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THE 30 YEAR JUDICIAL WAR OVER ABORTION RIGHTS IN THE U.S.A: POSSIBLE LESSONS FOR KOREA AS IT RECONSIDERS THE ISSUE

Bruce Patsner[*]

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ABSTRACT

Korea and the United States both permit a pregnant woman to obtain an abortion but do so in very different ways. Elective abortion in Korea is generally a crime except for a carefully enumerated list of specific medical indications for which termination of pregnancy may be legally performed. Another way of saying this is that an abortion is legal in Korea when it is primarily therapeutic, but the issue of abortion is not a particularly volatile political one despite the fact that more than 90% of abortions are done illegally, i.e. for reasons other than the statutory medically permissible ones. Elective abortion in the United States, by contrast, is a fundamental Constitutional right which may be performed for any reason, whether "medically indicated" or not, with some state interference early in pregnancy and limited ability to restrict the procedure until the third trimester. More than 90% of abortions in the United States are elective, i.e. done for non-medical indications,

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just as in Korea, the main difference being that these elective abortions are legal in the United States and a crime in Korea. Despite theConstitutionally-protected, non-criminal nature of the procedure in the United States, elective abortion remains an intensely controversial political issue which has interfered with the appointment of judges to the Supreme Court and called its Constitutional jurisprudence, and adherence to stare decisis, repetitivelyinto question. Should the Constitutional Court in Korea have the option to formally engage the Constitutionality of Korea's anti-abortion criminal statutes, the difficulties the United States Supreme Court has encountered over the past 30 years might offer judges in Korea valuable insight into how, if at all, they might elect to frame a woman's access to abortion services as a Constitutional right and how such a right might be limited by the State.

INTRODUCTION

The legal definition of abortion[1] is precise and accurate: "the knowing destruction of the life of an unborn child or the intentional expulsion or removal of an unborn child from the womb other than for the principal purpose of producing a live birth or removing a dead fetus." Whether performed surgically or induced medically, termination of pregnancy before term is an established part of gynecologic practice in virtually every country on every continent regardless of its legality. Abortion may be purely "elective" in the sense that the reason for termination of the pregnancy is not a particular medical indication *requiring* abortion per se but rather simply the result of the desire of the birth mother to end the pregnancy even though there is nothing "wrong" with the pregnancy. Therapeutic abortion, on the other hand, is termination of pregnancy for a particular medical/obstetrical indication (e.g. a lethal fetal anomaly, or a situation in which continuing the pregnancy poses a grave threat to the life of the birthmother). Perhaps the most basic difference in the law's approach to legal abortion between Korea and the United States is that abortion is legal (and not a criminal act) in Korea only when it is therapeutic, whereas abortion in the United States is elective and not tethered to one or more particular medical indications.The approach to legal abortion in Korea also differs from that of the United States in one other crucial way: access to abortion services in Korea is not a Constitutional right (nor has it been up until now even a Constitutional issue) but rather is a statutory, legal right which permits abortion to be performed up mid-second trimester of pregnancy only for a specified list of enumerated medical/obstetrical conditions[2] drawn up by the legislature with some input from the medical profession.

For countries such as Korea which permit only therapeutic abortion problems may arise over whether list of enumerated medical conditions which permit abortion is too narrow

[1]Black's Law Dictionary7 (9th ed. 2009).

[2]Health of Mother and Child Act.Article 14 (Limited Permission of Abortion).Amended by Act No. 8852,(2009). According to Article 14 of this law, put into effect July 8, 2009, abortion is allowed in South Korea within 24 weeks of pregnancy in the following circumstances: 1. A doctor may conduct an abortion with the consent of pregnant woman and her spouse (including partner in a *de facto* martial relation) only if: 1. Where she or her spouse suffers from any eugenic or genetic mental handicap or physical disease as prescribed by Presidential Decree; 2. Where she or her spouse suffer from any infectious disease as prescribed by Presidential Decree; 3. Where she is impregnated by rape or quasi-rape; 4. Where she is impregnated by relatives who are legally unable to marry under family law;5. Where the maintenance of pregnancy insures or may injure the health of a pregnant woman with medical reasons.

or too broad, i.e. does not take into account all of the potential ways in which an unwanted pregnancy, even if not characterized by a life-threatening condition or lethal fetal anomaly, may adversely impact on a woman's physical or psychological well-being. In between purely elective termination of a viable pregnancy and the necessary termination of a viable pregnancy for a distinct, serious medical or obstetrical indication is a potential grey area where there may be disagreement over whether the reason for ending the pregnancy meets the statutory requirements of the law, i.e. whether the abortion is "legal" or not.

On the other hand if one is talking about elective abortion the spectrum of possible legal approaches employed is vast: ranging from countries such as Ireland which has a very strict anti-abortion law[3] or El Salvador where abortion performed for any reason is illegal[4], to the United States where its Supreme Court's *Roe v Wade* decision created a new, fundamental Constitutional right to abortion which allowed abortion on demand during the first trimester pregnancy.[5]

I. THE PROBLEM OF ILLEGAL ABORTION IN KOREA

The number of abortions in the performed each year in the United States has been relatively unchanged for decades at approximately 1.5 million per year.[6] More than half of these are obtained by women younger than 25, more than 75% of these women are unmarried, and the vast majority of these abortions are elective[7] in the sense that they are primarily done for failed birth control. In Korea the number of abortions performed annually has also exceeded 1 million for several years,[8] a figure which greatly exceeds the expected number of abortions if termination of pregnancy were performed only for the legally permissible reasons. This fact alone strongly suggests that the current approach to legal abortion in Korea

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[3] Sarah Lyall, *EuropeanCourt Ruling Could Force Changes in Ireland's Laws Against Abortion*, N.Y. Times, December 17, 2010, at A6. Irish law holds that abortion is illegal in every circumstance except where there is a 'real and substantial risk' to the mother's life."

[4]Jack Hitt, Pro-Life Nation. What happens when you completely criminalize abortion? The Sunday N.Y. Times, April 9, 2006, at 40. This article points out that in El Salvador,abortion is illegal even in cases of incest, rape, or certain maternal death due to the pregnancy. Both the birth mother and the physician performing the abortion are subject to severe criminal liability.

[5]*Roe v. Wade* 410 U.S.113 (1973). [*HereinafterRoe*].The *Roe* decision actually created a fundamental right for women to access abortion services. Under Justice Blackmun's trimester approach, the state had essentially no interest in the life of the fetus during the first trimester of pregnancy and its role was limited to ensuring the abortion was provided by licensed physicians in an appropriate facility. No United States Supreme Court decision has ever attempted to delineate a list of permissible medical or obstetrical reasons for abortion.

[6]Henshaw SK, Van Vort J, *Abortion Services in the United States, 1987 and 1988,* Family Planning Perspectives 22: 201 (1990); NARAL Pro-Choice America, Who Decides? The Status of Women's Reproductive Rights in the United States. Texas, *available at*http://www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides/state-profiles/texas.html (*last accessed*on November 28, 2010).

[7]Clinical Gynecologic Endocrinology and Infertility.LeonSperoff, Robert H. Glass, and Nathan Kase, at 706(5th ed. 2006).

[8] Sean Hayes, *Abortion in Korea*, Korea Times, November 30, 2007, at A1. "Even though the Korean legal system may punish those that procure and perform an abortion, prosecutors rarely prosecute...because of the exceptions, the fact that doctors can fill their case into the exceptions, and the fact that the attitude of Koreans towards abortion has drastically changed since the imposition of the law…Statistics reported by the United Nations states that in 1996, 20 abortions per 1000 births occurred in Korea. However, the United Nations contends that the statistics on the actual number of abortions performed may be underestimated, since reporting is not mandatory, and most abortions are performed in private clinics."

is not working: currently it is estimated that more than 90% of abortions performed in Korea must be purely elective (i.e. the pregnancy simply isn't wanted).[9] In addition, enforcement of the laws against either women obtaining abortion or physicians performing them must be characterized as erratic at best since prosecutions of either patients or physicians is a rare event. These facts have been pointed out in the Korean press for several years,[10] and there are conflicting pressures from government officials upset at the number of illegal abortions as well as from women's groups which feel that the currently permitted indications for abortion are not expansive enough, i.e. do not take into account all of the adverse effects of having to carry an unwanted pregnancy to term.[11]

The issue Korea now faces is whether to change its current abortion law, or its approach to the legality of abortion. Several possible approaches exist: (1) acknowledging that access to abortion is a Constitutional right as it is in the United States; or (2) avoiding the Constitutional issue and focusing on either contracting or expanding the list of permissible medical indications for therapeutic abortion with the significant input from the medical profession; (3) changing the list of acceptable "medical" indications to include elective abortion for failure of contraception; or (4) leaving the list of permissible indications be left alone and more vigorously enforcing existing law.

Regardless of the approach Korea elects to take, no medical debate, legislative act, or judicial decision can or ever will be able to definitively answer the normative question surrounding abortion, i.e. whether the act itself is "right" or "wrong." The question of whether elective legal abortion is intrinsicallymorally right or wrong will not be settled by shifting legal standards or advances in medical technology. The core legal issue will always be whether elective termination of a live pregnancy is going to be permitted at all – either directly by civil legislation, Constitutional amendment, or by judicial decree - and if so what limitations, if any, will/should be placed on that legal right.

II. TWO DIFFERENT APPROACHES: CONSTITUTIONAL VERSUS LEGISLATIVE

As Korea once again begins to consider whether to simply dramatically increase enforcement actions against physicians who perform illegal abortions and/or patients who undergo them,[12] or to expand the permitted medical indicationsto include elective abortion, it might prove useful to review the trajectory of abortion jurisprudence in the United States over the past thirty years of continuous controversy at both the federal judicial and state levels. An analysis of Constitutional case law and legislative trends might provide a valuable perspective on the factors which might enter into crafting any new iteration of abortion-

[9] Personalcommunication Jay Kwon, M.D., Ph.D., Department of Obstetrics and Gynecology, Severance Hospital, Yonsei University Medical School, October 2011.

[10] Lee Jiyeon, *Illegal Abortion, South Korea's open secret,* Reuters, April 4, 2008, *available at*http://www.reuters.com/assets/print?aid=USSEO35121820080404 (*last accessed*on September 9, 2011).

