the EU's international obligations require the prior discharge of an international procedure for consultation or for the settlement of disputes, the measures referred to in Article 12 para 3 leg cit shall only be decided on after that procedure has been terminated and taking account of the results of the procedure. In particular, where the EU has requested an international dispute settlement body to indicate and authorize the measures which are appropriate for the implementation of the results of an international dispute settlement procedure, the EU commercial policy measures which may be needed in consequence of such authorization must be in accordance with the recommendation of such international dispute settlement body.

In application of these rules to Chapter 14 of the EU-Korea FTA it is necessary to look at subsides and the "other anticompetitive acts" separately:

C. SUBSIDIES

Is it possible for an EU enterprise to privately enforce an infringement of Section B of Chapter 11 FTA? Since it has been established that an infringement of Section B by either the EU or Korea can be opposed by means of the WTO dispute settlement regime, private enforcement under the EU Trade Barrier Regulation for European companies will provide an effective tool. Such subsidies would certainly have adverse effect on these companies' operation in Korea, and the requirement "obstacle to trade" can be met easily when it comes

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[26] *Id.* at 776.

[27] Such an indication was found in the investigation of the Commission against Korea examining measures imposed by Korea affecting the import, distribution and advertising of cosmetics, perfume and toiletries products, in 1998 O.J. (C 154).

to subsidies: Already in the past the Commission has taken action against Korea under the SCM Agreement within the framework of the WTO Agreements when Korea provided subsidies to its shipbuilding industry and suppliers, and launched official investigations under the Trade Barrier Regulation regime.[28]

The Trade Barrier Regulation therefore covers the Chapter 11 FTA provisions on subsidies and certainly opens a way for European private enterprises to supervise its full application by Korea.

D. OTHER ANTICOMPETITIVE ACTS

Since trade barriers are defined as trade practices adopted or maintained by a third country in respect of which international trade rules establish a right of action (Article 2 para 1 Trade Barrier Regulation), and the Korea-EU FTA contains obligations for the implementation of effective competition rules in both Korea and the EU, it can be argued that Chapter 11 FTA as a whole may be subject to private enforcement pursuant to the EU Trade Barrier Regulation.

As stated, the Regulation does not protect against private actions which have the effect of obstacles to trade. Thus, anticompetitive actions (e.g. the abuse of a dominant position towards an EU competitor in the Korean market, the establishment of a cartel or a merger with anticompetitive effect on an EU competitor in the Korean market) taken by Korean enterprises would not be covered by the Regulation *per se*. But if it can be established (under the rules of procedure and evidence of the Regulation) that Korea failed to implement "authorities responsible for, and appropriately equipped for, the implementation of the competition laws" defined by Article 11.2 FTA, or failed to apply its respective competition laws in a transparent, timely and non-discriminatory manner, without respecting the principles of procedural fairness and rights of defence of the parties concerned, or failed to make available upon request public information concerning its competition law enforcement activities and legislation related to the obligations covered by Section A (cf. Article 11.3 FTA), then this can be interpreted by the Commission as supporting, promoting or tolerating such actions by Korea where it would be actually obliged to take measures against such actions under the FTA, and such actions would be attributed to Korea itself.

Furthermore, since Chapter 11 para 3 FTA explicitly outlaws cartels, abuses of a dominant position and anticompetitive mergers as restricting competition, because they are "incompatible with the functioning of the FTA," this fundamental understanding is incorporated into the FTA and requires application when interpreting Chapter 11 FTA obligations. Ad far as these acts may affect trade between the parties, which will be a question of evidence under the Trade Barrier Regulation, they may open the way to private enforcement.

This is because it is perfectly possible that an EU company will suffer the same or similar amount of injury by such anticompetitive acts of competitors and that these acts show

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[28] Notice of initiation of an examination procedure concerning an obstacle to trade, within the meaning of Council Regulation 3286/94, consisting of trade practices maintained by Korea affecting trade in commercial vessels, in 2000 O.J. (C 345).

the same or similar impact on the economy of (a region of) the EU, as would do acts directly forbidden to Korea as a party of the FTA (e.g. subsidies). However, it will be necessary to provide sufficient evidence that these acts would in fact be caused by Korea through supporting, promoting or tolerating such actions. This will require a showing that the Korean competition authorities (the Korean Fair Trade Commission) would have incorrectly or insufficiently applied Korean competition law or that the Korean law would not comply with the FTA obligations. Both showings will be difficult to make.

In theory, the Commission would – provided the complainant presents sufficient evidence – start an official investigation under the Trade Barrier Regulation. Since neither the WTO nor the FTA dispute settlement mechanisms are appropriate (see above III.A.) and the Commission can only take actions in the framework of the relevant Agreement (i.e. the FTA), its final measures would be limited to cooperation and consultation pursuant to Articles 11.6 and 11.7 FTA. Hence in practice, it is more likely that the Commission will – instead of performing an investigation based on the Trade Barrier Regulation – try to address and settle the issue at early stage by way of cooperation and consultation pursuant to Articles 11.6 and 11.7 FTA only.

Nevertheless, the mere legal right to private enforcement under the Trade Barrier Regulation also in matters of competition law will contribute to monitoring the respect of the obligations contained the FTA and help to tackle trade barriers between Korea and the EU.

IV. CONCLUSIONS

The Korea-EU FTA contains enforcement rules with regard to competition law that go beyond nonbinding measures laid down in the Competition Agreement but may not be enforced by the FTA's general dispute settlement mechanism. The FTA explicitly outlaws cartels, abuses of dominant position and anticompetitive mergers for the first time, and provides for binding rules on public enterprises and state monopolies. As far as the competition matter at issue concerns subsidies, the full range of dispute settlement procedures under the WTO Agreements remains available.

The EU Trade Barrier Regulation can serve private European companies as a tool to enforce actions against infringements of the FTA's competition rules. This may even lead to a full range of measures against Korea under the WTO and FTA dispute settlement procedures as far as subsidies are concerned. As for other anticompetitive actions, the Trade Barrier Regulation will also be available in principle. Due to the limited scope of binding enforcement in such matters, a conflict will be settled based on cooperation and consultation proceedings in accordance with Chapter 11 FTA.

KEYWORDS

Abuse of Dominant Position, Cartel, Competition Agreement, Dispute Settlement, European Union, Free Trade Agreement, Korea-EU FTA, Merger Control, Subsidy, Trade Barrier Regulation, WTO Agreement

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ENVIRONMENTAL JUSTICE AND EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Ick-June, Yoon[*]

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ABSTRACT

Environmental justice is deeply rooted in the United States' unique history, culture, politics, ideology, economy, social structure, and legal systems. The movement has drawn upon principles taken from environmental law, civil rights law, and broader movements for economic and social justice. The environmental justice movement, which targets specific groups of environmentally disadvantaged people, provides an ethical direction and moral power for environmental law in the United States and in other countries all around the world.

In the early debates, minority groups began against the inequitable distribution of municipal services. But later, it was expanded to include concerns about the disproportionate impact of environmental hazards on minorities. In the United States, race is the most significant variable associated with the location of commercial hazardous waste facilities. Environmental race discrimination, referred to as

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environmental racism, is the disproportionate imposition of environmental hazards on minorities.

I suggest that environmental justice or racism need not necessary relinked the Equal Protection Clause of the Fourteenth Amendment. Some racial case (i.e. municipal discrimination) could relatively easy to prove the discriminatory intent, but environmental justice or racism cases about the hazardous waste facilities cases could not.

Although Location of a landfills or hazardous waste facilities was based on the economic choice or environmental decision-making, the equal and adequate protection of every person's environmental interests under the Constitution (i.e. environmental right) or several environmental laws is important. Especially in Korea, environmental hazardous facilities was made too much of the countryside having agricultural or forestry land outside of the urban. Thus, review of the environmental justice debates in the United States may redefine and remind of importance of the equal and adequate protection.

Environmental justice into our legislative and policy discussions must be considered. Although the causes of environmental disparities and historical background in Korea are different from those in the United States, the concept of environmental justice should be reconsidered in light of our unique situation.

I. INTRODUCTION

Most people are reluctant for a hazardous waste facility to be located in the proximate of their own residential area because a facility may affect their health and/or welfare. This is called "NIMBY(not in my backyard)." Thus, government or administrative agencies have often faced serious obstacles when the proposed facility has an environmentally hazardous character with the potential of affecting both health and welfare of the community in spite of the necessity of those facilities.

The result is that many of these facilities have been located in residential area of the poor or minorities so that government or agencies and/or facility's owners avoided the political and economic charges, - i.e. the land where the poor resided was mainly cheaper than others.[1]

Environmental race discrimination, referred to as "environmental racism," is the disproportionate imposition of environmental hazards on minorities.[2] In the United States,

[1] Likewise, poorer individuals buy the cheaper land. Industry also may situate facilities near the property of low income or minority groups, not because those groups reside in the area but because the land is cheaper in low-income areas and the land uses are mixed-residential, vacant, industrial, and commercial-and thus do not present the same expense and land use compatibility problems that exist in other areas. Roliff Purrington, Michael Wynne, Environmental racism: Is a nascent social science concept a sound basis for legal relief?, 35-APR Hous. Law. 34, 34-35 (1998).

[2] United Church of Christ Commission for Racial Justice, Toxic Wastes and Race in the United States, at 9-10 (1987).

race is also the most significant variable associated with the location of commercial hazardous waste facilities.[3]

This phenomenon was first recognized in the late 1960s.[4] According to the heightened social awareness, these discriminations were busted from the concerns about the urban environment.[5]

In the early debates, minority groups began protesting against the inequitable distribution of municipal services.[6] But later, it was expanded to include concerns about the disproportionate impact of environmental hazards on minorities.

This paper will discuss this environmental justice (or racism) case law in the United States in the context of the Equal Protection Clause of the Fourteenth Amendment.

II. EMERGENCE OF ENVIRONMENTAL JUSTICE IN UNITED STATES

A. ENVIRONMENTAL MOVEMENT

1. VOCAL TRADITIONAL ENVIRONMENTAL MOVEMENT

The environmental justice movement is deeply rooted in the traditional environmental movement. As noted, the environmental justice movement can be traced back to the late 1960s in the United States. The emergence of a vocal environmental movement in the 1960s and 1970s when the media and changed urban conditions generated public concern for environmental issues[7] played an instrumental role in the development of environmental justice.[8] The publication of Rachel Carson's "Silent Spring" and the increasing urban smog problem also captured public attention.[9] During the 1970s, Congress enacted several environmental statutes, such as the Clean Air Act,[10] Clean Water Act,[11] and Endangered

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[3] Indeed, a strong statistical correlation exists between the number of hazardous waste facilities and the size of the proximate minority population. United Church of Christ Commission for Racial Justice, supra note 2, at xiii. Further, three out of five Hispanic- and African-Americans live in communities with uncontrolled toxic waste sites. *Id*., at xiv. Regarding enforcement, penalties under hazardous waste laws in areas with the greatest white population are nearly 500% higher than those in areas with the greatest minority population. Marianne Lavelle & Marcia Coyle, Unequal Protection: The Racial Divide in Environmental Law, Nat'l L.J., Sept. 21, 1992, at S2.

[4] Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation*, 26 HARV. ENVTL. L. REV. 1, 4 (2002).

[5] Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1003 (1993).

[6] Concerned communities initiated a string of lawsuits against local governmental agencies for failing to provide acceptable sanitation, street lighting, and water supplies. *See also Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir.1971); *Ammons v. Dade City*, 783 F.2d 982 (11th Cir. 1986); *Dowdell v. City of Apopka*, 698 F.2d 1181(11th Cir. 1983); *Johnson v. City of Arcadia*, 450 F. Supp. 1363 (M.D. Fla. 1978).

[7] Lincoln L. Davies, *Lessons for an Endangered Movement: What a Historical Juxtaposition of the Legal Response to Civil Rights and Environmentalism has to Teach Environmentalists Today*, 31 ENVTL. L. 229, 282-283 (2001).

[8] Sten-Erick Hoidal, *Returning to the roots of environmental justice: lessons from the inequitable distribution of municipal service*, 88 MINN. L. REV. 193, 199 (2003).

[9] *Id*.

[10] Clean Air Act Amendments in 1977, 42 U.S.C. § 7401.

Species Act.[12] The federal and state judiciaries also played a role in addressing public concerns for the environment: several judges supported to these new environmental statues, interpreting them to provide more environmental protection than lawmakers likely intended.[13]

A number of environmental, public interest organizations, such as the Sierra Club, National Wildlife Federation, World Wildlife Fund, Natural Resources Defense Council, and Environmental Defense Fund became "mainstreams" around this period, and the American public started taking notice of environmental issues across the nation. These public interest groups lobbied and litigated on behalf of environmental protection goals.

The traditional environmental movement, however, alone could not address the ways in which environmental harm was disproportionately impacting communities of color.[14] During this early period, the mainstream of environmental justice movement only reflected the environmental concerns about the hazardous waste facilities, environmental pollution industries, conservation of endangered species. Minorities such as African-American or labor and environmental discriminations were not considered. It was not until the emergence of the civil rights movement as a powerful solution force if that "Environmental Racism" could be challenged.

2. CIVIL RIGHTS MOVEMENT

The environmental justice movement was also rooted in the Civil Rights movement, including the organizing efforts of African Americans, Native Americans and the blue-color labor movement.[15] Minority groups began protesting against the inequitable distribution of municipal services-including, street lighting, sanitary sewers, surface water drainage and so on.[16] As a result of this combination of increased environmental awareness and the emergence of civil rights activity, the traditional environmental movement was changed. Environmental justice plaintiffs have attempted to follow the Civil Rights Movement's success by using the Equal Protection Clause to challenge the placement of a facility in an underserved minority community on the grounds that the government decision-maker was racially discriminatory when selecting the site.[17]

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[11] Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1251.
[12] Endangered Species Act of 1973, 16 U.S.C. § 1531.
[13] *Hawkins v. Shaw*, 437 F.2d pp. 1288-1291; *Jhonson v. City of Arcadia*, 450 F. Supp. p. 1379.
[14] Richard J. Lazarus, Symposium, *Civil Right in the New Decade: Highways and Bi-ways for Environmental Justice*, 31 CUMB. L. REV. 569, 579 (2000).
[15] Rachel D. Jaffe, *Less is More: Some Productive, Small Ideas to Advance Environmental Justice at the U.S. Environmental Protection Agency*, TEMPLE JOURNAL OF SCIENCE, TECHNOLOGY AND ENVIRONMENTAL LAW, 2005, at 16-17.
[16] Sten-Erick Hoidal, *supra* note 8, at 196.
[17] James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125, 126 (1994).