[11] *Id.*

[12] Robert Neff, *Sweeping floors to kill babies – Is Korean's anti-abortion law working*? March 19, 2010, *available at*http://www.rjkoehler.com/2010/03/19/sweeping-floors-to-kill-babies (*last accessed*on September 21, 2011).

related women's rights in Korea, and highlight the problems encountered by the Constitutional law approach taken by the United States starting it 1973.

It may be the case that creating a Constitutional right to abortion services in the United States was inevitable given the sharp regional differences in social norms in the United States, its vast size, and the fact that medical practice is primarily regulated by the individual states and not the federal government. All of these factors created an inherent lack of equal access to abortion-related medical care for all women and clearly discriminated against women in general and indigent women in particular. By creating a right which guaranteed uniform access for all women in the United States, the Supreme Court eliminated an insane system where each of the 50 states had a completely different set of laws for and rights of access to abortion, whether elective or therapeutic. However, in doing so the Supreme Court also created decades of continuous legal controversy and Constitutional crises which Korea's legislative, enumerated approach to legal abortion has managed to avoid.

In particular, Korea's purely legislative/statutory approach to defining the legal right to abortion has avoided at least three significant problems the United States Supreme Court has encountered over the past three decades and which have hurt its reputation as an unbiased pillar of judicial opinion. First, the United States Supreme Court has repetitively violating the canonical legal principle of stare decisis with each subsequent decision since *Roe v Wade*. Second, by micro-managing the medical profession and day-to-day practices of physicians by upholding the Constitutionality of a federal ban on a particular abortion technique on grounds both legally questionable and medically arbitrary;[13] the Court has substituted its medical judgment for that of the medical profession itself and has strayed far from "the law." The Court has looked increasingly foolish and political in doing so. Korea, by contrast, has objectively relied on input from the medical profession to provide the language, and list, of medical reasons why abortion should be legal for therapeutic reasons. Based on this experience further expansion or contraction of this list with additional the input from the medical profession will more likely preserve the independence of medical practice.[14]

Lastly (3) the United States Supreme Court has allowed erosion of basic rights to access of abortion services by providing room for individual states to chip away at women's reproductive freedom by enacting laws which survive the Court's subjective "undue burden test" first outlined in *Casey v Planned Parenthood of Southeastern Pennsylvania*.[15] Among the requirements which have burdened the ability of women to access abortion-related

[13]*Gonzales v Carhart*, 550 U.S. 321 (2007). [*hereinafterGonzales*]. Justice Kennedy's majority opinion opines on the possible damage to the medical profession's reputation by the existence of the partial birth abortion (D&X, intact D&E) procedure because of the manner it which it "mimics" a breech delivery. Yet, Justice Kennedy has no problem preserving the existence of the primary alternative surgical procedure for termination of second trimester (D&E) which requires that the fetus be ripped apart and removed in pieces, the skull evacuated and crushed for safe removal, and all of the pieces from the aborts examined at the conclusion of the procedure to make sure none are "missing" and the procedure truly complete.

[14]One could also argue that the United States Supreme Court made a fundamental mistake in finding a fundamental right in access to abortion services for any reason, even the most trivial one, as opposed to simply finding that a right to abortion existed for any medical reason which a woman and her physician agreed to. This would at least have allowed therapeutic abortion for reasons related to psychological or psychiatric issues which might arise from forcing a woman to proceed with an unwanted pregnancy, or finding that a pregnancy resulting from a failure of contraception was also a "medical" indication.

[15]*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) [*hereinafterCasey*].

services are mandatory ultrasounds[16], compelled (but medically incorrect) physician free-speech;[17] restrictions on government payment for abortion services for poor women, and banning select procedures which may in fact be the safest method to preserve the life of the birthmother mid- second trimester. All of this has slowly pushed the United States back to the situation where once again there are significant regional differences in access to abortion services and significant compromise of women's reproductive rights.[18] Again, this situation is also something which Korea has managed to avoid. The absence of separate individual state laws modifying a basic federal Constitutional right means that in Korea the problem of erosion of a woman's right to access abortion services is not at the mercy of regional differences.

One reason Korea has perhaps taken the approach it has is because of profound social differences between it and the United States. Another reason may be a sociological one: perhaps the most important social difference between the two countries is the way the practice of medicine is regulated. In Korea there are national –not regional – laws governing the legal practice of medicine in general and abortion in particular. Contra this, in the United States unless the Supreme Court specifically weighs in on a particular issue which directly affects the practice of medicine (such as the recent decision in *Gonzales v Carhart* which banned "partial birth abortion"[19] or the *United States v Rutherford* decision which banned the use of the drug Laetrile[20]), what physicians can legally do is up to the individual states. Prior to the "federalization" of the abortion issue in the United States by the first United States Supreme Court decision on abortion rights in 1973,[21] each of the individual 50 states had its own specific laws on abortion legality and limitations; before *Roe v Wade* it was not uncommon for pregnant women in isolated rural areas in the central United States to have to travel hundreds of miles to a large city in another part of the country to obtain a legal abortion since the practice under many or any circumstances might simply be illegal in the state they were residing in.

III. ONE IMPORTANT SIMILARITY

These important differences aside, there is at least one important similarity between Korea and the United States in the structure of each country's Constitution: the word "abortion" does not appear in the language of either document, nor does either document specifically mention women's reproductive rights. This is not a statutory interpretations problem per se even if one is a "strict Constructionist"[22], as both documents contain lofty

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[16]The Week in Review Editorial Opinion, *The New Abortion Wars. State Battles Over Roe v Wade*, The NewYork Times, January 30, 2011 at 9. See also The Week in Review Editorial Opinion, *Undoing the Damage Done*, The New York Times, January 25, 2009, at 9.

[17]ZitaLarrarini, *South Dakota's Abortion Script – Threatening the Physician-Patient Relationship*, 359 NEW ENGLAND JOURNAL OF MEDICINE (2008)

[18]The Week in Review Editorial Opinion, *The Landscape. Where Abortion Rights Are Disappearing,* The New York Times, September 25, 2011, at 14.

[19]*Gonzales, supra* note13.

[20]*United States v Rutherford*, 442 U.S. 544 (1979).

[21]*Roe, supra* note 5.

[22]Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law(1998). The problem with being a strict

legal language and are clearly "generative". What it does mean is that for both countries if a specific right to obtain an abortion is going to exist it is going to have to be created; i.e. it will have to derive either from existing rights or interests (e.g. personal liberty) enumerated in the document[23] or created de novo either by legislative act or a Constitutional court decision.

In the United States the Constitutional right to an abortion was an extension of the right of married couples to obtain contraceptives granted in the seminal *Griswold v Connecticut* case[24] which arose from their "right to privacy", a right not specifically mentioned in the Constitution but felt, by the majority of the Court, to exist as a non-enumerated fundamental right (or "zone") derived from multiple amendments to the Constitution of the United States, in particular the 14th amendment with its guarantees of a right to "life, liberty, and the pursuit of happiness" in its Due Process Clause.[25] Korea has avoided these problems of interpretation of the Constitution, original intent of the drafters of the document, strict reading of the language of the document, etc. by simply creating a right to abortion by legislation and defining the medical circumstances under which that right may be exercised legally.

However, in terms of women's rights and maternal health the language of the Korean Constitution[26] might be interpreted to be slightly more generative or "evolved" than the U.S. Constitution if for no other reason than a specific right to privacy is mentioned. Article 12 paragraph 1 dictates the "all citizens shall enjoy personal liberty"; Article 17 mentions that "the privacy of no citizen shall be infringed"; and Article 37 broadly states that the freedoms and rights of citizens shall not be neglected on the grounds that they are not enumerated in the Constitution.[27] All of these Articles clearly open the door for the possible creation, or acknowledgement, of the existence of other fundamental rights not specifically described.

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constructionist is similar to the problem of being opposed to abortion; only a purist who would proscribe abortion under any circumstances has a purely defensible position in the sense that once one allows one or two exceptions then everything else becomes relative and fair game. Similarly, while it is noble to talk about original intent of individuals who wrote hundreds of years ago or the "plain meaning" of the language, or original content, the U.S. Constitution has had to be amended on multiple occasions to correct overt discrimination against women and non-Caucasian races.

[23] The most famous relevant example of this is the right to personal privacy in the United States. This right is an accepted canon, and fundamental right, of the U.S. legal system, yet the language and concept do not appear anywhere in the Constitution. Justice William O. Douglas' famous opinion in *Griswold v Connecticut* was long on literary and creative language but short on penetrating, precise legal analysis, since the exact source of this "right", which derived from the liberty interests appearing in multiple amendments to the U.S. Constitution, was not clear. This confusion as to the source of this new fundamental right was reflected in the myriad of legal theories which appeared in the other Justices' opinions. The creation of the right to privacy became the "wedge under the tent" which eventually led the court to find liberty interests in rights of married and unmarried people to contraceptives, access to abortion services, and personal private viewing of pornography as well as participation in certain sexual activities which prior to the *Griswold*decision were routinely outlawed.

[24] *Griswold v Connecticut*, 381 U.S. 479 (1965).

[25] *Id.*

[26] Constitution of the Republic of Korea July 17, 1948. Last revised 1987..

[27] *Id.*

IV. THE HISTORY OF FEDERAL ABORTION JURISPRUDENCE IN THE UNITED STATES

The history of the right to abortion services in the United States may be divided into three consecutive periods of time, each characterized by either a unique United States Supreme Court decision and/or a particular approach by the individual states to either directly challenge the Constitutionality of a woman's fundamental right to abortion, or to seek to impose progressively greater restrictions either on the right itself or the barriers which a woman might face in terminating her pregnancy.

The first phase in the United States Constitutional battle over abortion began in 1973 when women's Constitutional right to access abortion services was created by the United States Supreme Court decision in *Roe v Wade*.[28] As noted, prior to that decision abortion was legal in some states but illegal in others; in Texas, where *Roe* took place, there was a Texas state statute on the books since 1857 which made it a crime to "procure an abortion" except where it was "procured or attempted by medical advice for the purpose of saving the life of the mother."[29] In *Roe v Wade* the United States Supreme Court announced that the United States Constitution protected a woman's right to decide to end a pregnancy; as a direct result of this decision woman now had a right to access abortion services in *every* state regardless of prior individual state law. This new "abortion right" was determined by the Court to be a new fundamental right derived from personal liberty interests, and as such could not be interfered with successfully by any government unless a state or federal government law directly impacting on this right could survive "strict scrutiny", i.e. the burden would be on the government to show that any restriction of this right served a compelling state interest and was sufficiently narrowly tailored.