B. ENVIRONMENTAL RACISM

The commonly accepted beginning of the environmental justice movement was an uprising in Afton, North Carolina, in 1982.[18] Because Afton was a low-income African-American community, the state of North Carolina regarded Afton as an easier site to dump 32,000 cubic yards of soil contaminated with polychlorinated biphenyls (PCBs), a toxic chemical dangerous to humans.[19] In response to this plan, environmental activists and civil rights advocators coordinated a series of demonstrations opposing the site.[20] The protests successfully drew attention to the claim that poor communities of color were unfairly targeted as sites for toxic waste dumps and heavily polluting industries.[21]

In the 1980s, several studies also provided statistical support for developing environmental justice concerns.[22] Notably, the United Church of Christ Commission for Racial Justice (CRJ) performed an extensive study on the relationship between the selecting of hazardous waste facilities and the racial composition of host communities.[23] This study found a clear relation between the number of hazardous waste facilities located in a community and the percentage of the community's minority population. It also identified race as the most significant variable in determining the location of hazardous waste facilities.[24] Dr. Benjamin Chavis classified this kind of discrimination as "environmental racism,"[25] i.e. a racially motivated facility selecting. The focus of environmental justice soon expanded to include concerns of distributional equity across all population groups, risk reduction and avoidance, and the enforcement of environmental laws. These shifts in focus gave environmental justice its current, more expansive perspective.[26]

C. ENVIRONMENTAL JUSTICE

Environmental justice is a recently developed concept that does not have one clear definition. Initially, it was a concern based on the finding that there was a disparate impact of environmental harm on minority and low-income communities.27 In 1991, The People of

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[18] Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N.C. L. REV. 75, 77 (1996).
[19] *Id*., at 77-78.
[20] *Id*., at 78. National attention was focused on this case because more than five hundred people were arrested in demonstrating. Hae-Soo. Kweon, *Environmental Justice Movement and Political and/or Social Impacts in United States*, 28 ENVIRONMENT AND LIFE, 2000, at 154.
[21] *Id.*
[22] Nicole C. Kibert, *Green Justice: A Holistic Approach to Environmental Injustice*, 17 J. LAND USE & ENVTL. L. 169, 171 (2001).
[23] Tseming Yang, *supra* note 4, at 150.
[24] United Church of Christ Commission for Racial Justice, *supra* note 2, at xiii.
[25] *Id.*
[26] Sten-Erick Hoidal, *supra* note 8, at 200-201.
[27] As of 1987, of twenty-seven commercial landfills in the United States, nine were in the South; four of the nine were in minority areas. And three of the five largest commercial landfills in the United States are located in areas where African-Americans and Hispanics predominate. United Church of Christ Commission for Racial Justice, Toxic Wastes and Race: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites, at 13-22 (1987). The largest landfill is located in Emelle, Alabama, which is over seventy-five percent African-American. The fourth largest landfill is located in

Color Environmental Leadership Summit adopted the Principles of Environmental Justice and defined Environmental Justice as "the pursuit of equal justice and equal protection under the law for all environmental statutes and regulations without discrimination based on race, ethnicity, and/or social-economic status."[28] Other definitions of Environmental Justice are similar to the Principle's definition; all emphasize the goal of ending the disparate effect of environmental harm on low-income and minority communities.

These proposed definitions are not invariable. For example, the Environmental Protection Agency (EPA) considered changing the definition of environmental justice to eliminate any reference to race.[29] This recommendation came despite the fact that President Clinton's 1994 Environmental Justice Executive Order[30] emphasized race.[31]

I will discuss the disparate impact of environmental harm on minority and low-income communities, particularly focusing on the African-American neighborhoods, in the context of the 14th Amendment. The majority of these state cases occurred in the southern United States.

III. RELATION OF THE ENVIRONMENTAL JUSTICE AND EQUAL PROTECTION CLAUSE

A. EQUAL PROTECTION CLAUSE

The Equal Protection Clause of the Fourteenth Amendment represents the legal pathway of choice available to environmental justice plaintiffs.[32] The right to equal protection prohibits government officials from basing decisions regarding the distribution of environmental harms, risks, or benefits primarily alone racial lines.[33] The Equal Protection Clause provides that;

> "No State shall make or enforce any law which shall abridge the privileges or communities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

Scotlandville, Louisiana, an area which is ninety-three percent African-American, and the fifth largest site is in Kettleman City, California, which is over seventy-five percent Latino. *Id.*

[28] Environmental Justice Resource Center, Principles on Environmental Justice, *available at* http://www.ejrc.cau.edu/princej.html (*Last visited on* September 27, 2009)

[29] *Id.*

[30] Executive Order No. 12,898; 3 C.F.R. § 389 (1995).

[31] Miranda Welbourne, *Hurricane Katrina: Environmental Impact and Lessons on Public Health and Justice, "The environmental justice movements response to hurricane katrina, a critique: problems faced, successes, failures, and the state of the movement one year later,"* THURGOOD MARSHALL LAW REVIEW FALL, 2006, at 128.

[32] James H. Colopy, *supra* note 17, at 145.

[33] Barry E. Hill, *Lemons Into Lemonade*, ENVTL. F., May-June 2002, at 32.

Due Process Clause of the Fifth Amendment proscribes discrimination by the federal government. The Equal Protection Clause of the Fourteenth Amendment applies the 5th Amendment to the state to limit governmental discrimination by the states. The Equal Protection Clause, however, cannot mean that government is obligated to treat all persons exactly the same. Commonly, Legislation involves making classifications between people, but the question of whether the equal protection clause has been violated arises when a state grants a particular class of individuals the right to engage in an activity yet denies other individuals the same right. There is no clear rule, but Supreme Court has developed a three-tiered approach to analysis under the Equal Protection Clause: a rational basis test; strict scrutiny test; intermediate level test.

If the government action intentionally discriminates against a suspect class (i.e. race or national origin), strict scrutiny[34] will be applied and the law will be invalid unless it necessary to promote a compelling state interest, a much more difficult test.[35]

> "A classification is necessary when it is narrowly tailed so that no alternative, less burdensome means is available to accomplish the state interest. The means chosen must fit the compelling goal so closely that there is little or no possibility that the motive of the classification was illegitimate racial prejudice or stereotype."

To successfully challenge a state's decision regarding the location of a hazardous waste facility, minority residents making an Equal Protection claim must demonstrate that the state's purpose was discriminatory, and meet all three factors that the U.S. Supreme Court established as necessary conditions to an Equal Protection claim: 1) the action in question must be a government action, which includes government furtherance of private action; 2) the action must constitute an unjustifiable discrimination wherein similarly situated individuals are treated differently; and 3) there must be proof of intent to discriminate.[36] This case's factor has proved to be the most exclusive and successful "environmental racism" cases.

The Court's requirement of proof of discriminatory intention is the requirement that has "prevented" successfully environmental justice lawsuits.[37] A plaintiff must show not only that the state action had a disproportionate or discriminatory impact but also that the state acted with the intent to discriminate. In most cases brought under the Equal Protection Clause, plaintiffs have challenged the sitting of a facility in a community of color on grounds that the government decision-maker was racially discriminatory in selecting the site.[38] Requiring a showing of discriminatory intent as a prerequisite to racial discrimination under the Equal Protection Clause is often too high a burden for environmental justice plaintiffs to

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[34] "Government action that intentionally discriminates against racial or ethnic minorities is suspect and thus subject to strict scrutiny." Under strict scrutiny, a classification will be held to violate an equal protection unless found to be necessary to promote a compelling state interest." U.S.C. § 1017.

[35] U.S.C. § 1018.

[36] *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S (1977), at 252, 254.

[37] The court required the demonstration of discriminatory intent necessary in equal protection challenge. *Washington v. Davis*, 426 U.S. (1976), at 229, 247-248.

[38] James H. Colopy, *supra* note 17, at 148.

meet.[39] Because the government may succeed by showing that the same decision would have resulted regardless of the racial motivation.[40]

For this reason, the equal protection standard has been difficult, if not impossible, for environmental justice plaintiffs to use, even though it appeals to be the best constitutional tool to him. Nevertheless, in some the inequitable distribution case (municipal services case), some courts have readily inferred intent to discriminate from racially disparate impact. Because a failure to demonstrate discriminatory intent with certainty. No judicial reasoning exists to explain this inconsistency.[41]

B. MUNICIPAL SERVICES CASES

1. HAWKINS V. TOWN OF SHAW (437 F.2D 1286)

In 1971, the Environmental justice movement initially started in the case of *Hawkins v. Town of Shaw*.[42] In this case, a group of African-American citizens sued Shaw, Mississippi, alleging that the town provided various municipal services in a racially discriminatory manner. Such actions, the plaintiffs claimed, violated the Fourteenth Amendment's Equal Protection Clause. The plaintiffs supported their argument with disturbing facts: African-Americans occupied approximately 98% of the homes in the town of Shaw that faced unpaved streets, and 97% of the homes not served by sanitary sewers. In addition to citing these statistical disparities, the plaintiffs demonstrated that pervasive residential segregation greatly contributed to a long history of municipal discrimination.[43] In light of these facts and based on the overwhelming evidence presented, the court found that the plaintiffs made out a prima facie case of racial discrimination fully survived strict scrutiny.[44] The court concluded that no compelling state interest could justify the discriminatory results of Shaw's distribution of municipal services and granted the plaintiffs injunctive relief under 42 U.S.C. § 1983.[45] *Hawkins v. Shaw* Case became the template for subsequent successful municipal service equalization claims.[46]

2. JOHNSON V. CITY OF ARCADIA (450 F. SUPP. 1363, 1367)

The next test of the *Hawkins v. Town of Shaw* approach was in *Johnson v. City of Arcadia*.[47] In this case, African-American citizens of Arcadia, Florida, sought to ameliorate disparities in the quality and quantity of street paving services, parks and recreational

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[39] *Id.,* at 148.
[40] *Village of Arlington Heights v. Metro. Dev. Hous. Corp.*, 429 U.S (1977) at 252, 270-271.
[41] Sten-Erick Hoidal, *supra* note 8, at 205.
[42] *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971).
[43] *Id*., at 1287-1288.
[44] *Id*., at 1288.
[45] Plaintiffs were using § 1983 as the means to assert their equal protection claim. Id.
[46] *Ammons v. Dade City,* 783 F.2d 982, 983 (11th Cir. 1986); *Dowdell v. City of Apopka*, 698 F.2d 1181, 1184 (11th Cir. 1983); *Johnson v. City of Arcadia*, 450 F. Supp. 1363, 1367 (M.D. Fla. 1978).
[47] *Johnson v. City of Arcadia*, 450 F. Supp. 1363, 1367 (M.D. Fla. 1978).

facilities, and water supply systems.[48] They claimed that the city's actions regarding these services violated the Fourteenth Amendment's Equal Protection Clause, section 601 of Title VI of the Civil Rights Act,[49] and the Revenue Sharing Act.[50]

In analyzing these claims, the Florida district court set forth a new, more difficult test to determine whether the inequitable distribution amounted to a constitutional violation. The new test required the plaintiffs to establish three elements: (1) the existence of racially identifiable neighborhoods in the municipality; (2) substantial inferiority in the quality or quantity of the municipal services in question; and (3) proof of racially discriminatory intent or motive.[51] As in Hawkins, the plaintiffs successfully established all three elements by demonstrating statistical disparities in the provision of municipal services and the continued residential segregation perpetuated by historical discrimination on the part of the city.[52] The court concluded that such evidence was sufficient to demonstrate intent to discriminate.[53]

3. DOWDELL V. CITY OF APOPKA (698 F.2D 1181)

In *Dowdell v. City of Apopka*, a class of African-American residents sued the City of Apopka, Florida and four city council members for inequitable provision of street paving and maintenance services, storm water drainage, water distribution, sewer facilities, and park and recreational facilities.[54] This case was structured identically to Johnson and asserted claims under the Equal Protection Clause, section 601 of Title VI, and the Revenue Sharing Act.[55]

The court paid particular attention to the cumulative evidence of municipal action and inaction as indicative of discriminatory intent, and once again, the court ruled in favor of the plaintiffs. The court also focused on deprivation of the African-American community as a foreseeable outcome of the city's actions and as evidence of intent to discriminate. In addition, the court focused on the size of the disparity and the nature of the practices at issue to help infer intent from disparate impact. Consistent with precedent, the court held that the city's inequitable distribution of resources violated the Equal Protection Clause of the 14th Amendment.[56]

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[48] *Id.*

[49] 42 U.S.C. § 2000d (2000). Congress enacted the most comprehensive civil rights legislation since post the Civil Rights Act of 1964. Congress, using broad, forceful language, wrote Title VI of the Act to unambiguously prohibit the federal government from financially supporting any program operated in a racially discriminatory manner:
"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

[50] State and Local Assistance Act of 1972, 31 U.S.C. §§ 1221-1242 (1976) (expired 1976).

[51] *Id*., at 1379.

[52] *Id*.

[53] *Id*., at 1369-1370.

[54] *Dowdell v. City of Apopka*, 698 F.2d 1181 (11th Cir. 1983).

[55] *Id.*

[56] *Id*., at 988.

C. HAZARDOUS WASTE FACILITIES CASES

1. WARREN COUNTY V. STATE OF N. CAROLINA (528 F. SUPP. 276)

In June 1978, liquid materials containing PCBs were discharged onto roadsides on the military reservation at Fort Bragg, in Cumberland County, near Fayetteville, North Carolina. Shortly thereafter, complaints were received from various areas of Eastern and Piedmont North Carolina of similar occurrences. From Warren, Johnston and Harnett Counties in the East and from Lee, Chatham and Person Counties in the Piedmont reports came into Raleigh of areas of roadsides saturated with an oily substance, later identified as containing PCBs. All in all, fifty-one separate sites in fourteen counties were sprayed with the contaminant.[57]

In 1982, the state of North Carolina decided to site a landfill to dispose of soil contaminated by polychlorinated biphenyls in Warren County -the county with the highest concentration of African-American residents in the state, a community whose population was 84% African-American and one of the state's poorest counties. The county brought action seeking to prevent a tract of land in the county from being used as a landfill for disposal of soil contaminated with PCBs.[58]

On motions for summary judgments the District Court, Britt, J. ruled that: (1) the county lacked standing under North Carolina statute with respect to abatement of public nuisances and under the Toxic Substances Control Act, but had standing to maintain its other causes of action; (2) a proper party would need to be added to allow court to reach the merits of the nuisance issue; (3) use by state of its own property in manner authorized by valid legislative authority could not be enjoined by courts as a nuisance; (4) under the functional equivalence doctrine, the Environmental Protection Agency was not required to file a formal environmental impact statement; (5) the county failed to prove that decision of the EPA to approve the site was arbitrary, capricious or otherwise not in accordance with law; (6) a county ordinance totally forbidding disposal of PCBs in the county was void as conflicting with the purposes and objectives of Congress under the Toxic Substances Control Act; and (7) the environmental impact statement filed under the North Carolina Environmental Policy Act was adequate.[59]

The county appealed. But the Court of Appeals concludes that defendants have fully met the statutory and regulatory requirements in preparing and filing the Final Environmental Impact Statement. It would appear to the Court that every conceivable phase of the operation has been adequately considered. All of plaintiff's challenges to the sufficiency of the EIS as set forth in its sixth cause of action are rejected.[60]

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[57] 528 F. Supp. 276 (N.C. 1981).

[58] Jeffery Smith McLeod, Uumasking the Process and Justification that Lead to Environmental Racism: A Critique of Judicial Decision-making, Political and Public Ambivalence, and the Disproportionate Placement of Environment and Land Use Burdens in Communities of color, 15 Va. J. Soc. Pol'y & L. 545, 567 (2008).

[59] *Id.*

[60] *Id.*

2. CHESTER RESIDENTS CONCERNED FOR QUALITY LIVING V. PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION (132 F.3D 925)

Nonprofit residents organization (Chester Residents Concerned for Quality Living) brought this action against Pennsylvania Department of Environmental Protection and related defendants in federal district court, alleging that Department's Issuance of permit authorizing operation of waste processing facility in predominantly black community violated the civil rights of organization's members.[61] The defendants moved to dismiss, and the United States District Court for the Eastern District of Pennsylvania granted motion.[62] Defendants appealed. The Court of Appeals, Cowen, Circuit Judge, held that private plaintiffs may maintain action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to Title IV of the Civil Rights Act of 1964, but the court dismissed because the permit did not evidence discriminatory intend. And so Chester Residents Concerned for Quality Living appealed the Circuit Court.[63]

In 1997, the Third Circuit Court reversed the holding of the district court. The Action of the Pennsylvania Department of Environmental Protection should be remained base to district court under the restriction of discriminatory impact promulgated by the federal administrative agencies.[64] This decision was notable for holding that discriminatory impact was not required for residents.[65]

IV. THE RELATIONSHIP BETWEEN ENVIRONMENTAL JUSTICE AND THE CIVIL RIGHTS ACT

Historically, the legal strategies employed by the environmental justice movement have meet with limited success. During the 1970s and 1980s, several minority communities successfully challenging inequitable distribution of municipal services on equal protection grounds, as discussed. Despite these early successes, the environmental justice movement has not attempted to revive these cases in recent years.