Perhaps the most important aspect of the *Roe* decision was the creation of the "trimester" approach to define the limits of the newly created right to obtain an abortion. This approach sought to balance the woman's privacy interest in bodily autonomy with the state interest in protecting the life of the fetus. During the first trimester (weeks 1-12) abortion could be obtained on demand for any reason without restriction by the state. During the third trimester (beginning at week 24, coincidentally when the fetus is much more likely to be capable of independent life outside the mother's womb,[30] more likely to be capable of feeling pain from a neuro-developmental point of view,[31] and more likely to be capable of cognition or experiencing pain as a result of the appearance of the cerebral cortex),[32] the government's interest in preserving life was considered so great that abortion was essentially proscribed except possibly under the most extreme of circumstances. Extreme circumstances were generally assumed to be a situation in which abortion was necessary in order to save the life of the mother. During the second trimester (between 12 and 24 weeks), the fundamental right to abortion was preserved but at the same time a progressively greater state interest in the life of the fetus was acknowledged (but not defined). During the second trimester Justice

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[28] *Roe*, *supra*note 5.
[29] *Id.*
[30] *Id.*
[31] Katherine E. Engelman, *Fetal Pain Legislation: Protection Against Pain is Not an Undue Burden,* 10 Quinnipiac Law J. 279 (2007).
[32] *Id.*

Blackmun acknowledged that the woman's right to an abortion might need to be balanced in some manner against a greater state interest than that in the first trimester,[33] by the precise manner in which this "balancing" might take place was not spelled out by the Court.

This concept of progressively greater government interest in the life of the fetus with increasing gestation age which appeared in *Roe* ultimately set the stage for the second era in federal abortion jurisprudence – the end of the notion of immediate access to unrestricted abortion on demand during the first trimester of pregnancy. The abandonment of the concept of no state interference during the first trimester of pregnancy occurred almost twenty years after *Roe v Wade* in the United States Supreme Court's 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v Casey*.[34] Although Justice Sandra Day O'Connor's majority opinion repetitively stated[35] that it was upholding all of the core holdings of *Roe v Wade* and preserving a woman's fundamental right to access abortion services, by the end of the opinion the fundamental right of a woman to obtain a first trimester abortion without any government interference was gone.

The focus of the *Casey* litigation concerned a series of 5 statutes enacted by the Pennsylvania state legislature which directly impacted on a woman's ability to access abortion services during *any* trimester: (1) a 24 hour waiting period before an elective abortion could be performed (except in medical emergencies;[36] (2) a specific informed consent requirement;[37] (3) a requirement certifying that the woman's spouse had been notified about intent to abort the pregnancy;[38](4) a parental consent notification requirement for minors;[39] and lastly (5) new certification requirements for facilities performing abortions to ensure that certain "safety" standards were being met.[40] In reviewing these different, and wide-ranging, attempts to restrict immediate access to abortion services, the Supreme Court created the "undue burden" test[41] to weigh the previously unrestricted right to abortion against the specific government interference sought. In so doing the fundamental right to abortion was preserved yet now formally vulnerable to individual state legislative action.

Though the Court defined when a particular government restriction on access to abortion would exist[42] ("an undue burden exists, and therefore a provision of law is invalid**,** if itspurpose or effect is to place a*substantial obstacle*in the path of a woman seeking an abortionbefore the fetus attains viability.") this test would lay the groundwork for the third and most recent phase of fighting over abortion rights - state efforts to restrict, and ultimately eliminate, the ability of a woman to access some abortion services. The "undue burden" test also immediately became the standard which the United States Supreme Court would now have to use to judge any *federal* legislation regulating access to abortion services.

Long-range planning by litigators challenging the legality of abortion quickly realized that ultimately what constituted a substantial obstacle would be what five or more members

[33] *Roe, supra* note 5.
[34] *Casey, supra* note 15.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*

of the Supreme Court (the majority of whom were Catholic men) thought it was, since any significant effort by individual states or a more socially conservative Congress to challenge abortion rights would end up in front of the United States Supreme Court as a virtual certainty. Perhaps more than any other issue, abortion has single-handedly reminded the American people of the importance of the power of the President to nominate new justices to the Supreme Court. The *Casey* Court, for example, held that several of the new restrictions – the 24 hour waiting period, the informed consent requirement, the clinic safety requirements – were not undue burdens,[43] whereas the requirement for spousal notification raised the specter of possible domestic violence against women and as such did represent an undue burden over a pregnant woman's ability to control what happened to her body.[44] It is unclear if the present United States Supreme Court would reach the same conclusions on the five abortion access restrictions in *Casey* which the *Casey* Court did.

The *Casey* decision marked the beginning of the third phase, and the second consecutive nineteen year period (1973-1992; 1992 - 2011), of abortion jurisprudence and litigation in the United States. This third period extends to present day, has three prominent features and, like the previous two periods of time, has been dominated by a pivotal United States Supreme Court case.[45]

The current phase of the legal battle over abortion is unique in several aspects. First, we now see much more aggressive action on the part of the individual states to increase the administrative and/or safety burdens abortion services clinics have in order to make it more difficult to such facilities to either stay in business financially or to comply with increasingly complex and onerous state "safety" regulation. As such states are simply taking the permissible actions in *Casey* as far as possible, hoping they will withstand challenge under the "undue burden" test,in admitted efforts such as in the state of Kansas to eliminate the availability of abortion services in that state. Second there is a new "compelled free speech" approach under which individual states have increasingly mandated information which physicians must tell patients prior to any abortion, even if the information has little or no truthful basis in the established medical literature[46]. Third, for the first time we now see a successful effort by an increasingly conservative Congress to pass federal legislation making a certain abortion procedure illegal.[47] Lastly, there is an apparent clear rejection by the

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[43] *Id.*
[44] *Id.*
[45] *Gonzales, supra* note 13.
[46] Robert Post, I*nformed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 939 UNIV OF ILLINOIS LAW REV (2007).
[47] The 2003 Partial Birth Abortion Ban Act was passed by Congress three times, vetoed twice by President Bill Clinton but later signed into law by President George W. Bush, Jr. The federal law was carefully crafted to avoid some, but not all, of the problems a Nebraska state law had run into: (1) the failure to include an exception to performing the procedure when it was necessary to preserve the life of the birth mother; and (2) statutory language regarding abortion procedures so vague that the ban on the rarely performed "dilatation and evacuation procedure" could be construed to apply to any of the more commonly performed procedures done earlier in pregnancy. The Nebraksa law was ruled unconstitutional on both the "void for vagueness" and lack of maternal health exception grounds in the 2000 *Stenberg v Carhart* decision. The lack of a maternal health exception in particular was felt to represent an undue burden on a woman's Constitutional right to access abortion services under *Casey*. Congress was mindful of the problems the Nebraska statute had encountered with the Supreme Court and went out of its way to craft statutory language that clearly referred only to a rarely performed by gruesome procedure (though no more gruesome than the alternative abortion procedures which were still permitted). However, Congress did not include a specific maternal health exception in the new law.

United States Supreme Court of the sanctity of the need for a maternal health exception in any federal or state law regulating abortion.

The index United States Supreme Court case in this third decade of abortion wars is that of *Gonzales v Carhart,*[48] a case which coincidentally also represented the first time in more than 200 years that the United States Supreme Court agreed to "micromanage" the medical profession by specifically outlawed a particular type of abortion procedure.

V. THE FOUR UNIQUE ASPECTS OF THE THIRD DECADE OF THE ABORTION BATTLE IN THE UNITED STATES

As a result of recent landmark 2007 decision *Gonzales v. Carhart*,[49] a 5-4 majority of the Court held that the federal Partial-Birth Abortion Ban Act of 2003[50] ("the Act") was constitutional and did not impose an undue burden on the due process right of women to obtain an abortion that was established in *Roe v Wade*[51] and *Planned Parenthood v. Casey.*[52] The precise question before the court in *Gonzales v Carhart* was "Whether, notwithstandingCongress's determination that a health exception is unnecessary to preserve the health of the mother, the Partial-Birth Abortion Act is invalid because it lacks a health exception or is otherwise unconstitutional."[53] The immediate and direct result of *Carhart v. Gonzales* was that no physician anywhere in the United States could now perform a "partial-birth" abortion for any indication, even if itwas deemed the only safe procedure available to save the life of the mother and even if the fetus is not viable. Federal penalties for physicians included a monetary fine and the risk of imprisonment for up to two years. In some states performing this unlawful abortion also carries additional penalties.

With the *Gonzales v Carhart* decision the Court overturned a ruling by the United States Court of Appeals for the 8th Circuit[54] in favor of LeRoyCarhart, a physician who ran an abortion clinic in Nebraska. The 8th Circuit had ruled that the federal Partial-Birth Abortion Ban Act was unconstitutional because it lacked a provision allowing the procedure to be performed when necessary to save the life of the mother; the 8th Circuit Court felt this lack of such a provision was a violation of substantive due process. At the same time the Supreme Court also reversed the 9th Circuit Court's similar decision against the federal Act in its decision in *Gonzales v. Planned Parenthood*.[55]

Theconstitutionality of the law under *Roe* and *Casey* was immediately challenged in federal court and ruled unconstitutional in federal district and appellate court decisions but the majority opinion of the United States Supreme Court upheld the constitutionalityof the federal partial birth abortion ban in *Gonzales v Carhart*. There was no longer a "void for vagueness" issue, and the Court majority dealt with the (lack of a) maternal health exception issue by accepting clearly biased medical testimony that the existence of alternative procedures about which there was legitimate disagreement in the medical profession over whether they were just as safe did not truly amount to an abandonment of the maternal health exception.

[48] *Gonzales*, *supra*note 13.

[49] *Id.*

[50] Partial-Birth Abortion Ban Act of 2003, 18 U.S.C.A. § 1531 (2003).

[51] *Roe, supra* note 5.

[52] *Casey supra* note 15.

[53] *Gonzales, supra* note 13.

[54] *Carhartv.Gonzales*, 413 F.3d 791 (8th Cir.2005).

[55] *Planned Parenthood Federation of America, Inc. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006).

The 2007 *Carhart* decision appeared to be a clear 180 degree turn from the earlier 2000 United States Supreme Court decision in *Stenberg v. Carhart*[56] which held that Nebraska's "partial birth abortion" statute violated the U.S. Constitution precisely because its lack of a maternal health exception allowing the procedure to be performed was an undue burden on a pregnant woman's substantive due process right to an abortion. Writing for the Court in 2000, Justice Breyer found that the Nebraska statute was also void because it was so vaguely worded that the ban on the procedure in question could possibly have be applied to more commonly used surgical abortion procedures for second or first trimester abortion which were not contemplated by the statute. The Republican-dominated U.S. Congress responded to this 2000 Supreme Court decision by passing the federal 2003 Partial Birth Abortion Act. The Act was carefully written to precisely describe the surgical procedure being outlawed to avoid the void for vagueness issue in any subsequent litigation. However, the lack of a maternal health exception, which was the primary reason the Nebraska statute was ruled unconstitutional, was preserved.

The 2007 *Carhart* decision by the Court was made possible only by the recent departure of Justice Sandra Day O'Connor and her replacement by Justice Samuel Alito. With a shift to the right, the majority of the court lined up behind the medical opinion of Justice Kennedy and found that a direct federal ban on a rarely performed procedure for terminating a second trimester pregnancy now passed constitutional muster. Interestingly, Kennedy wrote that the decision was consistent "under precedents we here assume to be controlling"[57] (i.e. the *Roe* and *Casey* decisions), and attempted to distinguish his decision from the apparently opposite one the Court reached in the 2000 in *Stenberg*.

Much of the discussion in *Gonzales* centered around the Justices' differing interpretations over the expert medical testimony offered to Congress as to whether partial birth abortion was ever really necessary. Justice Kennedy accepted one set of medical arguments that the procedure was never really necessary and that safe, alternative procedures were always available. Under this set of circumstances, a ban on partial birth abortion would not be a violation of the substantive due process right to an abortion because, from a practical point of view, there was no restriction of access to second trimester abortion.[58] Justice Ginsburg embraced the opposing expert medical testimony which claimed that there were unique circumstances where partial birth abortion was the safest procedure,[59] and in an uncharacteristically blistering dissert, ridiculed Justice Kennedy's attempt to distinguish between the two *Carhart* cases. In a minority opinion joined by Justices Stevens, Souter, and Breyer, Justice Ginsburg pointed out that the only real difference between the two cases was in the composition of the Court.[60]

The difference in the composition of the Court may now make all the difference as far as future abortion cases are concerned. As such, the *Gonzales v Carhart*decision represents the potential dangers to women, and newly minted Constitutional rights, when the makeup of a Constitutional Court changes with the political winds.

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[56]*Stenberg v. Carhart*, 530 U.S. 914 (2000).
[57]*Gonzales, supra* note 13.
[58]*Id.*
[59]*Id.*
[60]*Id.*

VI. PARTIAL-BIRTH ABORTION, THE MEDICAL PROFESSION, AND THE UNITED STATES SUPREME COURT

Partial-birth abortion, also known as "intact D & E" (dilatation and evacuation) or "D & X" (dilatation and extraction),[61] was the perfect surgical technique for anti-abortion activists to go after. Rarely used, performed by only a small handful of practitioners, not described in any standard medical textbooks, and gruesome in its details (though in fact no more nor less gruesome than its alternatives), D & X was unsupported by any substantial safety or efficacy data from randomized, prospective trials comparing it to alternative procedures for termination of similar-gestational age pregnancies. D & X was defended only by a small number of academicians and the American College of Obstetricians and Gynecologists, which had until recently managed to keep the practice of the radar screen of public opinion. For all of these reasons, the procedure was easy to marginalize, and was the perfect "wedge" to pry under the tent of abortion rights. The medical profession's testimony before Congress when the Act was being debated probably didn't help, with physicians from the same medical school offering opposing views on the legitimacy and necessity of the procedure.

Exact figures on the number of D & X procedures performed in the United States, the number of individuals who routinely perform such procedures, and the number of women (if any) for whom the procedure is either the only method of termination available or deemed the safest given the gestational age of the fetus are unknowns. There is consensus agreement that all of these numbers are very small.[62] Alternative procedures for termination of second trimester pregnancy include (1) the traditional dilatation and evacuation (D & E) procedure; (2) direct injection of a prostin-saline solution into the amniotic fluid to terminate the pregnancy and produce labor which delivers the fetus intact; (3) early induction of labor without intrauterine injection to terminate the life of the fetus; (4) hysterotomy pre-viability or (5) Cesarean section post-viability.[63] The risks for any of these procedures include infection, bleeding, uterine perforation or injury, damage to the urinary or intestinal tract, and possible hysterectomy. The surgical complication rates for all second trimester procedures are very low in skilled hands[64], but greater than that for first-trimester terminations where there is no chance of fetal viability and the size of the fetus is much smaller.[65]

What was clear from the Congressional testimony, as well as from Justice Ginsburg's minority opinion, was that there was the distinct possibility that for a small number of women the D&X procedure wasthe safest surgical procedure for ending a mid-second-trimester abortion, depending on the specific medical indication for the procedure. Normally, when there was some disagreement within the medical profession over this sort of issue, particularly when the life of a citizen is at stake, the United States Supreme Court had always taken the position that if a judgment call is going to be made it preferred to err on the side of preservation of maternal health. This time, however, the decision was different; rather, the

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[61] David A. Grimes, *The Continuing Need for Late Abortions*, 280 JAMA 747 (1998).
[62]The Guttmacher Institute, *Issues in Brief – The Limitations of U.S. Statistics on Abortion*, *available at* http://www.guttmacher.org/pubs/ib14.html (*last accessed*on November 11, 2007).
[63]Janet E. GansEpner, Harry S. Jonas, and Daniel L. Seckinger, *Late-term Abortion*, 280 JAMA 724 (1998).
[64]*Id.*
[65]*Id.*

Court used the uncertainty over the best procedure to justify eliminating the procedure itself, even though the procedure appeared to have been developed to minimize some of the surgical complications of the alternative procedure which, if they occurred, could increase the risk for maternal complications and death. This shift in the Court's thinking was at odds with all of its prior jurisprudence, as well as with the medical philosophy behind the Korean civil abortion law, which is specifically oriented to preservation of maternal health and distinctly omits any references to the particular abortion techniques physicians in Korea might deem it necessary to employ to accomplish the abortion in the safest possible manner. The *Carhart* decision places the U.S. Supreme Court squarely in the middle of day-to-day medical decision-making by physicians. Direct government interference with the practice of medicine is something the Court has tried to avoid since its decision in *Roe v. Wade*, and is something which Korea has managed to avoid even in its civil abortion statute.

Even a cursory analysis of Justice Kennedy's writing in the Gonzales case reveals the problems which arise when judges foray into an analysis of physician surgical practice. If one is concerned about either the relative level of surgical aesthetics (i.e. is the procedure gruesome or distasteful), or concerned about fetal pain,[66] a strong argument can be made that the more commonly used D & E procedure which is still legal is worse in all aspects. The D & E procedure is a fragmentation procedure in which the fetus is literally torn into pieces and removed in sections using crushing instruments. If one is concerned about possible psychological damage to a woman from either a description of the procedure or the procedure itself[67] (as Justice Kennedy seemed to be), it is difficult to see how a more destructive procedure could be any less emotionally devastating. The D & X procedure at least has the virtue of first destroying the brain via suctioning the calvarium, thus lessening the likelihood of fetal pain (if such a thing actually exists)[68] and sparing the physician the need to rummage through chunks of fetal material to identify critical structures. As Justice Ginsburg correctly points out,[69] there is little practical difference among all of the surgical options for second trimester abortion, and the moral qualms Justice Kennedy has about partial birth abortion are readily transferable to the others.

The relentless logic of Kennedy's reasoning essentially mandates that alternative procedures for second trimester termination must also fall if similar challenges to these procedures reach the court. The only reason for not ruling the abolition all of these procedures constitutional would now appear to be to simply draw an arbitrary line and say that abolishing all second trimester termination procedures unduly burdens a woman's right to an abortion. So long as one safe surgical option is preserved, the Court could chip away at abortion procedures other than D & X.

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[66] Katherine E. Engelman, *Fetal Pain Legislation: Protection Against Pain is Not an Undue Burden*, 10 QUINNIPIAC L. J. 279 (2007).
[67] *Gonzales, supra* note 13.
[68] Hannah Stahle, *Fetal Pain Legislation: An Undue Burden*, 10 QUINNIPIAC HEALTH L. J. 251 (2007).
[69] *Gonzales, supra* note 13.

VII. RECENT LEGISLATIVE EFFORTS BATTLING ABORTION IN THE UNITED STATES

The shift in United States Supreme Court jurisprudence on abortion, and the abrogation of the commitment to preservation of fundamental rights of access to the safetyof abortion procedures for women in first or second trimester of pregnancy (which started in *Roe* and was preserved in *Casey*) mirrored a shift in laws concerning abortion in two other areas: (1) individual state laws regulating abortion practice; and (2) efforts by conservative Presidential administrations to issue federal rules to further limit the ability of women to access abortion services, even in hospitals predominately funded by government dollars and where the medical practitioners are government employees.

Opponents of abortion in individual states in the United States have pursued a two-fold strategy over the past decade. On the one hand, restrictive state laws have been passed[70] which have directly outlawed either abortion itself or select abortion procedures. Usually their focus is on those performed in the second trimester, where there is a balance between the rights of the mother and the legitimate increasing state interest in the rights of the fetus as the gestational age increases. At present four states permit abortions only to save the life of the mother,[71] while a select number of other states have proposed laws which do not even provide exceptions to the abortion prohibition in cases of rape or where the life of the mother is clearly in jeopardy.[72]

The second trend in state abortion legislation has been to steadily chip away at the edges of *Roe v. Wade* by passing laws which place increasing numbers of administrative or medical hurdles in the way of women who are determined to end their pregnancies by elective abortion. Such barriers range from requirements to obtain either parental consent, forced viewing of the pregnancy and fetal heartbeat on ultrasound, or requiring pre-abortion counseling to discuss carrying the pregnancy to term so the child may be put up adoption.[73] The point of these restrictive laws is to make it more difficult, psychologically and/or administratively, for a woman to go through with a planned abortion; at some point these barriers will successfully prevent some women, particularly poor women in rural areas far from major metropolitan areas, from being able to obtain a legal abortion.