The Civil Rights Act offered additional possible legal pathways to environmental justice plaintiffs, but in 2001, the environmental justice movement under the color of the Civil Rights Act ground to a halt.

More recently, the Supreme Court and the Third Circuit Court of Appeals have acted concurrently to eliminate this most promising means through which minority communities could contest perceived threats to their urban environment.[66] In *Alexander v. Sandoval*,[67] the

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[61] *Chester Residents Concerned for Quality Living v. Pennsylvania Department of Environmental Protection*. 132 F.3d 925(1997).
[62] 944 F. Supp. 413.
[63] *Id.*
[64] Hae-Soo. Kweon, *Environmental Justice Movement and Political and/or Social Impacts in United States*, 28 ENVIRONMENT AND LIFE, 2000, at 161.
[65] *Id.*
[66] Sten-Erick Hoidal, *supra* note 8, at 194.
[67] *Alexander v. Sandoval*, 532 U.S. 275 (2001).

Supreme Court held that citizens could not sue directly to compel compliance with regulations designed to remedy disparate impact discrimination in federally funded programs.[68] In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection (Camden III)*,[69] the Third Circuit further extended the Supreme Court's reasoning to hold that no private right of action existed under 42 U.S.C. § 1983 for citizens to enforce section 602 disparate impact regulations.[70]

These decisions have created a bewildered environmental justice movement which now needs a new legal basis through which to pursue its claims.[71]

V. CONCLUSION

Environmental justice is deeply rooted in the United States' unique history, culture, politics, ideology, economy, social structure, and legal systems. The movement has drawn upon principles taken from environmental law, civil rights law, and broader movements for economic and social justice. Several claims presented by environmental activists have challenged some of the fundamental basis of environmental law and policy. The environmental justice movement, which targets specific groups of environmentally disadvantaged people, provides an ethical direction and moral power for environmental law in the United States and in other countries all around the world.

I will suggest that environmental justice or racism need not necessarily relinked to the Equal Protection Clause of the Fourteenth Amendment. Some racial cases (i.e. municipal discrimination) could relatively easy to prove the discriminatory intent, but environmental justice or racism cases about the hazardous waste facilities cases was not. Proving discriminatory intent, i.e. that a plaintiff must show that the defendant acted with a racially discriminatory purpose in mind.

Location of a landfills or hazardous waste facilities was based on the economic choice or environmental decision-making.

The equal and adequate protection of every person's environmental interests under the Constitution (i.e. environmental right) or several environmental laws is important. Especially in Korea, environmental hazardous facilities was made too much of the countryside having agricultural or forestry land outside of the urban. Thus, review of the environmental justice debates in the United States may redefine and remind of importance of the equal and adequate protection.

Environmental justice into our legislative and policy discussions must be considered. Although the causes of environmental disparities and historical background in Korea are different from those in the United States, the concept of environmental justice should be reconsidered in light of our unique situation.

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[68] *Id*., at 293.
[69] *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 274 F.3d 771 (3d Cir. 2001).
[70] *Id*., at 774.
[71] Sten-Erick Hoidal, *supra* note 8, at 193-194.

KEYWORDS
Environmental Justice, Environmental Racism, Environmental Right, Equal Protection, Civil Rights Act

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CORPORATE SOCIAL RESPONSIBILITY IN ISLAMIC LAW: LABOR AND EMPLOYMENT*

*Radwa S. Elsaman***

TABLE OF CONTENTS

ABSTRACT

Islam is not only a way of worship, but also, an entire legal, economic, social, political, and commercial system that affect everyday behavior of its followers including, business transactions. Also, Islamic law, almost, dominates most of the Muslim countries' internal legal systems. Considering how Islamic business ethics affect corporate social responsibility can be useful to multinational corporations making their investment decisions in Muslim countries. This article discusses the general framework governing business ethics in Islamic law, giving perspective to labor standards.

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I. INTRODUCTION

Though the fact that globalization has brought the world closer with the necessity of considering the differences between the various legal systems, few articles in recent American law and business law journals are exposed to the Islamic legal system particularly in the field of corporate social responsibility. Hence, this article will discuss the general framework of business ethics governing corporate social responsibility in Islam [1] concentrating on labor rules as an application to corporate social responsibility in Islam. Many factors stand behind the importance of considering the different aspects of the Islamic legal system. The most important is that Muslims represent a large part of the world. The Muslim region does not only include the Arab countries with a majority of Muslim population, but also countries that are members of the Organization of the Islamic Conference (OIC).[2]

Recent studies indicate that some Muslim countries are among the most wealthy business market contributors in the world, e.g., Saudi Arabian foreign direct investment increased from $12,106,749,694 in 2005 to $22,486,400,000 in 2008.3. Also, Turkey increased its foreign direct investment from $10,031,000,000 in 2005 to $18,299,000,000 in 2008.4 According to Robert Westervelt, by 2012, the world's largest nine oil factories will exist in the Middle East.[5] Westervelt also confirms that Saudi Arabia records two-thirds of the Gulf Cooperation Council ("GCC")[6] chemical industry.[7] It is not surprising that the Saudi chemical production increased from $2 billion dollars in the early 1980's to $20 billion in the 1990's and is expected to jump to $100 billion dollars by 2015.[8] Generally speaking, and

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[1] The word Islam is an Arabic word literally meaning submission or surrender to the will of God and it refers to the religion of Muslims. G*lossary of Islamic Legal Terms,* 1 J. Islamic L. 89, 94 (1996). *See also* Irshad Abdal-Haqq, *Islamic Law An Overview of Its Origin and Elements,* 7 J. Islamic L. & Culture 27, 41 (2002) (Defining the Islamic law, explaining the main elements of the *Shari'a,* and discussing the methodologies and schools of the Islamic jurisprudence).

[2] Islamic Law Countries are the countries where the majority of the populations are Muslims and where the state is a member of the Organization of the inter-governmental organization of Islamic Conference with its 57 states which represent the collective voice of the Muslim world. NISRINE ABIAD, SHARIA, MUSLIM STATES AND INTERNATIONAL HUMAN RIGHTS TREATY OBLIGATIONS: A COMPARATIVE STUDY, 35 (BRIT. Inst. of Int'l & COMP. L. 2008).

[3] The World Bank Group Data Indicator, *Foreign Direct Investment Net Inflows BoP Current US*, http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD (*last visited on* Oct. 4, 2010).

[4] *Id*.

[5] Robert Westervelt, *Mideast Advance,* 171 CHEM. WEEK 3, 3 (2009).

[6] The GCC was established on May, 25, 1981 through an agreement concluded in Riyadh, Saudi Arabia between: Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates. According to the official website of the GCC, the GCC is a one strong union that was established to face any challenges of security and economic development in the area. Also, according to the GCC Charter the basic objectives are to promote coordination, integration and inter-connection between Member States in all fields, strengthen ties between their peoples, formulate similar regulations in various fields such as economy, finance, trade, customs, tourism, legislation, administration, as well as foster scientific and technical progress in industry, mining, agriculture, water and animal resources, establish scientific research centers, set up joint ventures, and encourage cooperation of the private sector. The Cooperation Council For The Arab States Of The Gulf Secretariat General, *Foundation and Objectives*, http://www.gccsg.org/ (*last visited on* Oct. 8, 2010).

[7] Westervelt, *supra* note 7, at3.

[8] *Id*.

according to the International Monetary Fund ("IMF"), between 2003 and 2008, the gross domestic product ("GDP") in the GCC doubled to one trillion dollars.[9]

Moreover, Muslim countries in general and the Middle East area in particular are attractive markets full with many active investment opportunities.[10] For instance, the distinctive geographical position that the Middle East enjoys, the accessibility to natural resources and the competitively priced labor are very important factors that made the Middle East an attractive market for investment.[11] Furthermore, the large Muslim population raises the demand for multinational producers, manufacturers and investors in general to consider doing business in the Muslim countries.[12] As a result, there is a remarkable move of foreign investment to the Muslim region business market. Many examples may be cited in this regard. The Industrial & Commercial Bank of China Ltd., the largest Chinese bank, began establishing different branches in the Middle East and is considering acquisitions there as part of the huge Chinese investment in the area.[13] Similarly, banking investment in the Middle East is expected to grow from $2.8 million in 2009 to $10 million in 2010.[14] Hence, many international law firms started considering providing their legal services in many Muslim countries. For instance, Ashurst, a leading international law firm is considering a finance staff in Dubai, United Arab Emirates to advice on Islamic law issues.[15]

Accordingly, multinational corporations ("MNCs") failure to consider Islamic law would result in losing reliability within their target market. This would be very clear in the situation of doing business in countries that have strict Islamic codes of conduct in business fields such as Saudi Arabia, Iran, and Pakistan.[16] However, it is worth mentioning here that, the degree to which Islamic law rules dominate in different Muslim countries' legal systems is different.[17] As a result, this article will discuss the general Islamic business ethics principles rather than concentrating on studying a specific Muslim country's legal system. This is particularly relevant given that Islam is not only a way of worship, but rather, an entire legal, economic, social, political, and commercial system.[18] Also, this article will examine labor issues in detail as an application to corporate social responsibility in Islam.

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[9] Moin Siddiqi, *Gulf Super Rich seek secure home for trillion-dollar assets,* 399 MIDDLE EAST 32, 36 (2010).

[10] John H. Donboli & Farnaz Kashefi, *Doing Business in the Middle East: A Primer for U.S. Companies*, 38 Cornell Int'l L.J. 413, 414 (2005).

[11] *Id*.

[12] *Id*.

[13] *ICBC Plans Middle East Expansion,* WALL ST. J., (E. ed.) June 13, 2010 P. C.3.

[14] *Id*.

[15] Kian Ganz, *Ashurts to establish funds team in Dubai*, 23 Lawyer 10 (2009).

[16] *Id*.

[17] The degree of adopting the *Shari'a* as the main source of national laws in Muslim countries is explained in detail in Part III of this Article.

[18] *See* J. Michael Taylor, *Islamic Banking- the Feasibility of Establishing an Islamic Bank in the United States*, 40 AM. BUS. L.J. 385, 387 (2003) (Discussing the importance of considering Islamic banking practices in the United States the, starting with introducing the effect of Islam on Muslims' life including their financial affairs, elaborating on the characteristics of Islamic finance and then searching the possibilities of establishing Islamic banking institutions in the United States), *Citing* IMTIAZ PERVEZ, ISLAMIC BANKING AND FINANCE, REPRINTED IN INFORMATION SOURCES ON ISLAMIC BANKING AN ECONOMICS, 8, 9 (S. Nazim Ali & Naseem N. Ali eds. 1994). *See generally* Bernard K. Freamon, *Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence*, 11 Harv. Hum. Rts. J. 1, 3 (1998) (Discussing the Islamic law of slavery and the solutions provided thereof after giving a brief introduction about the current situation of Islam and the different sources of the *Shari'a*)

Consequently, Part II of this article will define the Islamic law ("the *Shari'a*")[19] and its main sources. Part III will discuss the level of adopting the *Shari'a* as a source of law in Muslim countries. Part IV will address the general framework governing business ethics and corporate social responsibility in Islam. Part V will elaborate on the rules and principles governing labor in Islamic law. Part VI will examine the main collective measures taken by Muslim countries to protect human rights considering the *Shari'a* rules as the main source of legislation.

II. ISLAMIC LAW *("THE SHARI'A")* IN BRIEF

Islam, formally, *Al-Islam*, is the religion of Muslims whose rules and principles are provided by the Muslims' holy book ("the *Qur'an")*[20] which was dictated word for word by *Allah*[21] to his Prophet *Muhammad* (PB).[22]

Technically, the *Shari'a* refers to the body of rules driven from the main sources of Islamic law.[23] These sources are divided into two main categories: primary sources and secondary sources.[24] While the primary sources include both the rules incorporated in the *Qur'an* and the *Sunna,* [25] the secondary or supplementary sources include most importantly the *Ijma'* and the *Qiyas*.[26] The *Shari'a* must be distinct from *Fiqh.*[27] *Fiqh* means the

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[19] *Shari'a* is an Arabic word that literally means pathway to be followed that is traced directly from the *Qur'an.* THE HOLY QURAN ENGLISH TRANSLATION OF THE MEANINGS AND COMMENTARY, 1536 (The Presidency of Islamic Researchers, Ifta, Call and Guidance ed., 1994) [hereinafter THE QURAN] ("Then we put thee on the right Way of Religion: so follow though that Way and follow not the desires of those who know not") (Quoting the meaning of the *Qur'an* 45:18). Abdal-Haqq, *supra* note 3, at 33. The definition of the *Shari'a* is explained in details in Part II of this Article.

[20] The *Qur'an* is the Islamic holy book revealed to Prophet *Muhammad* (PB). *Glossary of Islamic Legal Terms*, *supra* note 3, at 99. *See also* Abdal-Haqq, *supra* note 3, at 45.

[21] *Allah* is an Arabic word which means God and refers to the Islamic name of the creator, the one and only deity. *Glossary of Islamic Legal Terms*, *supra* note 3, at 90. *See also* THE QURAN, *supra* note 20, at 2028 ("Say: He is Allah, the One; Allah, the Eternal, Absolute, He Begetteth not, nor is He begotten; And there is none like unto Him") (Quoting the meaning of the *Qur'an* 112).

[22] Prophet *Muhammad* (PB) is the Prophet of Islam. When the name of Prophet *Muhammad* (PB) is mentioned it is followed by the sentence Peace Be Upon Him ("PB") as a mark of respect and veneration. According to Abdal-Haqq, "Muhammad had a very difficult time establishing Islam among the Arabs of his day. Ultimately he succeeded. Though born an orphan an unable to read or write, he was able to combined religious with the secular in one of the most backward concerns of the earth to establish a civilization that ushered in the Renaissance in Europe among other things and for his accomplishment, he has been called the most influential person in the history of the world by a non-Muslim historian." Abdal-Haqq, *supra* note 3, at 40.

[23] MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW, 34 (Oxford U. Press Inc., N.Y.2003).

[24] M. Cherif Bassiouni & Gamal M. Badr, The *Shari'ah*: Sources, Interpretation, and Rule-Making, 1 UCLA J. ISLAMIC & NEAR E.L. 135, 136 (2002) (Defining the *Shari'a* and introducing its sources and methods of interpretation, and discussing the possibility of formulating new rules of law to meet the situations that were unknown during previous centuries and currently need to be both Islamic and modern).

[25] The word *Sunna* is an Arabic word that refers to the sayings and deeds of Prophet *Muhammad* (PB) and it is referred to sometimes as *Hadit.* Abdal-Haqq, *supra* note 3, at 33.

[26] *Ijma'* is an Arabic word that literally mans the unanimous agreement or consensus of opinion and it refers to the consensus of opinion of the learned Muslims scholars. Also, *Qiyas* is an Arabic word that literally means analogy and it refers to the process of deducing legal decision on the basis of analogy by reference to the *Qur'an* and the *Sunna*. *Glossary of Islamic Legal Terms*, *supra* note 3, at 99. *See also* Adnan A. Zulfiqar, *Religious Sanctification of Labor Law: Islamic Labor Principles And Model Provisions*, 9 U. Pa. J. Lab. &

technical process of applying the rules of the *Shari'a,* driven from its different sources, on real or hypothetical situations.[28]

As far as the *Qur'an* is concerned, it is the main source of the *Shari'a* and is not only a spiritual book but also is a legal code and a reference for everyday behavior.[29] The *Qur'an* is divided into *Suras*[30](chapters) and each chapter is divided into verses.[31] Since, the *Qur'an* is the highest source of the *Shari'a,* its revealed rules are not arguable and cannot be modified by rules derived from any of the other sources of the *Shari'a*.[32]

With regard to the *Sunna*,[33] it refers to the practice of Prophet *Muhammad* (PB) taking the form of actions, oral statements, or consensus in action by others.[34] Through the *Sunna*, Prophet *Muhammad* (PB) interpreted, explained and completed principles revealed in the *Qur'an*.[35] Hence, the *Sunna* cannot be contradictory to the *Qur'an* otherwise it is not a trusted *Sunna* and should not be considered.[36] Generally speaking, a trusted *Sunna* is usually narrated and recorded in one of the most famous books called the *Sahih*. These books are: (1) *Sahih Al-Bukhari*, (2) *Sahih Muslim*, (3) *Sunan An-Nasa'I,* (4) *Sunan Abi Dawud* , (5) *Sunan At-Tirmidh*i, (6) *Sunan Ibn Majah*.[37]

Where the *Qur'an* and the *Sunna* do not guide on certain issues, the supplementary sources of the *Shari'a* apply.[38] These sources include *Ijma'* and *Qiyas*. *Ijma'* means the convergence of opinion on a particular issue that is not provided by the *Qur'an* or the *Sunna* or that requires further interpretation.[39] *Ijma'* drives its reliability from Prophet *Muhammad* (PB) saying: *"My community will never agree on a mistak."*[40] The question is whose convergence of opinion constitutes *Ijma'*. After Prophet *Muhammad* (PB) passed away, his knowledgeable supporters' unanimous opinions constituted *Ijma'*.[41] Later, *Ijma'* is established through the unanimous opinions of the professional and knowledgeable Muslim

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Emp. L. 421, 433-434 (2007) (Discussing employees' rights in Islam starting with introducing the different sources of the *Shari'a* rules, explaining the role of Islam in shaping Muslim states, discussing the importance of having labor codes, elaborating on the presence of codes in the Muslim world, and developing a labor code from the sources of the *Shari'a*).

[27] *Fiqh* is an Arabic word which refers to the Islamic Jurisprudence and sometimes to the collection of decisions reached by specific individual or institution. *Glossary of Islamic Legal Terms*, *supra* note 3, at 92. According to Abdal-Haqq, some authors use the words Islamic law, the *Shari'a* and *Fiqh* as simultaneous words which may confuse readers. Abdal-Haqq, *supra* note 3, at 32.

[28] Abdal-Haqq, *supra* note 3, at 36.

[29] Bassiouni & Badr, *supra* note 26, at 149.

[30] *Sura* is an Arabic word meaning chapter of the *Qur'an* and literally meaning a series of things. *Glossary of Islamic Legal Terms*, *supra* note 3, at 94.

[31] Bassiouni & Badr, *supra* note 26, at 149.

[32] Bassiouni & Badr, *supra* note 26, at150. *See also* Freamon, *supra* note 20, at 15.

[33] *Sunna* is an Arabic word which literally means method and it refers to the second source of the *Shari'a* which is the sayings of Prophet *Muhammad* (PB). *Glossary of Islamic Legal Terms*, *supra* note 3, at 100. *See also* Bassiouni & Badr, *supra* note 26, at 151.

[34] Bassiouni & Badr, *supra* note 26, at 152. *See also* Freamon, *supra* note 20, at 19.

[35] Bassiouni & Badr, *supra* note 26, at 152.

[36] Bassiouni & Badr, *supra* note 26, at 148.

[37] Abdal-Haqq, *supra* note 3, at 48.

[38] *Id*. at 54.

[39] *Id*. *See also* Bassiouni & Badr, *supra* note 26, at 154, *and* Freamon, *supra* note 20, at 21-29.

[40] Recorded in *At-Tirmidhi*, 258/41, No. 44830, http://islamport.com/d/1/mtn/1/37/1116.html?zoom_highlightsub=%22%C3%E3%CA%EC+%DA%E1%EC+%D6%E1%C7%E1%C9%22 (*last visited on* 4 Oct. 2010). (Author translation from Arabic to English).

[41] Abdal-Haqq, *supra* note 3, at 54.

jurists of each era.[42] At the end any conclusion reached through *Ijma'* must be in conformity with the primary sources of the *Shari'a*, the *Qur'an* and the *Sunna*.[43]

Finally, *Qiyas* is a method of analogical reasoning that aims to govern a new situation with an old rule as long as this new situation is similar to that governed by the old rule.[44] *Qiyas* derives its reliability as a source of the *Shari'a* from the *Qur'an* and the *Sunna*.[45] To conclude, analogy is a method of analysis by which a new conclusion is derived from an old rule applied to a similar issue. Bassiouni and Badr gave a good example of *Qiyas* that since the *Qur'an* prohibits liquors because of its intoxicating effect on the body, jurists forbid drugs as they have the same effect on the body.[46]

III. THE LEVEL OF ADOPTING THE *SHARI'A* AS THE SOURCE OF NATIONAL LAWS IN MUSLIM COUNTRIES

Muslim countries' reaction towards the *Shari'a* as a source of national law differs from one country to the other. Nisrine Abiad, divides Muslim countries according to their reaction to the *Shari'a* as a source of laws into three main categories.[47] The first category includes few countries that do not provide for the *Shari'a* as the main source of their national laws and accordingly the effect of the *Shari'a* on their laws and regulations is not very clear, e.g., Lebanon and Turkey.[48] For instance, the Turkish Constitution provides that:

> The Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Ataturk, and based on the fundamental tents set forth in the Preamble.[49]

The second category includes the countries that consider the *Shari'a* the main source of their national laws but not with deep acknowledgement of applying it to the different aspects of their legal system, e.g., Algeria, Tunisia, Egypt, Jordan and Yemen.[50] Chapter 1 of the Tunisian Constitution provides that: "Tunisia is a free, independent, sovereign nation, its religion is Islam, Arabic language, and its Republic,"[51] and Chapter 38 provides that: "The President is the head of state and religion of Islam."[52] In the same context, Article 2 of the Egyptian Constitution declares Islam as the religion of the State and the main source of the

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[42] Abdal-Haqq, *supra* note 3, at 55.
[43] *Id*.
[44] Abdal-Haqq, *supra* note 3, at 56. *See also* Bassiouni & Badr, *supra* note 26, at 156, *and* Freamon, *supra* note 20, at 29-30.
[45] Abdal-Haqq, *supra* note 3, at 56.
[46] Bassiouni & Badr, *supra* note 26, at 155.
[47] ABIAD, *supra* note 4, at 51.
[48] *Id*.
[49] Turkey [Constitution] 1961, Art. 2. *See also* Kemal Gozler, *Turkish Constitutional Law Material in English*, http://anayasa.gen.tr/english.htm (*last visited on* Oct. 6, 2010).
[50] ABIAD, *supra* note 4, at 51.
[51] Tunisia [Constitution] June 1, 1959, No. 57, ch. 2. *See also* The Republic of Tunisia, Representatives Council, *The Constitution*, http://www.chambre-dep.tn/ (*last visited on* Oct. 6, 2010) (Author translation from Arabic to English).
[52] *Id*. at ch. 38.

law.[53] The same applies to Malaysia where Article 3-1 of the Federal Constitution provides that "Islam is the religion of the Federation but other religions may be practiced in peace and harmony in any part of the Federation."[54] Similarly, Article 1 of the Yemeni Constitution provides that: "The Yemen Republic is an Arab Muslim and independent country," Article 2 provides that: "Islam is the religion of the country and Arabic is its official language," Article 3 provides that: "The *Shari'a* is the main source of legislation," and Article 23 provides that: "The right of inheritance is guaranteed in accordance with *Shari'ah*."[55]

The effect of the *Shari'a* on the legal systems of the states of this category differs from one country to the other.[56] For example, the Egyptian Supreme Constitutional Court held that:

> The principles of the Islamic *Shari'a* are the major source of legislation. This imposes a limitation curtailing both the legislative an executive power, through which they are obliged that whatever laws or decrees they enact, no provision contained in them may contradict the provisions of Islamic law which are definite in terms of their immutability and their meaning…whatever legislative enactment contravenes them must be declared null and void.[57]

However, in Malaysia, Islamic law application is restricted to Muslims with regard to specific issues mentioned in the States List of the Federal Constitution of the country.[58]

At last, the third category of Muslim countries recognize the *Shari'a* as the main source of their national laws to the extent that they consider the *Qur'an* the constitution of their countries, e.g. Iran, Bahrain and Saudi Arabia.[59] Article 1 of the Bahraini Constitution provides that: "The Kingdom of Bahrain is Arab, Islamic, independent, and fully sovereign."[60] Similarly, Article 1 of the Basic Law of 1992 of Saudi Arabia provides that: "Saudi Arabia is an Arab Islamic country with full sovereignty whose religion is Islam and its Constitution, the Book of Allah and the *Sunna* of His Prophet, peace be upon him, and its language is Arabic, and its capital city is Riyadh."[61] Also, Article 1 of the Qatari Constitution provides that "Islam is the State's religion and the Islamic *Shari'a* is the main source of its legislations."[62] The same rule is provided by the Constitution of the United Arab Emirate: "Islam is the formal religion of the country; the *Shari'a* is the main source of

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[53] Constitution of The Arab Republic of Egypt, 11 Sept. 1971, as amended, May 22, 1980, May 25, 2005, March 26, 2007. *See also* http://www.egypt.gov.eg/english/laws/Constitution (*last visited on* Oct. 4, 2010).

[54] Malaysia [Constitution] 1957, Art. 3.1. *See also* Constitution of Malaysia*, Part I- The States, Religion, And The Law Of The Federation*, http://confinder.richmond.edu/admin/docs/malaysia.pdf (*last visited on* Oct. 6, 2010).

[55] Yemen [Constitution] 1994, Art. 1-3 & Art. 23. *See also* Republic of Yemen Supreme Commission for Elections and Referendum, *The Constitution of the Republic of Yemen*, http://www.scer.org.ye/ (*last visited on* Oct. 8, 2010).

[56] ABIAD, *supra* note 4, at 47.

[57] Case No. 5257/43/Dec. 28, 1997/Constitutional Court (Egypt).

[58] ABIAD, *supra* note 4, at 49.

[59] ABIAD, *supra* note 4, at 51.

[60] Bahrain [Constitution] 2002, no. 17, Art. 1. *See also* Department of Legal Affairs, *Bahrain Kingdom Constitution*, http://www.legalaffairs.gov.bh/ (*last visited on* Oct. 6, 2010).

[61] Saudi Arabia [Constitution] 1992, Art. 1. *See also* Kingdom of Saudi Arabia Ministry of Foreign Affairs, *The Basic Law of Government*, http://www.mofa.gov.sa/ (*last visited on* Oct. 6, 2010).

[62] Qatar [Constitution] 2003, Art. 1. *See also* Embassy of the State of Qatar in Washington DC, *Constitution of Qatar*, http://www.qatarembassy.net/constitution.asp (*last visited on* Oct. 8, 2010).

its legislations and Arabic is its formal language of the Union."[63] Pakistan established the Islamic Council to confirm that the bills are in conformity with the *Shari'a* before issuance and it also established the Federal *Shari'a* Court to examine the conformity of the application of the national laws with the *Shari'a*.[64]

In essence, Islamic rules, whether adopted in local laws and regulations or not, have great influence on their followers' everyday decisions, including labor issues.[65] According to Williams and Zinkin:

> The separation of church and state in many western societies has lead to the view that religion is essentially a private matter, whereas the Islamic ethical system allows no such separation. As a result Islam influences the decision making of its followers in every situation including in business relationships.[66]

IV. BUSINESS ETHICS AND THE GENERAL PRINCIPLES AFFECTING CORPORATE SOCIAL RESPONSIBILITY IN ISLAM

While Islamic law is represented in the *Shari'a* which is composed of a body of rules driven from the *Qur'an*, the *Sunna*, the *Ijma'*, the *Qiyas* and other secondary sources, as mentioned earlier,[67] Islamic ethics may be argued to refer to the general Islamic principles and moralities. In terms of business, *Shari'a* addresses business ethics in different ways. On one hand, the rules of the *Shari'a* organize the different aspects of Muslims' behavior including their business relationship, as mentioned earlier.[68] Examples may include the prohibition of interest on loans, the necessity of fair determination of prices, and the prohibition of trade in certain products that may have negative effect on the body such as liquors, drugs.[69]

On the other hand, Islam has a unique money theory, "Moderation", which works as a midpoint between "Liberalism," adopting the concept of absolute possession and disposal of money, and "Totalitarianism," eliminating the nature of human beings to possess and invest.[70] The core of Moderation theory is the idea of *Khilafa.*[71] *Khilafa* means that a human being is a successor of *Allah* and accordingly, his life is "a test of the worth of men in the eyes of *Allah"*.[72] Hence, the ownership of money reverts originally to *Allah* and people are appointed as successors/trustees to use this money by having nominal ownership.[73] The Muslim writer Mahmoud Shaltot explained the fruits of this philosophy by saying that: "The

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[63] United Arab Emirates [Constitution] 1971, Art. 7. *See also* http://www.gcc-legal.org/mojportalpublic/BrowseLawOption.aspx?LawID=2766&country=2 (*last visited on* Oct. 8, 2010).

[64] ABIAD, *supra* note 4, at 46.

[65] Williams, Geoffrey Alan and Zinkin, John, Doing Business with Islam: Can Corporate Social Responsibility be a Bridge between Civilisations? (October 2005). Available at SSRN: http://ssrn.com/abstract=905184

[66] *Id*. at 67, *Citing* Gillian Rice, *Islamic Ethics and the Implications for Business*, 18 J. Bus. Ethics 345, 346-347 (1999).

[67] See Section II, Islamic Law *("the Shari'a")* in brief, *supra* note 3.

[68] See *supra* p. 6.

[69] Williams & Zinkin, *supra* note 67.

[70] Muhammad Mostafa Emarah, *Money Theory in Islam,* http://www.dr-emara.com/Articles.html (Author translation from Arabic to English).

[71] *Khilafah* is an Arabic word meaning succession. *Glossary of Islamic Legal Terms*, *supra* note 3, at 89.

[72] Geoffrey Williams & John Zinkin, *Islam and CSR: A Study of the Compatibility Between the Tenets of Islam and the UN Global Compact,* 51 J. Bus. Ethics 520 (2009).

[73] Emarah, *supra* note 74.

benefits of money must be for all the society to satisfy their needs.[74] *Allah* attributed money to himself to underline its importance and assigned owners of money as successors/trustees who are responsible for maintaining, increasing, and spending money according to directions and instructions set by *Allah*.[75] So, where money is owned by *Allah*, all people are worshipers of *Allah* and the life they live is dictated by *Allah*, money shall be generated for *Allah* with a logical consequence that money must be for and maintained by all people, and its benefit shall be in the favor of all people.[76] Therefore, money is from and to the whole nation with all of its members who serve one with deep notions of social solidarity of the Islamic nation as one body; if any organ suffers, its neighbors would hurry to cure it.[77] As an application to the *Khilafa* principle, and considering the *Qur'an* as its constitution,[78] Saudi Arabia provides in its Constitution: "Ownership, capital and labor are basic fundamentals of the kingdom's economic and social entity. They are private rights that perform a social function in conformity with Islamic Shari'ah."[79]

Also, business in Islam is not about achieving profits, rather it aims at promoting the social welfare of the whole society.[80] This explains why Islam prohibits certain types of businesses such as *Riba,*[81] trade in tobacco, trade in alcohol, trade in armaments, and gambling.[82] According to Williams and Zinkin, the prohibition of such kinds of businesses aims to protect life and health by avoiding the harmful effects of these types of business on the society.[83] Thus the *Qur'an* says: "They ask thee concerning wine and gambling. Say: 'In them is great sin, and some profit, for men; but the sin is greater than the profit."[84] To be more specific, gambling means "getting something too easily" without suitable efforts and for no return which is considered unlawful and damned."[85] *Riba*, is prohibited for "the moral, social and economic well being of society, since it creates profit without work, and it does not share the risk between the lender and the borrower."[86] In this context, the *Qur'an* provides:

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[74] *Id*.