For example, recent legislation from Texas sits within this second category. Currently in Texas there are six "anti-choice laws" which restrict access for Texas women seeking either a first or second trimester abortion.[74] Restrictions include limitations on use of public monies to pay for low-income women's access to abortion except in cases of rape or incest or to preserve the life of the mother; counseling and mandatory 24 hour delay requirements which stipulate that a woman may not undergo an abortion until at least 24 hours have passed since she was provided information on gestational age of the fetus and possible complications of an abortion; mandatory parental consent requirements for unmarried women under age 18;

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[70] The Guttmacher Institute, *State Policies on Later-Term Abortions*, STATE POLICIES IN BRIEF, November 1, 2007.
[71] *Id.*
[72] NARAL Pro-Choice America, *Who Decides? The Status of Women's Reproductive Rights in the United States. Texas*, *available at*http://www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides/state-profiles/texas.html (*last accessed* on Novermber 28, 2007).
[73] *Id.*
[74] *Id.*

limitations on which physicians may perform an abortion in Texas; and opt-out provisions for health care providers who disagree with a woman's decision to have an abortion.[75] Texas also has a post-viability restriction on abortion in the third trimester, restricting the procedure only to situations in which it is necessary to either save the life of the mother or avoid substantial risk of physical or mental impairment.[76]Additional restrictions introduced in the Texas legislature which have yet to be filed or passed include "Choose Life" license plates and mandatory requirements for ultrasound and viewing of the fetal heart, even if not medically necessary.[77] A recently proposed Texas law[78] referred to the House State Affairs Committee of the Texas State Legislature would also, among other things, require pregnant women desiring abortion to: (1) be required to look at a real-time ultrasound of their fetus the day of the planned abortion;[79] (2) listen to a physician provide a verbal explanation of the results of the ultrasound images,[80] describe the dimensions of the embryo or fetus[81] as well as the presence of cardiac activity;[82] (3) listen to a statement that having an abortion will increase their risk of developing breast cancer even though there is good medical evidence that this statement is scientifically incorrect; and (4) listen to the fetal heart for a length of time and in a manner identical to that for a routine antenatal pregnancy visit.[83]

These overt attempts to effectively preclude the ability to obtain abortion services at the state level in abortion clinics was mirrored in efforts by the recently departed Bush Presidential administration and the new federal rule[84] it wrote for the Department of Health and Human Services (HHS) just after the 2008 Presidential election. The right to enact new federal rules at the end of an administration's time in office is a privilege of being in power which both Democratic and Republican Presidents have exercised, and the new rule is a prime example. The new rule took effect immediately despite the fact that the Presidency and the U.S. government's approach to women's reproductive rights[85] were clearly going to shift one month later.

The final version of the rule is designed to significantly broaden "conscience clause protection for *more* health care workers, hospitals and insurers who refuse to provide care to patients seeking abortion-related services for moral or religious reasons,[86] as well as to expand the types of care this protection will apply to. The potential impact of this new federal

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[75]*Id*.
[76]*Id*.
[77] NARAL Pro-Choice America, *Who Decides? The Status of Women's Reproductive Rights in the United States. Texas*, *available at*http://www.prochoiceamerica.org/choice-action-center/in_your_state/bill-tracker/state.html?state=TX (*last accessed*on November 28, 2007).
[78]*Id.*
[79]*Id*.
[80]*Id*.
[81]*Id*.
[82]*Id*.
[83]*Id*.
[84]U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, FINAL RULE: ENSURING THAT DEPARTMENT OF HEALTH AND HUMAN SERVICES FUNDS DO NOT SUPPORT COERCIVE OR DISCRIMINATORY POLICIES OR PRACTICES IN VIOLATION OF FEDERAL LAW, DECEMBER 19, 2008, 45 C.F.R. PART 88 [*hereinafter* New Federal Abortion Rule].
[85] Daniel J. DeNoon, *Controversy Over New 'Conscience' Rule. Bush Broadens Rule on Refusal of Health Services for Moral Reasons*, WedMD Health News, December 19, 2008, *available at*http://www.webmd.com/news/20081219/new-conscience-rule-controversy?print=true.
[86]New Federal Abortion Rule*, supra* note 84

rule is vast, although efforts to undo this last-minute federal regulation have been underway by the Obama administration for two years at the time of this writing.[87]

United States federal law[88] had already prohibited health care providers and organizations from discriminating against many individuals who refuse to provide abortions or birth control. Indeed, there had been no published data or public outcry that health care workers' moral concerns were not already being adequately addressed by existing federal and state laws which extended conscience clause protection to health care workers who did not want to participate in sterilization or abortion procedures. The rule issued on December 19, 2008 by HHS[89] significantly broadened, however, the ability of health care workers, hospitals, and insurers to refuse abortion, sterilization, or other women's health-related care services for moral or religious reasons. Secretary of HHS Michael O. Leavitt stated that "This rule protects the right of medical providers to care for their patients in accord with their conscience."[90]

The new federal rule became effective on January 21, 2009 and contained several provisions which greatly expanded the range of potential health care institutions to which the conscience clause now applies.[91] The rule now covers more than half a million health care entities including hospitals, pharmacies, physicians' offices, medical and nursing schools, diagnostic laboratories, nursing homes, and insurers,[92] and gives all of these institutions and the personnel employed there much greater leeway in deciding whether participation in a broad range of activities related to a woman's reproductive care violates their conscience.[93] There is no limit on the percentage of their job which must be concerned with abortion-related activities for this new rule to apply.[94] The law also requires that all entities must certify in writing that they will comply with this new federal rule or risk loss of federal funding if they either fail to certify that they will comply or actually fail to comply.[95]

The new rule also differs from previous federal conscience clause law in that it applies to more than just abortion or sterilization services, i.e. to more than just actions directly related to performing an abortion or sterilization. The scope of new conscience clause protection encompasses the provision of information and counseling about such services, scheduling patients for these health care services, or *referring* patients elsewhere for such services. In effect, the new federal rule would allow a medical secretary who found the counseling about such medical services to be morally objectionable to refuse to schedule a

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[87] Editorial, *Undoing the Damage Done,* THE NEW YORK TIMES, January 25, 2009, Week in Review, p9.

[88] In 1973 Congress passed the Church Amendment to protect the conscience rights of hospitals and health care providers from forced involvement in abortion. The Amendment provides that any recipient of federal funds in various federal health programs will not require hospitals or individuals to participate in abortion procedures if their objection to participation is based on moral or religious grounds. The Amendment also forbids requiring participation in abortion procedures a condition of employment. In 1976 Congress passed the Hyde Amendment to the 1976 Labor/HEW Appropriations Bill to protect the consciences of taxpayers who object to having their tax dollars pay for abortion-related services. Some version of this Amendment has been passed every year since 1976.

[89] New Federal Abortion Rule, *supra*note 84.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

patient for a doctor visit if the reason for the visit was to discuss a referral for abortion or sterilization.

Undoing federal rules, particularly those passed by an outgoing administration certain that the rules will be immediately opposed by the incoming administration, is a complicated process. Overturning a newly enacted federal rule is not easy procedurally or politically. Although newspapers such as *The New York Times* have commented in their editorial pages[96] that "the [new] administration should suspend enforcement and craft a new rule," it turns out that the administrative law remedies available to a new President under the Administrative Procedures Act (APA) are limited. It is much easier to allow a newly proposed rule to wither and die on the administrative law grapevine than it is to overturn a new rule which has taken effect. Attempting to simply not enforce a new rule is one possibility but will almost certainly result in a successful challenge in federal court. There are only two real remedies available to the new White House: (1) work with Congress to pass new legislation which would overturn the federal rule; or (2) go through the entire formal rulemaking process again. Neither option is speedy, and neither may be particularly palatable given the recent fighting over the economic stimulus package and an understandable desire to avoid the distraction of a fight over abortion so soon after the 2008 election, or before the 2012 re-election campaign. At the time of this writing the federal abortion rule on "conscience clause" exceptions remains on the books, with the expected deleterious effect on accessing legal abortion services.

All of these problems with the United States approach to abortion - the Supreme Court ignoring *stare decisis*, micromanaging the medical profession, sacrificing preservation of maternal health; a Presidential administration supporting individual state efforts to curtail access to abortion services, allowing government medical facilities to neither provide for nor counsel about otherwise legal abortion services – are conspicuously absent from Korea's dealings with abortion.

VIII. THE STRENGTHS OF THE CONSTITUTIONAL APPROACH DESPITE THE PROBLEMS NOTED

The aforementioned problems with the Constitutional approach and the politics of abortion in the United States notwithstanding, there are at least two advantages to this approach. The first is that, at least at present, the right to access abortion services is a Constitutional right and not subject to the whims of local police officials interested in increasing enforcement of laws against non-enumerated, impermissible reasons for performing an abortion. Hand in hand with this "rights" approach is the absence of a specific list of permissible medical indications for performing a legal abortion. By its very nature such a list is inherently subjective, may be under-inclusive, and reflect the gap in medical knowledge between legislators and physicians over which specific medical conditions (infectious, genetic, psychiatric, others) "merit" inclusion in a list of acceptable medical indications for terminating a pregnancy.

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[96] Week in ReviewEditorial,*Undoing the Damage Done*, THE NEW YORK TIMES, January 25, 2009, at 9.

The United States Constitutional approach limits micromanagement of medical practice to a ban on partial birth abortion at the federal level and the imposition of state compelled free speech requirements on physicians in the requirements of information which must be communicated to patients prior to performing an abortion. The United States Constitutional approach reserves the decisions and reasons why to terminate a pregnancy in the first and second trimesters of pregnancy to the privacy of the relationship between a woman and her physician. The same may be said for the federal rejection of any paternal/husband consent requirement, although this is likely more of a reflection of profound cultural differences between Korean and United States society that medical ones.

IX. THE DISADVANTAGES OF THE KOREAN APPROACH

The absence of a Constitutional guarantee to a right to abortion services puts patients at the mercy of the legislative process and local police enforcement politics, exactly where the abortion issue is in individual states in the U.S. From a criminal law point of view this situation is less than ideal if enforcement of laws is arbitrary and individual citizens cannot determine how to comport their individual behavior to be in compliance with the law.

A second problem with the Korean approach is that the list of medically permissible reasons to allow abortion is clearly under-inclusive – not only because only 3% of the abortions being done in Korea actually meet the medical indications but also because the list of infectious as well as genetic disease indications is not consistent with the current antenatal genetic screening technology.[97] This should come as no surprise: the enumerated medical conditions list of permissible reasons is old (the law was first passed in the 1970s and essentially antedates even the AIDS crisis), whereas the Criminal Code provisions became law in the 1990s. The two sets of laws reflect two different eras and have not "merged" well.