[75] *Id*. *See also* THE QURAN, *supra* note 20, *at* 1688-1689 ("says: "Believe in Allah and His Messenger, and spend (in charity) out of the (substance) where He has made you heirs. For, those of you who believe and spend (In charity),-for them is a great reward") (Quoting the meaning of the *Qur'an* 57:7), *and* THE QURAN, *supra* note 20, at1688-1689 ("give them something yourselves out of the means which Allah has given to you") (Quoting the meaning of the *Qur'an* 24:33).

[76] Emarah, *supra* note 74. *See also* THE QURAN, supra note 23, at14 ("He Who hath created for you all things that are on earth") (Quoting the meaning of the *Qur'an* 2:29).

[77] Emarah, *supra* note 74.

[78] *Id*.

[79] Qatar [Constitution], *supra* note 64, at. Art. 1. *See also* Embassy of the State of Qatar in Washington DC, *Constitution of Qatar*, http://www.qatarembassy.net/constitution.asp (*last visited on* Oct. 8, 2010).

[80] Williams & Zinkin, *supra* note 72, at 523. *See also* Taylor, *supra* note 20, at 388.

[81] *Riba* is an Arabic word which means usury. *Glossary of Islamic Legal Terms*, *supra* note 3, at 99. Literally *Riba* means "increase" and it refers to "the premium paid by the borrower to the lender along with the principal amount as a condition for the loan or for an extension in its maturity". Taylor, *supra* note 20, at 389.The Islamic alternative method to *Riba* is the *Qrde Hasan* (benevolent financing) which means that the lender provides the borrower the loan free of charge as if he is providing financial assistance and in return the borrower is committed to repay the loan, provide a collateral if required, and pay some small administrative charges sometimes. Taylor, *supra* note 20, at 399.

[82] Williams & Zinkin, *supra* note 72, at 523.

[83] *Id*.

[84] THE QURAN, *supra* note 20, at 93 (Quoting the meaning of the *Qur'an* 2:219).

[85] Williams & Zinkin, *supra* note 72, at 523.

[86] *Id*.

> But Allah hath permitted trade and forbidden usury. Those who after receiving admonition from their Lord, desist, shall be pardoned for the past; their case is for Allah (to judge); but those who repeat (The offence) are Companions of the fire: they will abide therein (for ever).[87]

It also provides: "That they took usury, though they were forbidden; and that they devoured men's wealth wrongfully; We have prepared for those among them who reject faith a grievous chastisement."[88] Considering the *Shari'a* as the main source of its national legislations, Sudan provides in its Constitution that:

> The Central bank of Sudan shall use and develop two sets of banking instruments, one Islamic and the other Conventional, to regulate and supervise the implementation of a single monetary policy through: (a) an Islamic financing window in Northern Sudan under a Deputy Governor of the Central Bank of Sudan using Islamic financing instruments to implement the national monetary policy in Northern Sudan.[89]

At last, business ethics in Islam are governed with the general frameworks shaping the *Shari'a* rules.[90] These general frameworks include, the most important, the doctrines of *Ibadah,*[91] *Tawhid,*[92] *Maslaha,*[93] and *Adalah.*[94]

Ibadah means that all individual activities represent part of his/her religious belief.[95] Accordingly, any behavior undertaken by any individual under Islam is a part of his worship to Allah and accordingly it needs to meet the ethical and spiritual purpose of worship, including any businesses conduct.[96]

The second doctrine is the doctrine of *Tawhid*. In writing about *Tawhid*, Gillian Rice explains:

> All life is essentially a unity because it also provides the practical way to pattern all facets of human life in accordance with God's will. There should be unity of ideas and actions in a person's existence and consciousness…A definite relationship between fellow humans is thus prescribed. This is the relationship of brotherhood or sisterhood and equality. In this sense, unity is a

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87 THE QURAN, *supra* note 20, at 127 (Quoting the meaning of the *Qur'an* 2:275).
88 THE QURAN, *supra* note 20, at 269 (Quoting the meaning of the *Qur'an* 4:161).
89 Sudan [Constitution] 2005, Art. 202-1-a, The International Constitution of the Republic of Sudan 2005, http://www.sudan-embassy.de/c_Sudan.pdf (*last visited on* Oct. 8, 2010).
90 Williams & Zinkin, *supra* note 67.
91 *Ibadah* is an Arabic word which literally means worship. *Glossary of Islamic Legal Terms*, *supra* note 3, at 93.
92 *Tawhid* is an Arabic word which literally means the Unitarian concept in Islam that Allah is but One. *Glossary of Islamic Legal Terms*, *supra* note 3, at 100.
93 *Maslaha* is an Arabic word which literally means public interest. *Glossary of Islamic Legal Terms*, *supra* note 3, at 100.
94 *Adalah* is an Arabic word which literally means justice of fairness. *Glossary of Islamic Legal Terms*, *supra* note 3, at 89.
95 Williams & Zinkin, *supra* note 72, at 520.
96 *Id*.

> coin with two faces: one implies that Allah is the sole creator of the universe and the other implies that people are equal partners or that each person is a brother or sisters to the other. As far as business is concerned, this means cooperation and equality of effort and opportunity.[97]

Hence, *Tawhid* doctrine requires Muslims to recognize that there is only one God and that they shall surrender themselves and their life, including their business and commercial relationships, to him and apply his rules and instructions in their everyday life.

The doctrine of *Maslaha* means that when a new question arises, while the sources of the *Shari'a* do not provide a rule to solve this question, the public interest shall be considered to reach such rules to govern this question.[98] The logic behind the idea of *Maslaha* is well explained by Bassioni and Badr:

> When a new rule is needed to regulate a novel situation and cannot be derived from qiyas, ijma, or urf, resort to maslaha is permissible. It is, in some respects, equivalent to the common law's equity, though it is much broader because it extends beyond the parties to a given conflict. Consideration of the common or public good is based on the fact that the law is intended to protect and promote the legitimate interests of the community and its individual members. In any unprecedented situation calling for a new rule of law, identifying that public interest is the first step towards formulating a new rule that protects and promotes that public good. Maslaha is therefore an expression of public policy.[99]

Applying the doctrine of *Maslaha* to business transactions, the rules governing business relationships and business activities shall consider the public good and support the social welfare of the society.

Finally, the doctrine of *Adalah* requires Muslims to supply the basic requirements of everyone within the society, particularly those who do not have a source of income.[100] This explains the Islamic principle of *Zakah,*[101] which is a wealth tax comprising compulsory charitable giving for specially designated groups in society.[102] The idea of *Zakah* illustrates how Islam distributes income and wealth in the society to guarantee social security for members in order to maintain business activity on just and ethical lines and to avoid unemployment.[103] Williams and Zinkin argue that the system of *Zakah* applies to both Muslims and non-Muslims who are in need as Islam allows non-Muslims that are in need to

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[97] Rice, *supra* note 68, at 345-347.
[98] *Id*.
[99] Bassiouni & Badr, *supra* note 26, at 159.
[100] Emarah, *supra* note 74..
[101] *Zakah* is an Arabic word that refers to the obligatory charity based upon a percentage of annual surplus wealth. *Glossary of Islamic Legal Terms*, *supra* note 3, at 94. *Zakah,* as one of the basic requirements of adopting Islam as a religion, is the obligation to pay a wealth tax consisting of compulsory charitable giving for people in need within the society. *Zakah* represents a method of distributing income and wealth through having a financial system that assures that all members within the society will have enough money for a humane life and for slaves in particular to free them by paying money to their masters. Williams & Zinkin, *supra* note 72, at 520-526.
[102] Emarah, *supra* note 74.
[103] *Id*.

share the wealth of Muslims.[104] In their argument Williams and Zinkin refer to the Prophet saying: "The Head of State is the Guardian of him who has nobody to support him."[105] Considering this principle of *Adalah* and *Zakah*, Article 7-1 of the Yemeni Constitution provides that: "The national economy should be founded on the following principles: a. Islamic social justice in economic relations which aims at developing and promoting production, achieving social integration and equilibrium, providing equal opportunities and promoting higher living standards in society" and Article 21 provides that: "The country shall collect the Zakat and shall spend it through its legal channels in accordance with the law."[106]

V. LABOR IN THE *SHARI'A*

A. THE DIGNITY OF WORK IN THE SHARI'A

Building upon the general ethical principles governing business in Islam, we next explore the attitude of Islam towards work and labor. Islam connected work with faith to the extent that it mentioned the importance and dignity in more than fifty verses in the *Qur'an*.[107] For example, Allah says in the *Qur'an*:

> Whoever works righteousness, man or woman, and has Faith, verily, to him will We give a life. That is good and pure, and We will bestow on such their reward according to the best of their actions.[108]

Work is not only connected to faith in Islam, but also, it is considered to be, "if done with pure intention and in conformity with the *Shari'a,"* as acts of worship that will be rewarded by *Allah* in both life and the Hereafter without any distinction between males and females.[109] As a result, *Allah* says in the *Qur'an*: "It is He Who has made the earth manageable for you, so traverse ye through its tracts and enjoy of the sustenance which He furnishes: but Unto Him is the Resurrection."[110] Thus, Allah prepared and subjugates the earth to human beings to be a convenient and stable dwelling place so that people can move freely seeking earnings and trade. The logical outcome is that the *Qur'an* appreciates time and asks people to make use of it working once they are done with their prayers: "And when the Prayer is finished, then may ye disperse through the land, and seek of the Bounty of Allah: and remember Allah frequently that ye may prosper."[111]

The *Sunna* also appreciated the value of work. For example, Prophet *Muhammad* (PB) is reported to have said: "Nobody has ever eaten a better food than that which one has earned

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[104] Williams & Zinkin, *supra* note 72, at526.
[105] *Id*.
[106] Yemen [Constitution], *supra* note 57, at Art. 7-1 & Art. 21.
[107] Rafik I. Beekun & Gamal A. Badawi, *Balancing Ethical Responsibility Among Multiple Organizational Stakeholders: The Islamic Perspective,* 60 J. Bus. Ethics 131, 133 (2005).
[108] THE QURAN, *supra* note 20, at 763 (Quoting the meaning of the *Qur'an* 16:97).
[109] Beekun & Badawi, *supra* note 111, at 133. *See also* THE QURAN, supra note 20, at 533 ("Work (righteousness): Soon will Allah observe your work") (Quoting the meaning of the *Qur'an* 9:105).
[110] THE QURAN, *supra* note 20, at 1787 (Quoting the meaning of the *Qur'an* 67:15).
[111] THE QURAN, *supra* note 20, at1749 (Quoting the meaning of the *Qur'an* 62:10).

by working with one's own hands as the Prophet of Allah, David used to eat from the earnings of his manual labor."[112] Prophet *Muhammad* (PB) is also reported to have said: "One would rather cut and carry a bundle of wood on his back than asking somebody who may or may not give him."[113] Furthermore, Prophet *Muhammad* (PB) is reported to have said: "Allah likes the professional Muslim."[114] According to Zulfiqar:

> The general expectation in Islam is that a person "produces[s]" more than he or she "consumes"…Bearing this in mind, there is significant religious support for securing the rights of those who work. For instance, a Prophetic tradition reports that an individual who takes away rights of a worker should be considered an oppressor.[115]

Prophet *Muhammad* (PB) gave a practical example teaching Muslims the importance of work and its dignity when:

> A man of the Ansar came to the Prophet (P) and begged from him. He (the Prophet) asked, "Have you nothing in your house?" He replied, "Yes, a piece of cloth, a part of which we wear and a part of which we spread (on the ground), and a wooden bowl from which we drink water."
> He said, "Bring them to me". He then brought these article to him and he (the Prophet) took them in his hands and asked, "Who will buy these?" A man said, "I shall buy them for one Dirham." He said twice or thrice, "Who will offer more than one dirham?" A man said, "I will buy them for two dirhams."
> He (the Prophet) gave these to him and took the two dirhams and, giving them to the Ansari, he said, "Buy food with one of them and hand it to your family, and buy an ax and bring it to me". He then brought it to him. The Apostle of God (P) fixed a handle on it with his own hands and said, "Go, gather firewood and sell it, and do not let me see you for a fortnight." The man went away and gathered firewood and sold it. When he had earned ten dirhams, he came to him and bought a garment with some of them and food with the others. The Apostle of God (P) then said, "This is better for you than that begging should come as a spot on your face on the Day of Judgment.[116]

In essence, most of Muslim countries ensure the dignity of work as recognized by Shari'a in their constitutions. Some countries go further to consider work not only a right of every one but also a duty. Simple word like "citizens have the right to work," "work is a duty," and "work is dignity" are found in article 55 (1) of the Algerian Constitution,[117] article

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[112] 3 Zab¯id¯i, Ahmad ibn Ahmad, **Mukhtasar Sah¯ih al-Bukh¯ar¯i, al-musammá al-Tajr¯id al** 162-163 (al-Riy¯ad, al-Mamlakah al-'Arab¯iyah al-Sa'¯ud¯iyah : Maktabat D¯ar al-Sal¯am, 1994).. *See also* Zulfiqar, *supra* note 28, at 435.

[113] 3 SAHIH AL-BUKHARI, *supra* note 116, at 163.

[114] 3 The Series of the Correct *Sunna*, 106 (Mohamed Nasser El-albani ed. Al-Maaref for Publ'g and Distribution 1995), http://arabic.islamicweb.com/Books/albani.asp?id=8294

[115] Zulfiqar, *supra* note 28, 435.

[116] Beekun & Badawi, *supra* note 111, at 138.

[117] Algeria [Constitution] April 10, 2002, No. 03-02, Art. 31 (amended by the Law No. 19-08 of Nov. 16, 2008), People's Democratic Republic of Algeria Presidency of Algeria General Secretariat of Government, *Constitution*, http://www.joradp.dz/HAR/Index.htm

13 (a) of the Bahraini Constitution,[118] article 23 of the Jordanian Constitution,[119] article 41 of the Kuwaiti Constitution,[120] and articles (29) and (36) of the Syrian Constitution.[121]

Let us now consider the most important ethical Islamic rules and principles governing the different aspects of labor as an application to corporate social responsibility.