Having discussed all of this, where might these considerations of both the Korean and United States approaches take Korean jurisprudence on legal abortion?

X. REASSESSING LEGAL ABORTION IN KOREA: CONSIDERATIONS, AND A PROPOSAL

At the time of this writing an elective (i.e. non-emergency) abortion may be performed legally in Korea for a select number of defined medical indications listed in the Health of Mother and Child Act;[98] this Act describes the only legal exceptions to the Korean Criminal Code Articles 269 and 270, which respectively prohibit women from procuring abortions and physicians from performing them.[99] The availability of abortion in Korea is strongly opposed by the Church, while some women's groups have petitioned the National Human Rights Commission to revise the existing law which is felt to be too restrictive and "shows no understanding of the circumstances of women who are forced to abort."[100]There is

[97] *Id.*
[98] Health of Mother and Child Act.Article 14 (Limited Permission of Abortion), *supra* at 5.
[99] Korean Criminal Code Articles 269 and 270.
[100] Interestingly, the protest seems to concern the notion that there are not enough medical indications

at present no defined Constitutional right to abortion in Korea, and Korea's Constitutional Court has not ruled specifically on the issue although at some point it is likely that a case concerning either the constitutionality of the ban on purely elective abortion or the criminal laws restricting access to abortion services will come before the Korean Constitutional Court.

The current situation may best be described as one in which there is a national political consensus that there are recognized legitimate medical reasons to grant a woman (or married couple) the right to terminate a pregnancy; and that purely elective abortion for other reasons is illegal but clearly is widespread and only intermittently and selectively enforced with occasional government threats to do otherwise. Regional differences in attitudes towards abortion in different regions of Korea do not appear to be a problem, nor is the apparent spousal or partner notification/permission requirement. In marked contrast, in the United States there are significant regional differences in attitudes surrounding the legality of and Constitutionality of the right to access to abortion services, and no national consensus on what medical indications are appropriate for permissible abortion. The political landscape in the Courts and Congress is much more confrontational regarding abortion in the United States than it is in Korea.

If the Korean Constitutional Court agrees to hear a challenge to the constitutionality of the Articles in the Korean Criminal Code which prohibit women from getting abortions and physicians from performing them, it has several options. For one, it can determine that the issue is actually moot – the Constitutionality of the Criminal Code prohibitions is irrelevant, or legal, simply because the Mother and Child Law already provides a legal remedy. Or, it could simply rule that the Criminal Code is unconstitutional in light of multiple articles of the Korean Constitution without going any further by creating a new right. Alternatively, the Constitutional Court might simply state that the current medical indications for legal abortion should be expanded by legislation to provide greater access to abortion services to prevent compromise of maternal health, something which would appear to be guaranteed by the Korean Constitution itself. Lastly, the Korean Constitutional Court could determine that neither the Criminal Code nor the Mother and Child Law is unconstitutional, essentially leaving the issue at the current status quo. This approach would throw the entire issue back to the legislature to debate whether to amend the enumerated reasons permitting legal abortion. Local police officials could then modify their enforcement strategies accordingly.

The advantages of not over-reaching on abortion as a Constitutional issue are apparent after even a cursory perusal of the debris of thirty years of litigating abortion rights in federal court in the United States: the Constitutional Court will avoid likely decades of controversy; the Constitutional Court is not placed in the position of assessing the relative merits of medical expert testimony they clearly lack the experience or training to evaluate;[101] the Court

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enumerated for legal abortion. Were the Korean statute a United States federal law, the most objectionable phrase would almost certainly be the spousal (or partner) consent requirement. This difference undoubtedly reflects a deeply ingrained culture difference between the U.S. and Korea on the marital relationship between husband and wife.

[101]For example, in *Gonzales v Carhart* Justice Kennedy, in writing for the majority, spends a great deal of time obsessing over the fact that the abortion procedure at hand – variously termed "intact D & E, dilatation and evacuation, D &X, or partial birth abortion – resembles a breech vaginal delivery (at least up to the point of the delivery of the head) than the more commonly performed (and still legal after the decision) procedure.

avoids the onus of repetitive linguistic gymnastics claiming reverence for fundamental rights and the principles of *stare decisis*while at the same time issuing increasingly twisted, non-legal arguments to buttress progressive diminutions of the same; and lastly the Court avoids the debate over "creating rights" instead of following the original language of the Constitution

The disadvantage of the current situation is that the right to access to abortion is not a guaranteed Constitutional right, and could therefore be more easily revoked or limited. One obvious solution is to simply update and expand the list of acceptable medical conditions for legal abortion to bring the current law in line with advances in genetic diagnostics as well as the realities of newer, or more prominent infectious diseases, which can affect pregnant women. Incorporating some of the recent psychological and sociological research on the short- and long-term adverse effects of unwanted pregnancy on women might further allow the realities of why women undergo abortion with the realities of why abortions are usually performed in Korea. Changing the law with great unbiased, data-driven input from the medical profession itself – a practice for the most part lacking in United States legislation – would lessen the notion that the government was arbitrarily micro-managing the practice of medicine.

The greatest lesson for Korean Constitutional law that could be drawn from the battles over abortion rights in the United States may be that the Constitutional Court should not interfere with an issue when it doesn't have to. Modernizing and expanding the list of permissible medical indications might eliminate any real problem with a pregnant woman obtaining an elective abortion, negate the need for Constitutional intervention, and avoid the problem of selective law enforcement. Formal language which would encompass the sanctity of the physician-patient relationship and permit some flexibility in decision-making by the woman and her physician would be helpful, and might avoid the necessity to interpret the language of the statute to encompass legitimate medical indications for legal abortion which somehow failed to make the list of permissible medical reasons.

Even if greater enforcement were to happen however, the language of Provision 1 of Article 14 of the Health of Mother and Child Act is so broadly worded,[102] and the phrase "may injure the health of a pregnant woman with medical reasons" so undefined and nebulous that one could easily argue that any potential psychological damage from an unwanted pregnancy would be sufficient to go over the bar necessary to obtain a legal abortion. The language of the abortion-enabling statute is expansive enough to allow legitimate pushback by lawyers against the enforcement, should the situation call for that.

KEYWORDS
Abortion, United States, Korea, Supreme Court

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[102]Health of Mother and Child Act.Article 14, *supra.*

HUMAN RIGHTS OF PEOPLE WITH MENTAL DISORDERS IN BANGLADESH

Md. ErshadulKarim[*]

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ABSTRACT

The issue of mental health is extremely important as mind drives a person. People with mental disorders have been facing continuous human rights violations in every sphere of life starting with family, institutions, etc. These people, though rarely posing a threat for others because of their diseases which are beyond their control, have faced stigma, discrimination, social exploitation in most spheres of life. The issue is more vibrant in a society like Bangladesh where the problem of mental

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health is still considered to be the result misfortune, and people superstitiouslybelieve that mental disorders is considered sometimesto be the result of sin on the part of the parents of the patient. People are still reluctant to accept this normally like other diseases affecting other parts of the person. These people are 'citizens' of Bangladesh and are entitled to have equal protection of law and their human rights are constitutionally guaranteed. This paper aims at focusing on the human rights issues of these people. In so doing their status in the society, the legal framework of Bangladesh, initiatives of the successive governments to improve their situation and commitments of Bangladesh governments under different international human rights instruments will all be considered. Since even after forty years of independence of the country, these people are still an 'object of neglect' in all strata of Bangladesh, at the end of the paper some suggestions are advanced towards the development of a comprehensive Mental Health Law in Bangladesh with a hope to improve the situation of these people.

I. INTRODUCTION

The issue of mental health is extremely important as mind drives a person. People with mental disorders have been facing continuous human rights violations in every sphere of life starting with family, institutions, etc. These people, though rarely posing a threat for others because of their diseases which are beyond their control, have faced stigma, discrimination, social exploitation in most spheres of life. The issue is more vibrant in a society like Bangladesh where the problem of mental health is still considered to be the result misfortune, and people superstitiously believe that mental disorders is considered sometimesto be the result of sin on the part of the parents of the patient. People are still reluctant to accept this normally like other diseases affecting other parts of the person. Besides, the issue of mental health is no more an isolated medical issue since serious human rights issues are also involved with this.

In a country like Bangladesh, a family having a member with any type of mental disability faces serious misfortune and discrimination. People are not willing to consider the fact that mind or brain is an integral part of human body and thus mental disorder is a disease affecting brain like ulcer is affecting the intestine. Families with such a patient are discriminated against in most of the cases and the issue of mental illness is treated as curse on the family from the Almighty. Therefore the nature of human rights of such families in Bangladesh is totally different as these family members also have been suffering from different types of discrimination in life because of presence of member(s) with mental disability in family.

In Bangladesh, when the human rights of people other than mentally disabled could not be respected, let alone the situation of mentally disabled persons. However, we are very optimistic that the situation will be changed and human rights of all people shall be ensured irrespective of any status i.e. age, race, ancestry, place of origin, color, religion, national or ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, record of offenses,

marital status, family status or disability etc.In Bangladesh, the family bondage is very strong and people used to give the maintenance of family tie the highest priority. Therefore, if we consider the family members to include the members with mental disorder, the total population will be huge and ignoring the human rights of these huge numbers of population, the government cannot ensure human rights for all citizens which is its constitutional obligation.

Though the issue of mental health is a vast one and involves so many things the primary objective of this paper is to share the legal and human rights issues of the people with mental disorder with a special focus on Bangladesh. Hard and fast medical rules relating to causes and consequences, treatment and medication of people with mental disability are not considered in this paper rather focus will be given on the human rights issues relating to such people of Bangladesh. Even though we are aware of mental health disorder classification, the latest being theChapter V of the International Classification of Diseases (ICD-10) produced by the World Health Organization (WHO) and the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), in this paper we will basically focus on theissues of mental disorders used in the different laws of Bangladesh. In doing so, the discussion starts with focusing shed on the issue of mental health under the international human rights instruments and national laws of the land. Thereafter we will attempt to give a brief scenario of mental health and mental health administration in Bangladesh. After that different terms frequently used in this area of knowledge will be defined and then the different human rights of such people that have been being frequently violated will be considered. Finally some suggestions will be put forth for consideration by the law and policy makers of the country in developing a comprehensive mental health law with a hope to improve the overall situation of these people.

II. MENTAL HEALTH AND INTERNATIONAL LEGAL FRAMEWORK:

Health is wealth and few will dispute that sound health is one pre-condition to enjoy other human rights. Mental health is an integral part of 'health' as defined by World Health Organization in its Constitution, the Charter of United Nations,[1] the International Bill of Human Rights i.e. the Universal Declaration of Human Rights,[2] the International Covenant on Civil and Political Rights,[3] the International Covenant on Economic, Social and Cultural Rights,[4] and the core international human rights instruments in a number of places have all proclaimed equal status of human being without making any discrimination of any kind such

[1]Race, sex, language, or religion (U.N. CHARTER art. 1, para. 3; art. 13, para. 1(b); art. 55(c); art. 76(c)).

[2] Distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, political, jurisdictional or international status of country or territory (UNIVERSAL DECLARATION OF HUMAN RIGHTS art. 2 (1948)).

[3]Distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS art. 2, para. 1 (1966)).

[4]Fair wages and equal remuneration for work of equal value without distinction of any kind (INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS art. 7(a)(i) (1966)).

as on grounds of disability, race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, legal or social status, age, property or birth.

Simultaneously, different International instruments e.g. declarations, conventions, treaties,[5]norms and standards[6]emphasize on the importance of health for the full enjoyment of human rights. Many legal instruments on health were regionally adopted in Africa, America, Arab and Europe as well.[7] World Health Organization ("WHO") has revealed that every country in the world is now a member ofat least one of these international instruments that addresses health-related rights, including the right to health and a number of rights related to conditions necessary for health.[8]

In some international treaties, standards and guidelines, the issues relating to rights of people with mental illness were considered either specifically or indirectly. These include the

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[5]E.g., CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (1948), CONVENTION FOR THE SUPPRESSION OF THE TRAFFIC IN PERSONS AND OF THE EXPLOITATION OF THE PROSTITUTION OF OTHERS (1949), FIRST GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (1949), SECOND GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA (1949), THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (1949), FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (1949), CONVENTION RELATING TO THE STATUS OF REFUGEES (1950) AND THE PROTOCOL RELATING TO THE STATUS OF REFUGEES (1967), INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1963), INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (1966), INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1966) AND ITS PROTOCOL OF 1966, FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (1977), SECOND ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (1977), CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (1979) AND ITS OPTIONAL PROTOCOL (1999), CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (1984), SECOND OPTIONAL PROTOCOL ON THE ABOLITION OF THE DEATH PENALTY (1989), CONVENTION ON THE RIGHTS OF THE CHILD (1989), INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES (1990), CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (2007).

[6] DECLARATION ON THE USE OF SCIENTIFIC AND TECHNOLOGICAL PROGRESS IN THE INTERESTS OF PEACE AND FOR THE BENEFIT OF MANKIND (1975), PRINCIPLES OF MEDICAL ETHICS RELEVANT TO THE ROLE OF HEALTH PERSONNEL, PARTICULARLY PHYSICIANS, IN THE PROTECTION OF PRISONERS AND DETAINEES AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT (1982),DECLARATION ON THE RIGHT TO DEVELOPMENT (1986), PRINCIPLES FOR THE PROTECTION OF PERSONS WITH MENTAL ILLNESS AND THE IMPROVEMENT OF MENTAL HEALTH CARE (1991), DECLARATION ON THE RIGHTS OF PERSONS BELONGING TO NATIONAL OR ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES (1992), DECLARATION ON THE RIGHT AND RESPONSIBILITY OF INDIVIDUALS, GROUPS AND ORGANS OF SOCIETY TO PROMOTE AND PROTECT UNIVERSALLY RECOGNIZED HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (1998).

[7]AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS (1981), AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD (1990), AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN (1948), AMERICAN CONVENTION ON HUMAN RIGHTS (1969) AND ITS PROTOCOL OF 1990, INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE (1985), ADDITIONAL PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS - PROTOCOL OF SAN SALVADOR (1988), AMERICAN CONVENTION ON THE PREVENTION, PUNISHMENT AND ERADICATION OF VIOLENCE AGAINST WOMEN: CONVENTION OF BELEM DO PARA (1994), INTER-AMERICAN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST PERSONS WITH DISABILITIES (1999), ARAB CHARTER ON HUMAN RIGHTS (1994), EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (1950), EUROPEAN SOCIAL CHARTER (1961, REVISED 1996), EUROPEAN CONVENTION ON HUMAN RIGHTS AND DIGNITY OF THE HUMAN BEING WITH REGARD TO THE APPLICATION OF BIOLOGY AND MEDICINE: CONVENTION ON HUMAN RIGHTS AND BIOMEDICINE (1997), COMMONWEALTH OF INDEPENDENT STATES CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (1995).

[8]WHO, *Health and Human Rights*(*lasted visited* on Nov. 21, 2011) <http://www.who.int/hhr/hhr_activities_eng.pdf>.

Universal Declaration of Human Rights of 1948[9], the International Convention on the Elimination of All Forms of Racial Discrimination of 1965,[10] the International Covenant on Civil and Political Rights of 1966,[11] the Declaration on the Rights of Mentally Retarded Persons of 1971,[12] the Declaration on the Rights of Disabled Persons of 1975,[13] the Convention on the Elimination of All Forms of Discrimination Against Women of 1979,[14] the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1984,[15] the Declaration on the Right to Development of 1986,[16] the Convention on the Rights of the Child, 1989,[17] the International Conventions on the Protection of the Rights of all Migrant Workers and Members of Their Families of 1990,[18] UN Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care of 1991,[19] the Declaration of Caracas of 1990,[20] the Declaration of Madrid on Ethical Standards for Psychiatric Practice of 1996,[21] the WHO Technical Standards (Mental Health Care Law: Ten Basic Principles and Guidelines for the Promotion of Human Rights of Persons with Mental Disorders) of 1996, the UN Convention on the Rights of Persons with Disabilities of 2006, Resolution on Health and Human Rights of 2010.[22]It is therefore self-evident that the issue of mental health is no longer an isolated issue; rather the entire world community has been treating this issue seriously for some time now.

III. MENTAL HEALTH SITUATION: A BRIEF SCENARIO

The reasons why a person suffers from mental illness are not certain; socio-economic and environmental circumstancesand emotional issue are important facts behind this. Some of

[9]UNIVERSAL DECLARATION OF HUMAN RIGHTS art.2 (1948).
[10]INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION art. 5(e)(iv) (1965).
[11]INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS art.2, para.1 (1966).
[12]G.A. Res. 2856 (XXVI), 26 U.N. GAOR Supp. No. 29, at 93, U.N. Doc.A/8429 (1971)<http://www1.umn.edu/humanrts/instree/t1drmrp.htm>.
[13]G.A. res. 3447 (XXX), 30 U.N. GAOR Supp. No. 34, at 88, U.N. Doc.A/10034 (1975) <http://www1.umn.edu/humanrts/instree/t3drdp.htm>.
[14]CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN,pmbl.art. 10(h); art.11, para.1(f); art.12, para.1 (1979).
[15] CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENTart. 1, para.1 (1984).
[16]G.A. Res. 41/128 (1986)<http://www.un.org/documents/ga/res/41/a41r128.htm>.
[17]CONVENTION ON THE RIGHTS OF THE CHILDart.3, para.3; art.14, para.3; art.17; art.23, para.1; art.24; art.25; art.32; art.39 (1989).
[18]INTERNATIONAL CONVENTIONS ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIESart.12, para.3; art.25, para.1(a); art.28; art.43, para.1(e); art.45, para.1(c); art.70 (1990).
[19]G. A. Res. No.A/RES/46/119 (1991) <http://www.un.org/documents/ga/res/46/a46r119.htm>.
[20] Adopted on November 14, 1990 by lawyers, judges, professional associations and mental health professionals gathered to the Regional Conference on Restructuring Psychiatric Care in Latin America, held in Caracas, Venezuela.
[21] Approved by the General Assembly of the World Psychiatric Association in Madrid, Spain, on August 25, 1996, and enhanced by the WPA General Assemblies in Hamburg, Germany on August 8, 1999, in Yokohama, Japan, on August 26, 2002, and in Cairo, Egypt, on September 12, 2005.
[22] Pan American Health Organization& WHO, 50th Directing Council, 62nd Session of the Regional Committee, Resolution on Health and Human Rights (CD50.R8), Washington D.C., USA, September 27 – October 1, 2010.

the mental disorders are very common while some are not, some are curable by medication or therapy while some regress naturally when aggravating socio-emotional factors subside. Whatever the reasons are, the most alarming fact is that the number of people suffering from mental health disorders seems to be increasing.

According to the official statistics of United Nations:

> Millions of people worldwide have mental health conditions and an estimated one in four people globally will experience a mental health condition in their lifetime. Almost one million people die due to suicide every year, and it is the third leading cause of death among young people. Depression is the leading cause of years lost due to disability worldwide. Mental health problems, including alcohol abuse, are among the ten leading causes of disability in both developed and developing countries. In particular, depression is ranked third in the global burden of disease, and is projected to rank first in 2030. Persons with mental and psychosocial disabilities often face stigma and discrimination, as well as experience high levels of physical and sexual abuse, which can occur in a range of settings, including prisons, hospitals and homes.[23]

According to National Mental Health Survey in 2003-2005 about 16.05% of the adult populations in Bangladesh aresuffering from mental disorders.[24] In Bangladesh, 16% of citizens above 18 years suffer from mental disorders. Considering the voters of the country as eighty one million, the total number of mentally ill person are one hundred and twenty million and eight hundred and six thousands. Of them 1.1% of people have been suffering from serious mental disorder. 8.4% have been suffering from anxiety disorder, 4.6 % have been suffering from depressive disorder and 0.6 % suffersfrom drug addiction.[25]Although it is not possible to provide the exact number of people with mental disorder, the percentage of people with such disorder is very high.