B. LABOR AS PART OF CORPORATE SOCIAL RESPONSIBILITY IN THE SHARI'A

1. THE GENERAL FRAME GOVERNING EMPLOYER-EMPLOYEE RELATIONSHIP IN ISLAM

According to Islam the employer-employee relationship is based on a brotherhood relationship.[122] Such a conclusion is recited directly from Prophet *Muhammad* (PB) saying:

> Your employees are your brothers upon whom Allah has given you authority, so if a Muslim has another person under his control, he/she should feed them with the like of what one eats and clothes them with the like of what one wears and you should not overburden them with what they cannot bear and if you do so, help them in their jobs.[123]

Similarly, Prophet *Muhammad* (PB) is reported to have said: "each one of you is shepherd and each one is responsible for the flock under him."[124]

On one hand, from the employers' side, this family relationship built by Islam as the base of employer-employee relationship results in a preliminary liability of employers towards their employees from different aspects that will be examined later in this section. On the other hand, such a friendly relationship imposes different obligations on employees as well. In this regard Beekun and Badawi claim that:

> It is imperative that in his work, an employee has to fulfill the trust (*amanah*) that the employer has bestowed on him. Prophet said that: "An office is a trust; it is a humiliation except for those who rise equal to the task"… worker must be honest and look after the property and tools of the employer. He must neither use nor allow anyone else to use anything that belongs to his employer without the employer's permission. The Qur'an provides: "Do not betray nor misappropriate knowingly things entrusted to you."[8:27] Also, the Prophet said that: "whosoever deceives is not one of us." Many ethical issues characterize the relationship of the employee to the firm…thus an employee

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[118] The Kingdom of Bahrain [Constitution] February 14, 2002, The Kingdom of Bahrain Embassy of the Kingdom of Bahrain in Japan, *The Constitution of the Kingdom of Bahrain*, *available at* http://www.bahrain-embassy.or.jp/en/?page_id=13

[119] Jordan [Constitution] January 1, 1952, The Library Documents, *The Constitution of the Hashemite Kingdom of Jordan*, http://www.kinghussein.gov.jo/constitution_jo.html (*last visited on* Oct. 12, 2010).

[120] Kuwait [Constitution] State of Kuwait, Constitution.

[121] Law No. 17 of 2010 (Labor Law), the Arab Republic of Syria the Ministry of Social Affairs and Labor, http://www.molsa.gov.sy/index.php?m=202 (*last visited on* Oct. 19).

[122] Zulfiqar, *supra* note 28, at 436.

[123] Recorded in *Abi-Daoud*, 145/9, No. 5135, http://islamport.com/d/1/krj/1/77/1021.html.

[124] 3 SAHIH AL-BUKHARI, *supra* note 116, at 349.

> must neither embezzle the funds of the company nor reveal company secrets to outsiders.[125]

One may conclude that the Islamic employer-employee relationship is a double faced relationship that imposes a strict liability on employers towards their employees. But at the same time, employees owe their employers different forms of duties such as honesty, hard work and the like.

2. DISCRIMINATION AGAINST EMPLOYEES

Generally speaking Islam is based on equality between people regardless of color, language, race, gender, or nationality. The *Qur'an* provides:

> O mankind! We created you from a single (pair) of male and female, and made you into nations and tribes that you may know each other Not that ye may despise (Each other). Verily the most honored of you in the sight of Allah is (he who is) the most righteous of you. And Allah has full knowledge and is well acquainted (With all things).[126]

Furthermore, Islam prohibits sexism. Prophet *Muhammad* (PB) is reported to have said:

> No Arab has superiority over a white person and no white person has superiority over an Arab; no dark person has superiority over a white person and no white person has any superiority over a dark person. The criterion of honor in the sight of Allah is righteousness and honest living.[127]

In addition to the general prohibition of discrimination between citizens in any capacity provided by almost all Muslims countries constitutions, specific labor laws confirm such a prohibition in work environment. For instance, the Egyptian Labor Law prohibits discrimination in wages on the basis of sex, origin, language, religion, or others.[128] Also, the Syrian Labor Law prohibits discrimination between employees at work place due sex, color, race, marital status, religion, political believes, nationality, dressing, or the like.[129]

Unlike the common misunderstanding about inequality between men and women in Islam, Islam did not provide for any gender criteria distinguishing between men employees and women employees. This rule may be deduced from the principles set by the *Qur'an* and the *Sunna*. The *Qur'an* provides: "If any do deeds of righteousness, be they male or female and have faith, they will enter Heaven, and not the least injustice will be done to them."[130] Similarly, Prophet *Muhammad* (PB) confirmed that the criteria of preference in employment are the quality of work and the qualifications that the employee enjoys: "Whoever delegates a

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[125] Beekun & Badawi, *supra* note 111, at 139.

[126] THE QURAN, *supra* note 20, at 93 (Quoting the meaning of the *Qur'an* 49:13).

[127] Narrated by *Ahmed Ebn-Hanbal*, 244/51, No. 24204, http://islamport.com/d/1/mtn/1/88/3377.html?zoom_highlightsub=%22%E1%C7+%DD%D6%E1+%E1%DA%D1%C8%EC+%DA%E1%EC%22 (*last visited on* Oct. 8, 2010) (Author translation from Arabic to English).

[128] Law No. 12 of 2003, *supra* note 132, Art. 35

[129] Labor No. 17 of 2010, *supra* note 125, Art.2.

[130] THE QURAN, *supra* note 20, at 255 (Quoting the meaning of the *Qur'an* 4:124).

position to someone whereas he sees someone else as more competent, verily he has cheated Allah and His Apostle and all Muslim.[131] According to Williams and Zinkin:

> The right to equal treatment extends to equality before the law. When a woman of high rank was brought for being involved in a theft, and it was recommended that she be treated leniently because of her rank, the Prophet replied: "The nations that lived before you were destroyed by Allah because they punished the common man for their offences and let their dignitaries go unpunished for their crimes; I swear by him (Allah) who holds my life in His hand that even if Fatima, the daughter of Muhammad (PB) had committed this crime, then I would have amputated her hand.[132]

Historically, women could be represented in Muslims' meetings during the era of Prophet *Muhammad* (PB), could discuss openly to the Prophet, could argue with men, could defend their interests, and could even be participate in military and political issues.[133] In this regard, the Moroccan Constitution provides that: "All nationals have the right to work in public jobs and they are equal with regard to the required conditions in this regard."[134]

Muslim local labor laws are reflection of *Shari'a,* as mentioned earlier, in addition to social situations. Hence, the Egyptian Labor Law provides for very special rules with regard to women employees. For example, it prohibits women from working in specific jobs such as dangerous jobs and it also prevents women work during the period from seven pm to seven am.[135] Furthermore, it gives a woman employee the right of maternity leave of ninety days with compensation equal to her comprehensive wage and prevents an employer from discharging female employees during her maternity leave.[136] Moreover, it gives a woman employee one hour paid breast feeding leave every day for at least two years following the day of giving birth, and two years leave to take care of her child.[137] It also requires employers having more than hundred female employees to provide a nursery school services for female employees' kids.[138] The Algerian Labor Law has more conservative rules with regard to female employees as it prevents employers from asking female employees to work during night in general.[139] Sudanese Labor Law also has specific rules for female employees.

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[131] Muhammad W. Khan, *Leadership and Islam, Principles of Success According to the Seerah of Prophet Muhammad* (PB), http://makkah.wordpress.com/leadership-and-islam/ (*last visited on* Oct. 4, 2010), *Citing* Ibn Taymiyya, *Assiyasah Ash-Shar'iyya* (1996). *See also* THE QURAN, *supra* note 20, at 205 ("O mankind! Fear your Guardian Lord, Who created you from a single person") (Quoting the meaning of the *Qur'an* 4:1 and 7:189), *and* the *Qur'an*, *supra* note 20, at 202 ("And their Lord hath accepted of them, and answered them; "Never will I suffer to be lost the work of any of you, be he male or female: You are members, one of another") (Quoting the meaning of the *Qur'an* 3:195), *and* THE QURAN, *supra* note 20, at 1252-1253 ("For Muslim men and women, for believing men and women, for devout men and women, for true men and women, for men and women who are patient and constant, for men and women who humble themselves, for men and women who give in charity, for men and women who fast, for men and women who guard their chastity, and for men and women who engage much in Allah's remembrance. For them has Allah prepared forgiveness and great reward") (Quoting the meaning of the *Qur'an* 33:35) (reflecting the fact that *Allah* created both males and females from the same soul without any preference for any gender to the other).

[132] Williams & Zinkin, *supra* note 72, at 525.

[133] Williams & Zinkin, *supra* note 72, at 524.

[134] Morocco [Constitution] Oct. 7, 1996, No. 157.96.1, Art. 12, The Moroccan Kingdom The Ministry of Justice, The Constitution, http://www.gpc.gov.ly/html/home.php (*last visited on* Oct. 8, 2010) (Author translation from Arabic to English).

[135] Law No. 12 of 2003, *supra* note 132, Art. 89.

[136] Law No. 12 of 2003, *supra* note 132, Art. 91.

[137] Law No. 12 of 2003, *supra* note 132, Art. 93.

[138] Law No. 12 of 2003, *supra* note 132, Art. 96.

[139] Algeria [Labor Law], *supra* note, Art. 29.

It prohibits employing women in jobs that require huge physical efforts, dangerous jobs and other similar ones. It also prohibits employing women after ten pm until six am except for specific simple administrative and medical jobs.[140] The Sudanese Labor Law recognizes a unique type of paid leave for widow female employees once their husband pass away for four month and ten days if she is not pregnant and until she gives birth if she is pregnant.[141]

3. LABOR ASSOCIATIONS

Though Islam did not recognize the current form of labor associations and unions adopted by employment laws all over the world, it highly considers participating in public meetings and peaceful groups to express and discuss opinions. In this regard, the *Qur'an* provides:

> You are the best of Peoples, evolved for mankind. Enjoining what is right, forbidding what is wrong, and believing in Allah. If only the people of the Book had faith, it was best for them: among them are some who have faith, but most of them are perverted transgressors.[142]

The *Qur'an* also provides*:* "Help ye one another in righteousness and piety, but help ye not one another in sin and rancor: Fear Allah: for Allah is strict in punishment."[143]

A good example to labor associations and collective bargaining is to be found in the Abbasid era[144] where some labor structures, not having the name of labor unions, existed with the same features of labor unions.[145] For instance, the members of these structures were the employees of the same profession living in the same neighborhood.[146] These groups of employees used to have certain type of insurance against any unexpected difficulties and used to support each other in their financial and social needs.[147]

Applying the general principle founded by the *Qur'an* on freedom of assembling and cooperation, and the examples driven from the Muslims' history, the recent local employment laws of almost all Muslim countries provide for the right of collective bargaining and freedom of association. Examples include the Egyptian Labor Law which organizes both collective bargaining rights of employees and labor associations.[148] Similalry, Qatari Labor Law confirms employees' rights of collective bargaining, collective agreements, labor unions, and striking.[149] Syrian, Yemeni, Algerian labor laws are also good examples. [150]

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[140] Law of 1997, *supra* note 144, Art. 19-21.
[141] Law of 1997, *supra* note 144, Art. 48.
[142] THE QURAN, *supra* note 20, at 173 (Quoting the meaning of the *Qur'an* 3:110).
[143] THE QURAN, *supra* note 20, at, 278 (Quoting the meaning of the *Qur'an* 5:2).
[144] The Abbasid Era was the period from the establishment of the Abbasid dynasty in 132/750 to the death of Al-Mutawakkil in 247/861. This era represents an important era of the Islamic intellectual and social history. For instance, this era noticed a great developments towards formalizing the *Sunna*. Muhammad Qasim Zaman, *The Caliphs, The "Ulama", and the Law: Defining the Role and Function of the Caliph in the Early "Abbasid Period",* 4 Islamic L. & Soc'y 1, 1 (1997).
[145] Dr. Muhammad Moneer Saad Eldin, *Muslims Labor Unions*, http://www.dahsha.com/viewarticle.php?id=26838. (*last visited on* Oct. 4, 2010). (Author translation from Arabic to English).
[146] *Id*.
[147] *Id*.
[148] Law No. 12 of 2003, *supra* note 132.
[149] Law No. 14 of 2004, *supra* note 153Art. 116-134.

In addition, collective Muslim labor movements provide for the same right. For instance, the 2004 Arab Charter on Human Rights ("Charter") [151]provides: "Every individual has the right to freely form trade unions or to join trade unions and to freely pursue trade union activity for the protection of his interest."[152] Also the Arab Labor Organization[153] issued two regional agreements in this regard; the first agreement is Agreement No.11/1979 on Collective Bargaining[154] and the second is Agreement No. 8/1977 on Labor Unions Freedom.[155]

4. CHILD LABOR

The *Shari'a* identifies children rights while being in the womb, such as the right of life by prohibiting abortion,[156] the right of inheritance in case of death of the predecessor before child birth.[157] After birth, the *Shari'a* organizes lot of rights for children that include but are not limited to, good name, good nourishment, education, and protection from all kinds of cruelty, mental or physical abuse or punishment.[158] The *Shari'a* also organizes children rights in special circumstances such as divorce, guardianship and custody and the like.[159] According to the *Shari'a*, it is the responsibility of parents, relatives and governments to protect children and watch the application of the rights provided for children by the

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[150] Labor No. 17 of 2010, *supra* note 125, Art.178-183. *See also*, Law No. 25 of 1997, amending Law No. 5 of 1995, and amended by Law No. 25 of 2003 (Labor Law), Art. 32-35, http://www.yemen-nic.net/contents/laws_ye/detail.php?ID=11525 (*last visited on* June 3, 2011). *See also*, Algeria [Labor Law], *supra* note 143, Art. 5.

[151] League of Arab States Arab Charter on Human Rights [hereinafter *Charter*]. *See also* University of Minnesota Human Rights Library, *available at* http://www1.umn.edu/humanrts/instree/loas2005.html?msource=UNWDEC19001&tr=y&auid=3337655 (*last visited on* Oct. 4, 2010). More details are given in Section IV, Collective Measures Taken by Muslim Governments to Enhance the *Shair'a* Rules on Labor Issues, of this Article.

[152] Charter, *supra* note 134, at Art. 5:1.

[153] The Arab Labor Organization is a regional organization that has almost all the Arab countries as members and that has a tripartite representation system composed of the Arab governments, employers and employees participation in the activities of the organization. The Arab Labor Organization goals include the promotion of employees rights of labor unions and collective bargaining, providing technical assistance in labor issues for member states, developing labor laws in member states, improving work conditions in member states, improving health and social insurance and services to employees in member states, providing minimum fair wages criteria in member states, protecting vulnerable groups such as women, children and disabled, developing human resources in member states, fighting against unemployment in member states, following up with immigrant Arab employees, providing training programs to employees in member states. The Arab Labor Organization, *Goals*, http://www.alolabor.org/ (*last visited on* Oct. 4, 2010). (Author translation from Arabic to English).

[154] The Arab Agreement No.11/1979 on Collective Bargaining, March 1977, The Arab Labor Organization, http://www.alolabor.org/ (*last visited on* Oct. 4, 2010).

[155] The Arab Agreement No. 8/1977 on Labor Unions Freedom, March 1979, The Arab Labor Organization, http://www.alolabor.org/ (*last visited on* Oct. 4, 2010).

[156] THE QURAN, *supra* note 20, at 292-293, ("if any one slew a person… it would be as if he slew the whole people. And if any one saved a live, it would be as if he saved the life of the whole people") (Quoting the meaning of the *Qur'an* 5:32).

[157] Zainah Almihdar*, Human Rights of Women and Children under the Islamic Law of Personal Status and its Application in Saudi Arabia,* 5 Muslim World Journal of Human Rights 1, 8 (2008).

[158] *Id.*

[159] *Id*.

Shari'a.[160] In this regard Prophet *Muhammad* (PB) is reported to have said: "each one of you is shepherd and each one is responsible for the flock under him."[161]

Prophet *Muhammad* (PB) put the general rules organizing children issues to be:

"Whoever is not merciful to others, will not be treated mercifully."[162]

The *Shari'a* does not allow placing any burden on children that would negatively affect their growth.[163] Beekum and Badawi comment on the strict Islamic rules concerning child labor as follows:

> The problem of child labor relates not only to the question of exploitation, but also to the Prophet's (P) emphasis on education as a mandatory duty on every Muslim. The right to education is a legitimate right of the child from an Islamic perspective on religious and moral grounds.[164]

Applying these general principles, the Charter[165] provides:

> The states parties recognize the right of the child to be protected from economic exploitation and from being forced to perform any work that is likely to be hazardous or to interfere with the child's education or to be harmful to the child's health or physical, mental, spiritual, moral or social development.[166]

Furthermore, the Arab Labor Organization issued an independent agreement on child labor that is the Arab Agreement No. 18/1996 Regarding Juveniles.[167] The Agreement prohibits employing children under thirteen years old, organizes the employment of juveniles (children between thirteen and eighteen) and organizes issues related to work conditions, hours, wages and others.[168]

Examples from local laws of Muslim counties include countries like Egypt, Qatar, Syria, Ageria, and others. Both the Egyptian and the Qatari Labor Laws that prohibits employing kids less than fourteeen years old.[169] The Syrian Labor Law prohibits employing kids less than fifteen years old.[170] The Algerian Labor Law prohibits employing children less than sixteen years old and it prohibits employing any person less than nineteen years old in a night work.[171]

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[160] *Id*.
[161] 3 SAHIH AL-BUKHARI, *supra* note 116, at 349.
[162] 8 SAHIH AL-BUKHARI, *supra* note 116, at18.
[163] Abdul Aziz Al-Khayyatt, *Human Rights and Racial Discrimination in Islam*, 48 (Khalifa Ezzat & Heather Shaw trans., Dar Al- Salam 2d ed.,) (2008).
[164] Beekun & Badawi, *supra* note 111, at 138.
[165] Mervat Rishmawi, *The Revised Arab Charter on Human Rights: A Step Forward*, 5 Hum. Rts. L. Rev. 361, 361 (2005).
[166] The Charter, *supra* note 169, at Art. 34:3.
[167] The Arab Agreement No. 18/1996 Concerning Juveniles' Labor, March 24, 1996, http://www.alolabor.org/ (*last visited on* Oct. 4, 2010). (Author translation from Arabic to English).
[168] *Id*.
[169] Law No. 12 of 2003, *supra* note 132, Art. 86-92,
[170] Labor No. 17 of 2010, *supra* note 125, Art.113-118.
[171] Algeria [Labor Law], *supra* note 143, Art. 15.

5. FORCED LABOR

During *Jahiliyyah,*[172] the period before Islam, slavery was deeply recognized as a socio-economic fact and it was not possible for Islam to stop it at once.[173] Therefore Islam encouraged the elimination of slavery in an implied and gradual way through restricting unfairness, inequality and oppression.[174] First of all, Islam confirmed the unity of humanity and equality of people whether in the *Qur'an* or the *Sunna*. The *Qur'an* provides:

> O mankind! We created you from a single (pair) of male and female, and made you into nations and tribes that you may know each other Not that ye may despise (Each other). Verily the most honored of you in the sight of Allah is (he who is) the most righteous of you. And Allah has full knowledge and is well acquainted (With all things).[175]

Similarly, Prophet *Muhammad* (PB) is reported to have said:

> No Arab has superiority over a white person and no white person has superiority over an Arab; no dark person has superiority over a white person and no white person has any superiority over a dark person. The criterion of honor in the sight of Allah is righteousness and honest living.[176]

The Islamic policy towards eliminating slavery continued to close all the avenues for obtaining new slaves, such as prohibiting usury (capital interest) particularly debtors were commonly enslaved when they could not pay back the capital interest for loans with high interest.[177]

With regard to those arrested during wars, the *Qur'an* language is in the essence that they should either be freed out of generosity or asked for ransom.[178] The Qur'an says: "Therefore (Is the time for) either generosity or ransom."[179] However, Prophet *Muhammad* (PB) gave the best example to Muslims releasing the captives on mercy basis without ransom.[180] Sultana Afroz gives examples from the Islamic history when Prophet Muhammad

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[172] Jahiliyyah is an Arabic word which literally means ignorance and it refers to the era of dark ages of pre-Islamic Arabia. *Glossary of Islamic Legal Terms*, *supra* note 3, at 95.

[173] Sultana Afroz, *Islam And Slavery Through The Ages: Slave Sultans And Slave Mujahids*, 5 J. Islamic L. & Culture 97, 98-99 (2000) (Examining the position of slavery in Islam and its condemnation by not only the *Qur'an* but also the other sources of the *Shari'a* giving some examples from the Islamic history).

[174] DR. MUHAMMAD EMARAH, ISLAM AND HUMAN RIGHTS, 18, 22 (Al-Shorouk 2006). (Author translation from Arabic to English). *See also* Afroz, *supra* note 177, at 98-99.

[175] THE QURAN, *supra* note 20, at 93 (Quoting the meaning of the *Qur'an* 49:13).

[176] Narrated by *Ahmed Ebn-Hanbal*, 244/51, No. 24204, *available at* http://islamport.com/d/1/mtn/1/88/3377.html?zoom_highlightsub=%22%E1%C7+%DD%D6%E1+%E1%DA%D1%C8%EC+%DA%E1%EC%22.

[177] EMARAH, *supra* note 178, at 18-22.Usury and capital interest are prohibited by Islam not because Islam does not see it as a way to turn excess capital into profit but because of a deeper concern for the moral, social and economic well being of society sine it creates profit without work and it does not share the risk between the lender and the borrower. Williams & Zinkin, *supra* note 72, at 520.

[178] EMARAH, *supra* note 178, at 18-22. *See also* Freamon, *supra* note 20, at 43-44.

[179] THE QURAN, *supra* note 20, at1560 (Quoting the meaning of the *Qur'an* 47:4).

[180] Afroz, *supra* note 177, at 97-101.

released 70 non-Muslim war captive after the *Battle of Badr* in 624 AD, 6,000 captives after the *Battle of Hunain* in 627 AD, 600 captives after the *Battle of Muraisi*.[181]

Furthermore, Islam encouraged the freeing of slaves by great rewards from Allah to the extent that the *Qur'an* considered that freeing a slave as an act of worship.[182] In this regard Sultana Afroz confirms that:

> Voluntary emancipation sprang from a Muslim's conviction in the principle of equality and brotherhood and his desire to please God- as Man is God's best creation, thus not only the soul but the physical status needs to be freed. Voluntary emancipation known as al-Itq became the common practice of Prophet Muhammad (SAW) providing the best example for his followers. He freed all the salves he had acquired as prisoners of war and otherwise. His companions followed his example.[183]

Sometimes the *Qur'an* makes freeing a slave a penalty for committing a breach of Allah's orders such as intentional misconduct, mistaken killing and the like.[184] The *Qur'an* provides:

> Never should a believer kill a believer; except by mistake, and whoever kills a Believer by mistake it is ordained that he should free a believing slave and pay blood money to the deceased's family unless they remit it freely. If the deceased belonged to a people at war with you, and he was a Believer, the freeing of a believing slave (is enough). If he belonged to a people with whom you have a treaty of mutual alliance, blood money should be paid to his family, and a believing slave be freed.[185]

> In the same context, Prophet *Muhammad* (PB) said:

> Allah says, I will be against three persons on the Day of Resurrection; One who makes a covenant in My Name, but he proves treacherous, One who sells a free person, as a slave, and eats the price and One who employs someone and gets the full work done by him but does not pay him his wages.[186]

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[181] *Id*.

[182] EMARAH, *supra* note 178, at 43.

[183] Afroz, *supra* note 177, at 97-103.

[184] EMARAH, *supra* note 178, at 43.

[185] THE QURAN, *supra* note 20, at 243 (Quoting the meaning of the *Qur'an* 4:92). Life is highly protected under Islam according to the principle of brotherhood but in case of mistaken accident, the deceased family has a right of compensation and the mistaken person has to free a slave if any. Thus, killing by mistake was considered to be one of the occasions, among others, for winning the liberty of a slave if exists. THE QURAN, *supra* note 20, at 242 (Quoting the meaning of the *Qur'an* 4:92).

[186] Recorded in *Al-Bukhari*, *See* http://islamport.com/d/1/mtn/1/39/1136.html?zoom_highlightsub=%22%CB%E1%C7%CB%C9+%E1%C7+%ED%DF%E1%E3%E5%E3+%C7%E1%E1%E5+%ED%E6%E3+%C7%E1%DE%ED%C7%E3%C9%22 (*last visited on* Oct. 8, 2010).

Prophet *Muhammad* (PB) went further when he supported the marriage of his daughter with his ex-slave, *Zayd,* to mix slaves with noble families' members as a method of eliminating slavery.[187]

At last, the Islamic system of *Mukataba* put an end to slavery in Muslims' history. *Mukatabah* means that if slaves require masters to free them, masters have no option except to release them writing this down in return for certain amount of money.[188] In this regard the *Qur'an* says:

> And if any of your slaves ask for a deed in writing, (for emancipations), give them such a deed if ye know any good in them; yea, give them something yourselves out of the means which Allah has given to you. But force not your maids to prostitution when they desire chasity, in order that ye may make a gain of this life.[189]

Slaves unable to acquire the required money to release themselves could get it through *zakah* funds.[190] It may be concluded that Islam gave a great example on condemning slavery and forced labor as a hidden form of slavery.[191]

Currently, all Muslim states deny slavery and provide in their constitutions for the right to freedom and equality. For instance, the Kuwaiti Constitution provides that: "All people are equal in human dignity, and in public rights and duties before the law, without distinction as to race, origin, language or religion."[192] It also provides: "Personal liberty is guaranteed."[193] The Bahraini Constitution provides for a similar meaning.[194] Similarly, the Egyptian Constitution provides: "All citizens are equal before the law. They have equal public rights and duties without discrimination due to sex, ethnic origin, language, religion or creed."[195] In the same context, the Algerian Constitution provides: "All citizens are equal before the law. No discrimination shall prevail because of bind, race, sex, opinion or any other personal or social condition or circumstance."[196]

Concentrating more on forced labor issues, the *Shari'a* requires employers to take care of their employees, not to overload them with work, to ask them for only reasonable kinds of work, and to provide them with acceptable work conditions.[197] In this regard,

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[187] Afroz, *supra* note 177, at 106. *See also* Freamon, *supra* note 20, at 41-42.
[188] Afroz, *supra* note 177, at 107.
[189] THE QURAN, *supra* note 20, at1014 (Quoting the meaning of the *Qur'an* 24:33).
[190] *See supra* note 101 (explaining the definition and context of *Zakah)*. *See also* THE QURAN, supra note 20, at 519 ("Alms are for the poor and the needy, and those employed to administer the (funds): for those whose hearts have been (recently) reconciled (to Truth); for those in bondage and in debt; in the cause of Allah; and for the wayfarer (thus is it) ordained by Allah. And Allah is full of knowledge and wisdom") (Quoting the meaning of the *Qur'an* 9:60).
[191] Bernard K. Freamon confirms that freedom, brotherhood, toleration and equality principles are vital from Islam perspective to achieve its target that is justice. Freamon, *supra* note 20, at 36.
[192] Kuwait [Constitution] 1962, ar. 29, Kuwait Info, *Constitution*, http://www.kuwait-info.com/a_state_system/state_system_articles1.asp (*last visited on* Oct. 8, 2010).
[193] *See id*. at. Art. 30.
[194] Bahrain [Constitution], *supra* note 62, art. 18.
[195] Constitution of The Arab Republic of Egypt, *supra* note 55, at. Art. 40. *See also* http://www.egypt.gov.eg/english/laws/Constitution (*last visited on* Oct. 4, 2010).
[196] Algeria [Constitution], supra note 121.
[197] Beekun & Badawi, *supra* note 111, at 138.

Prophet *Muhammad* (PB) is reported to have said: "Do not ask them to do any job that is beyond their abilities and if you have to, then you must help them fulfilling such a work."[198] The *Qur'an* laid down a general rule that no one shall be tempted beyond what they can bear: "On no soul doth Allah place a burden greater than it can bear."[199] In essence, working hours are strictly required to be reasonable.[200]

Considering the *Qur'an* and the *Sunna*, the Universal Islamic Declaration of Human Rights ("UIDHR"),[201] which provides for the *Qur'an* and *Sunna* as the main sources of its text, provides, in its preamble, that slavery and forced labor are abhorred.[202] Also, the Cairo Declaration of Human Rights in Islam ("CDHR") [203] explicitly prohibited slavery by ensuring that human beings are born free and cannot be enslaved, humiliated, oppressed or exploited.[204] In the same context, considering the *Shari'a* as the main source of its national legislation,[205] the Egyptian Constitution provides: "No work shall be imposed on citizens, except by virtue of the law, for the performance of public service and in return for a fair remuneration."[206] The Kuwaiti Constitution provides for the same meaning.[207]

In essence, the Bahraini constitution explicitly provides that "Compulsory work cannot be imposed on any person except in the cases specified by law for national exigency and for a fair consideration, or pursuant to a judicial ruling."[208] Similarly, the Omani constitution provides that "Every citizen has the right to engage in the work of his choice. It is not permitted to impose any compulsory work on anyone except in accordance with the Law and for the performance of public service, and for a fair wage."[209] In the same context, the Yemeni Constitution provides that "No citizen can be compelled to do any work except within the law, and in which case it is to serve the common interest and be in return for a fair wage."[210]

Most of Muslim countries paid attention to work conditions in their labor laws. The Egyptian Labor Law, for example, requires employers to provide vocational safety, healthy

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198 1 SAHIH AL-BUKHARI, *supra* note 116, at 29-30.

199 THE QURAN, *supra* note 20, at 132 (Quoting the meaning of the *Qur'an* 2:286).

200 Zulfiqar*, supra* note 28, at 436.

201 *See* The Universal Islamic Declaration of Human Rights, Sept. 19, 1981. Islam and Human Rights. *Universal Islamic Declaration of Human Rights*, http://www.ntpi.org/html/uidhr.html (*last visited on* Oct. 8, 2010) [hereinafter *UIDHR*].More details are discussed in Part IV, Collective Measures Taken by Muslim Governments to Enhance *Shair'a* Rules on Labor Issues, of this Article.

202 *See* The UIDHR, *supra* note 205.

203 Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, U.N. GAOR, 4th Sess., (1993). *See also* http://www.arabhumanrights.org/publications/regional/islamic/cairo-declaration-islam-93e.pdf (*last visited on* Oct. 4, 2010) [hereinafter *CDHR*]. More details are discussed in Part IV, Collective Measures Taken by Muslim Governments to Enhance *Shair'a* Rules on Labor Issues, of this Article.

204 The CDHR, *supra* note 207, at. Art. 11:2.

205 *See id*.

206 Constitution of The Arab Republic of Egypt, *supra* note 55, at. Art. 13, http://www.egypt.gov.eg/english/laws/Constitution (*last visited on* Oct. 4, 2010).

207 Kuwait [Constitution], *supra* note 172, art. 47.

208 The Kingdom of Bahrain [Constitution], *supra* note 122.

209 Oman [Constitution] Royal Decree no. 101/96, Nov. 6, 1996, Art. 12, Ministry of Information Sultanate of Oman, http://www.omanet.om/english/government/basiclaw/overview.asp?cat=gov&subcat=blaw (*last visited on* June 3, 2011).

210 Yemen [Constitution], 1994, Art. 29, the Constitution of the Republic of Yemen 1994, http://www.al-bab.com/yemen/gov/con94.htm (*last visited on* June 3, 2011).

and secure work environment according to the nature of each work.[211] Another example is the Sudanese Labor Law that provides a special chapter titled Industrial safety which asks for specific conditions to be met in work environment and certain procedures and licenses to be attained by employers working in specific industrial fields as a means of protecting employees from any dangerous work conditions.[212] The Syrian Labor Law also requires employers to provide the proper working conditions.[213] The law pays specific attention to mining workers driving strict rules on work conditions to be considered.[214] It also asks employers to provide medical services for employees when required.[215]

6. EMPLOYEES' FREEDOM OF BELIEF

Applying the main principles governing business ethics in Islam and the brotherhood principle governing the relationship between employers and employees, employers are obliged to respect employees' religious beliefs.[216] Employers shall allow their employees to perform mandatory daily prayers, to take reasonable sickness leaves when required and should not be abused whether sexually or otherwise.[217] The rules governing employees' freedom of belief shall be applied on equal basis to both Muslim and non-Muslim employees.[218] Thus, the *Qur'an* provides: "To you be your way and to me mine."[219] Beekun and Badawi give an example of the Islamic history when the Jews lived under their own laws rather than the Islamic rules during the Prophet *Muhammad* (PB) era.[220]

Besides providing for freedom of belief as one of the constitutional rights in most Muslim countries constitutions, many countries ensure freedom of belief in their local labor laws. For example, the Sudanese Labor Law recognizes a special type of religious paid leave for maximum 15 days.[221] Another example is the Syrian Labor Law that provides thirty days paid religious leave for Muslims and seven days for Christians.[222]

7. WAGES

The *Shari'a* rules on prompt payment of wages and fair wages are very precise. Prophet *Muhammad* (PB) is reported to have said that: "An employee shall be given his wages before his sweat dries."[223] The implication of this saying is the restriction on delaying paying an employee's wages. The *Shari'a* took the position that declining employee's fair wages would make an employer an enemy to *Allah* as Prophet *Muhammad* (PB) is reported to

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211 Law No. 12 of 2003, *supra* note 132, Art. 208.
212 Law of 1997, *supra* note 144, Art. 75-98..
213 Labor No. 17 of 2010, *supra* note 125, Art.93.
214 Labor No. 17 of 2010, *supra* note 125, Art.141-154..
215 Labor No. 17 of 2010, *supra* note 125, Art.94.
216 Beekun & Badawi, *supra* note 111, at 138.
217 *Id*.
218 *Id*.
219 THE QURAN, *supra* note 20, at 2022 (Quoting the meaning of the *Qur'an* 109:6).
220 Beekun & Badawi, *supra* note 111, at 138.
221 Law of 1997, *supra* note 144, Art. 49.
222 Labor No. 17 of 2010, *supra* note 125, Art.173.
223 Narrated by *Ibn-Maja*, 186/17, 470.R, *available at* http://islamport.com/d/1/mtn/1/39/1136.html?zoom_highlightsub=%22%CB%E1%C7%CB%C9+%E1%C7+%ED%DF%E1%E3%E5%E3+%C7%E1%E1%E5+%ED%E6%E3+%C7%E1%DE%ED%C7%E3%C9%22.

have said: "Allah said I will be an opponent to three types of people on the Day of Resurrection:… One who employs a labourer and takes full work from him but does not pay him for his labour."[224] As far as the fair wages amount average is concerned, wages must be fixed in a reasonable way with respect to both employers and employees.[225] Thus, Islamic juristic discourses suggest that it should be "at least at a level that would enable employees to fulfill all their and their families' essential needs in a humane manner."[226] In early Islamic history, one of the governmental jobs was to appoint a *Muhtasib,* ethic officer, whose job was to settle wages disputes and to ensure that the minimum acceptable wages are the average wages for similar works performed by others.[227]

Local labor laws of Muslim countries pay high attention to wages issues. The Egyptian, Sudanese, Syrian, and Qatari Labor Laws provide that wages are determined according to employment contract and if not the wage shall not be less than wage of employee in equivalent position.[228] In all cases, it establishes a national council for wages under the supervision of the Minister of Planning to set the minimum wages at the national level subject to the cost of living.[229] Similarly, the Jordanian Constitution confirms that every employee has the right to receive that proportionate with the quantity and quality of his work and special compensations are supposed to be given to employees with dependants, suffering specific kinds of diseases, old aged employees, employees having emergencies arising out of their the nature of their work.[230] In Yemen, wages are determined according to the nature and importance of the job, efforts made by employees, employees' qualifications, and the like.[231]

8. PROFIT SHARING

Although *Murabaha*[232] is a pure Islamic financial system, Zulfiqar argues that *Murabaha* as one of the financial Islamic methods is based on the idea of profit sharing. Hence, applying *Murabaha* in Islamic labor filed requires each employer to create a "profit sharing scheme" to its employees.[233] According to *Murabaha*, employers invest capital and employees contribute efforts with setting aside specific portion of annual portion of end profits to be distributed among employees as a bonus.[234] This *Murabaha* portion may be

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224 3 SAHIH AL-BUKHARI, *supra* note 116, at 258.
225 Zulfiqar, *supra* note 28, at 436.
226 *Id*.
227 Beekun & Badawi, *supra* note 111, at 137.
228 Law No. 12 of 2003, *supra* note 132, Art. 3.See also Law No. 14 of 2004, supra note 153,Art. 65-72. See also Law of 1997, supra note 144, Art 35-41. See also Labor No. 17 of 2010, supra note 125, Art..69-90.
229 Law No. 12 of 2003, *supra* note 132, Art. 34.
230 Jordan [Constitution], *supra* note 123.
231 Law No. 25 of 1997, amending Law No. 5 of 1995, and amended by Law No. 25 of 2003 (Labor Law), http://www.yemen-nic.net/contents/laws_ye/detail.php?ID=11525 (*last visited on* June 3, 2011).
232 From a financial perspective, *Murabaha* is one of the methods developed by Muslim financial institutions to comply with the *Shari'a* rules on business and finance. *Murabaha* is a sale contract by which the financial institution works as an intermediate and buy the required goods on behalf of its customers and then sell these goods to this customer in return for the original price and a plus profit on installments bases and the customer does not pay any extra interest or charges and does not bear the cost for any mistake from the institution. Taylor, *supra* note 20, at 399.
233 Zulfiqar*, supra* note 28, at 437.
234 *Id*.

given to employees in addition to their wages or may be used to improve their working conditions, health insurance, social programs, and educational allowances.[235]

The Egyptian Companies Law is a good example to profit sharing by employees. That is particularly relevant knowing that it requires business associations to share at least 10 % of the profits achieved by the association, to be distributed by the General Assembly.[236]

VI. COLLECTIVE MEASURES TAKEN BY MUSLIM GOVERNMENTS TO ENHANCE *SHAIR'A* RULES ON LABOR ISSUES

The most important collective measures taken by Muslim countries concerning human rights in general and labor rights in particular are: (1) The Universal Islamic Declaration of Human Rights ("UIDHR") of September 19th, 1981,[237] (2) The Cairo Declaration of Human Rights in Islam ("CDHR") of August 5, 1999,[238] and (3) The 2004 Arab Charter on Human Rights ("Charter").[239]

Fifty Muslim states worked on the UIDHR under the supervision of the Islamic Council in London and declared it at the UNESCO Headquarters on 19 September 1981.[240] The UIDHR is based on the *Qur'an*, the *Sunna,* and any laws deduced from them.[241] Generally speaking, the UIDHR provides for different human rights such as the right to life, the right to freedom, the right to equality, prohibition against impermissible discrimination, the right to justice, the right to fair trial, the right to be protected against abuse of power, the right to be protected against torture, the right to protect honor and reputation, the right to asylum, the rights of minorities, the right and obligation to participate in the conduct and management of public affairs, the right to freedom of belief, the right to freedom of speech, the right to freedom of religion, the right to benefit of nature, the right to own property, the right to be prescribed a share in the wealth of the rich as fixed by the Islamic system of *Zakah,* the right to social security, and the right to constitute a family.[242] Concerning women, the UIDHR provides for the rights of married women of having a house, getting an accepted and reasonable standard of living, divorcing themselves if needed according to the Islamic system of *Khul'a,*[243] the right to inherit from husbands, parents, children and relatives, and the right to enjoy strict confidentiality from ex-spouses if divorced.[244] The UIDHR also provides for the right to education as well.[245] It also provides for the right of privacy and the freedom of movement and residence.[246]

Concerning labor issues, the UIDHR provides that Islam honored work and that worker shall be treated "justly and generously."[247] Hence, the UIDHR, in its Preamble, abhor

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235 *Id*.
236 Law No. 159 of 1981 (Companies' Law), *Al-Jarida Al-Rasmiyya,* 1 Oct. 1981, Vol. 40, Art. 41.
237 *See* the UIDHR, *supra* note 205.
238 *See* the CDHR, *supra* note 207.
239 the Charter, *supra* note 169.
240 *Salma K. Jayyusi, Human Rights in Arab Thought: A Reader 259 (Salma K. Jayyusi ed., 2009).*
241 *See* the UIDHR, *supra* note 205.
242 *See* the UIDHR, *supra* note 205, at. Art. 1-20.
243 *Kul'a* is an Arabic word which literally means separation and it refers to the Islamic right conferring upon wives the power to dissolve a marriage. *Glossary of Islamic Legal Terms*, *supra* note 3, at 96.
244 *See* the UIDHR, *supra* note 205.
245 *Id.*, at. Art. 21.
246 *Id.*, at. Art.22-23.
247 *See* the UIDHR, *supra* note 205, at. Art. 17

slavery and forced labor.[248] It also provides for the right to free associations whether religious, social, cultural or political to every person.[249] In the same regard the UIDHR requires the prompt payment of employees' wages and the right of having adequate rest and leisure time.[250] Similarly the UIDHR forbids children work at an early age.[251] At last, the UIDHR confirms that every person's right to a free choice of profession and career and of the right to fully develop his natural endowments.[252]

With regard to the CDHR, it confirms that all rights and freedoms stipulated are subject to the *Shari'a* which is the only source of reference for the explanation and clarification of any of its articles.[253] The CDHR discusses different human rights aspects such as the prohibition of discrimination on basis of race, color, language, belief, sex, religion, political affiliation, social status, the right to life, the prohibition of genocide, the right to a safe body from harm, the right to a healthy environment, the right to have a good name, the right of marriage, equality between men and women, children rights, parents' rights, the right to knowledge and education, the freedom of religion, the right to self determination, the right to own property, the right to privacy, the right to equality before the law, the right to fair criminal procedures and fair trial, the freedom of expression, and the right to participate in public life.[254]

However, the CDHR was accused of being a repetitive combination of international and Islamic elements that was affected to a certain extent with the International Bill of Human Rights.[255] Furthermore, the CDHR was accused of being ambiguous on the issue of equality between men and women; particularly it spoke only in terms of basic human dignity rather than assurance equality in rights and freedoms or presenting guarantees of protection to women and non-Muslims.[256]

Regarding labor rights, the CDHR provides for different aspects of labor such as the right to work itself, the right to freely choose work, the right to enjoy safety and security and social guarantees, the right not to be assigned with work that goes beyond the employee's capacity, the right not to be subject to exploitation or harm, and the right to have fair wages without discrimination between men and women.[257] However, the articles concerning labor in the CDHR were criticized that they did not provide adequate guarantee against discrimination against women being denied certain jobs that takes place in some Muslim countries sometimes.[258]

Concerning the Charter, it was adopted for the first time by the Arab League in 1994 and then replaced by the new version of 2004.[259] The Charter is composed of a Preamble and 52 Articles which are claimed to be in consistency with the international standards of human rights initiatives and the current jurisprudence on human rights.[260] For example, it is argued that the Charter adopted similar rights to those of the Human Rights Committees General

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[248] *Id*.
[249] *Id.*, at. Art. 14.
[250] *Id.*, at. Art. 17.
[251] *Id.*, at. Art. 19:d.
[252] *Id.*, at. Art. 21:b.
[253] *Id.*, at. Art. 24.
[254] *See* the CDHR, *supra* note 207.
[255] Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct*? 15 Mich. L. Int'l L. 307, 329 (1994).
[256] *Id.* at 330.
[257] *See* the CDHR, *supra* note 207, at. Art. 13-14.
[258] Mayer, *supra* note 220, at 333.
[259] Mervat Rishmawi, *The Revised Arab Charter on Human Rights: A Step Forward*, 5 Hum. Rts. L. Rev. 361, 361 (2005).
[260] *Id.*

Comment on Article 4 of the International Covenant on Civil and Political Rights 1966 on states of emergency.[261] The Charter provides in its preamble for the *Shari'a* and other "divine religions."[262]

Unlike the CDHR and the UIDHR, the Charter provides for an enforcement mechanism for the rights and obligations provided by its articles. The Charter creates a Committee of seven members to examine periodic reports submitted by the member states and then issues recommendations on the actions to be taken to improve the compliance of the states parties.[263] Also, the Charter provisions are very comprehensive as they discuss a variety of human rights in details such as the right to self determination, the protection from racism and foreign domination, the right to equality and prohibition of discrimination based on race, color, sex, language, religion, opinion, thought or the like, equality between men and women, and the right to be protected by the law.[264] The Charter also organizes the application of death penalty and puts many restrictions on it as the prohibition of applying it to persons under eighteen years of age and pregnant women.[265] Moreover, the Charter prohibits physical and mental torture, scientific experimentation or use of organs without free consent.[266] Furthermore, the Charter lays down the guarantees of litigation, trial arrest and judgments, provides for the right to political and public participation, guarantees the right of privacy, and protects minorities' rights. [267] Besides, the Charter provides for the freedom of movement, political asylum, the right to nationality, the right to freedom of thoughts, the right to education, the right to own property, the freedom of expression, the right of marriage and having family, and the right to pursue sporting activities.[268] In addition, the Charter confirms the right to development, the right to an adequate standard of living, the right to health care and health insurance, the obligation to fight illiteracy, the right to participate in cultural life, the freedom of scientific research, and the protection of vulnerable groups such as children, minorities and the disabled.[269]

Regarding labor aspects dealt with by the Charter, the Charter explicitly prohibits slavery and forced labor.[270] It also confirms the importance of the right to work, it ensures "the equality of opportunity without discrimination of any kind", it provides for the importance of providing suitable conditions of work, it prohibits children exploitation and it requires states parties to provide for a minimum age of employment and hours of work for children, it confirms equality between men and women employees and it ensures the protection to "workers migrating to states parties' territories", it provides for the right to form trade unions, the right to striking, and the right to social security and social insurance. [271]

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[261] Id.
[262] *See* the Charter, *supra* note 169.
[263] *Id.*, at. Art. 45-49.
[264] *Id.*, at. Art. 2-4.
[265] *Id.*, at. Art. 6-7.
[266] *Id.*, at. Art. 8-9.
[267] *Id.*, at. Art. 13-125.
[268] *Id.*, at. Art. 26-33.
[269] *Id.*, at. Art. 37-45.
[270] *Id.*, at. Art. 10:2.
[271] *Id.*, at. Art.34.

VII. CONCLUSION

The deep understanding of Islamic law rules governing corporate social responsibility is a must to MNCs conducting business in Muslim countries. Given that labor practices are most relevant to companies in managing their business in different countries, the understanding of the framework of business ethics in general and labor rules, in particular, can be useful to MNCs making their investment decisions in Muslim countries.

Though the degree of adopting the *Shari'a* rules as a source of internal laws and regulations in each Muslim country is not the same, most Muslim countries provide for the *Shari'a* as guidance on their laws and regulations with few exceptions. Thus, this article gives a primary understanding of the common Islamic rules governing business ethics and labor without focusing on any internal legal system to a specific Muslim country.

The *Shari'a* focuses primarily on the duties that each believer has, rather than on the rights of individuals. From corporate social responsibility, all believers are charged with fulfilling their duties imposed by the *Shari'a* on everyday life, including business transactions, in light of the general principles influencing Muslim life with the end goal of promoting the social welfare of the whole society. Applying this to labor issues, all Muslims must carry out their duties that are related to work, both from the side of employers to treat employees fairly and as family, and from the side of employees to engage in honest and hard work to their capacity.

KEYWORDS
Corporate Social Responsibility, Business Ethics, Labor, Employment, Islamic Law, Shari'a, Human rights, Comparative law, Commercial Law, Religion, Middle East, Arab

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