IV. MENTAL HEALTH ADMINISTRATION IN BANGLADESH:

There is no specific mental health authority in the country, though there is one mental health institute, theNational Institute of Mental Health and Research (NIMHR). There are 50 outpatient mental health facilities but no facility provides follow-up care in the community. There areno day treatment mental health facilities in the country; there are 31 community-based psychiatric inpatient units for a total of 0.58 bed per 100,000 population and on average patients spend 29 days in the facility per discharge. There is one 500 bed mental hospital situated in Pabna in the country, which was established in 1957 and shifted there in 1958, and on average patients spend 137 days in the hospital. For one hundred and sixty

[23]U.N., *Mental Health and Development* (lasted visited Nov. 21, 2011) <http://www.un.org/disabilities/default.asp?id=1545>.
[24]WHO, *WHO-AIMS Report on Mental Health System in Bangladesh* (2006)(lasted visited Nov. 21, 2011) <http://www.searo.who.int/LinkFiles/Mental_Health_Resources_WHO-AIMS_Report_MHS_Ban.pdf>.
[25]AMADERSHOMOY, Jan. 10, 2010 <http://www.amadershomoy.com/content/2010/01/10/news0703.htm>.

million people of Bangladesh, there are only 117 mental health experts.[26]The total number of human resources working in mental health facilities or private practice per 100,000 population is 0.49. Fifty-four % of psychiatrists work for both government and private sectors and 46% work for only in the private sector.[27] The density of psychiatrists, nurses and psychiatric beds in or around Dhaka, the largest city, is 5 times greater than the density of beds in the entire country.[28] There are also model hospitals in Sonargaon, Kaligonj, Keranigonj and Dhamrai. There are departments of mental health in Bangabandhu Sheikh Mujib Medical University, Government Medical College Hospitals and Armed Forces Hospital.

For a young democracy like Bangladesh, provision of standard health for its citizens has not been treated as primary obligation or concern or priority for the government, and that's why the issue of health is considered in the Constitution of Bangladesh under the 'Fundamental Principles of State Policy', which are internationally referred as ECOSOC rights and thus are not judicially enforceable.[29] Also if we analyze the allocation of resources in Bangladesh's national budget, it will be evident that the health sector is very neglected: it is the Ninth priority of the government in national budget for the financial year 2010-2011. All previous governments including this present government only 6% of total national budget was allocated for health sector; or little more or less than that which was only 1% of the country's GDP. Only 6.2% of the total budget in 2010-2011 fiscal year was allocated for health sector while it was only 5.9% in 2008-2009, 6.6% in 2007-2008 fiscal year.

V. TERMINOLOGIES

In Bangladesh, there is no comprehensive health code or health policy.[30] What 'health' is has not been defined anywhere in Bangladesh law. The National Health Policy of Bangladesh adheres to the definition of health as given by WHO, and the issue of mental health is considered as the thirteenth among fifteenth goals of Bangladesh government. However, there are a good number of laws relating to different aspects of health.[31] Though

[26] *Id*.
[27] WHO, *supra* note 24.
[28] *Id*.
[29] BANGLADESH SHONGBIDHAN[Constitution] art.11; art.15; art.18; art.8, para. 1.
[30] For details, *see*FaridaAkhter&FarhadMazhar, *Towards Peoples' Health Care System 2009*<http://www.ubinig.org/index.php/networkdetails/showAerticle/1/4/English>.
[31] The list of these laws include the Vaccination Act (Bengal Act V of 1880), the Epidemic Diseases Act (Act No. III of 1897), the Lepers Act (Act No. III of 1898), the Glanders and Farcy Act (Act No. XIII of 1899), the Mining Settlements Act (Bengal Act II of 1912), the White Phosphorus Matches Prohibition Act (Act No. V of 1913), the Medical Degrees Act (Act No. VII of 1916), the Juvenile Smoking Act (Bengal Act II of 1919), the Public Health (Emergency Provisions) Ordinance (Ordinance No.XXI of 1944), the Embankment and Drainage Act (East Bengal Act No. 1 of 1952), the Undesirable Advertisements Control Act (East Bengal Act No.XV of 1952), the Pure Food Ordinance (East Pakistan Ordinance No.LXVIII of 1959), the Civil Aviation Ordinance, the Eye Surgery (Restriction) Ordinance (Ordinance No.LI of 1960), the Medical Colleges (Governing Bodies) Ordinance (Ordinance No.XIII of 1961), the Allopathic System (Prevention of Misuse) Ordinance (Ordinance No. LXV of 1962), the Cantonment Pure Foods Act (Act No. XVI of 1966), the Bangladesh College of Physicians and Surgeons Order (President's Order No. 63 of 1972), the Children Act (XLII of 1974), the *Bidi*-Manufacturer (Prohibition) Ordinance (Ordinance No.LVII of 1975), the Pharmacy Ordinance (Ordinance No.XIII of 1976), the Prevention of Malaria (Special Provisions) Ordinance

the issue of 'mental health" is not considered directly as a whole other than in the Bangladesh ProtibondhiKollanAin(Act No. 12 of 2001), after scrutinizing the laws of the land, we have found that different terminologies e.g. lunatic or unsound,[32] idiot,[33] insane,[34] mentally retarded and defectives,[35] mental ill-health,[36] mental harm,[37] mental disability,[38] mental incapacity,[39] mental derangement,[40] mental infirmity,[41] and so on have been used frequently to mean different aspects of mental health. Therefore, we need to clarify the meaning of these words used in different laws.

A. MENTAL HEALTH:

Mental health is an integral part of the definition of 'health' as provided by the WHO Constitution of 1946, which defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." Similar observation is made in Article I of the Alma-Ata Declaration of 1978 which defines health as "a state of complete

(Ordinance No.IV of 1978), the International Center for Diarrheal Disease Research, Bangladesh Ordinance (Ordinance No. LI of 1978), the Medical and Dental Council Act (Act No. XVI of 1980), the Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance (Ordinance No.IV of 1982), the Drugs (Control) Ordinance (Ordinance No.VIII of 1982), the Bangladesh *Unani* and *Ayurvedic* Practitioners Ordinance (Ordinance No.XXXII of 1983), the Fish and Fish Products (Inspection and Quality Control) Ordinance (Ordinance No.XX of 1983), the Bangladesh Homeopathic Practitioners Ordinance (Ordinance No.XLI of 1983), the Bangladesh Nursing Council Ordinance (Ordinance No.LXI of 1983), the Breast-Milk Substitute (Regulation of Marketing) Ordinance (Ordinance No.XXXIII of 1984), the Livestock Research Institute Ordinance (Ordinance No. 143 of 1984), the Drugs (Supplementary Provisions) Ordinance (Ordinance No. XIII of 1986), the *Iodine ObhabJonitRogProtirodAin* (Act No. X of 1989), the *MadokDrobboNiontronAin* (Act No. 20 of 1990), the *ParomanobikNirapotta O BikironNiontronAin*(Act No. 21 of 1993), the *BangabandhuShiekhMujiburRahman*Medical*BishwabidhalayaAin* (Act No. I of 1998), the Transplantation of Organ in Human Body Act (Act No. V of 1999), the Bangladesh *ProtibondhiKollanAin* (Act No. XII of 2001), the Safe Blood Transfusion Act (Act No. XII of 2002),the*Dhumpan o TamakjatDrobboBabohar (Niontron) Ain* (Act No. 11 of 2005), the Bangladesh Labour Act (Act No. XLII of 2006), the Consumer Rights Protection Act (Act No. XXVI of 2009), the National Human Rights Commission Act (Act No. LIII of 2009).

[32] BANGLADESH SHONGBIDHAN art.66, para.2; art.122,para. 2, Lunacy Act § 3(5) (1912) (Act No. IV of 1912) (Bangl.).

[33] *Id.*, Income Tax Ordinance § 95(4)(a) (1984) (Act No. XXXVI of 1984), **Hindu Inheritance (Removal of Disabilities) Act** § 2 **(1928) (Act No. XII of 1928) (Bangl.).**

[34] Bangladesh House Building Finance Corporation Order art.9,para.c(1973) (P.O. No. 7 of 1973), Bangladesh Insurance (Nationalization) Order art. 11, para.2 (1972) (P.O. No. 95 of 1972); art.13, para.d, Bangladesh Bank Order (1972) (P.O. No. 127 of 1972), Bangladesh Small and Cottage Industries Corporation Act§ 11(1)(c) (1957) (East Pakistan Act No. XVII of 1957), Forest Industries Development Corporation Ordinance § 8(1)(c) (1959) (East Pakistan Ordinance No. LXVII of 1959), Bangladesh Biman Corporation Ordinance § 11(b) (1977) (Ordinance No. XIX of 1977), Road Transport Corporation Ordinance § 8(1)(a) (1961) (East Pakistan Ordinance No. VII of 1961), Industrial Development Corporation Ordinance § 9(1)(c) (1962) (East Pakistan Ordinance No. XXXVII of 1962), Bangladesh Shilpa Bank Order art.11, para.c (1972) (P.O. No. 129 of 1972), Bangladesh Banks (Nationalization) Order art.11, para. 3(e) (1972) (P.O. No. 26 of 1972), Bangladesh Inland Water Transport Corporation Order art. 8,para.b (1972) (P.O. No. 128 of 1972) (Bangl.).

[35] Intermediate and Secondary Education Ordinance § 2(h)(x) (1961) (East Pakistan Ordinance No. XXXIII of 1961) (Bangl.).

[36] Bangladesh Nursing Council Ordinance § 15(1) (1983) (Ordinance No. LXI of 1983), Medical and Dental Council Act § 28(1) (1980) (Act No. XVI of 1980) (Bangl.).

[37] International Crimes (Tribunals) Act § 3(2)(c)(ii) (1973) (Act No. XIX of 1973) (Bangl.).

[38] Bangladesh *Cha SramikKallyan* Fund Ordinance § 8(a) (1986) (Ordinance No.LXII of 1986) (Bangl.).

[39] BANGLADESH SHONGBIDHANart.53, para.1.

[40] Children Act § 34 (1974) (Act No. XXXIX of 1974) (Bangl).

[41] Supreme Court Judges (Leave, Pension and Privileges) Ordinance § 21 (1982) (Bangl.).

physical, mental and social wellbeing, and not merely the absence of disease or infirmity."

World Health Organization (WHO) defines 'mental health' as a state of well-being in which the individual realizes his or her own abilities, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to his or her community. It is the foundation for well-being and effective functioning for an individual and for a community.[42] Therefore, one conclusion that can be drawn is that mental health is more than the absence of mental disorders.

B. MENTAL DISABILITY:

§ 2 paragraph of the Bangladesh *ProtibondhiKallayanAin*(Act No. 12 of 2001)provides that a person is 'mentally disabled' if he has arrested or incomplete development of mind which is specially characterized by sub-normality of intelligence and whose mental stability is partially or permanently impaired. That includes one whose mental development is not at par with his chronological age or his IQ (Intelligent Quotient) is far below the normal range, or his mental balance is damaged, partly or wholly.

C. ABNORMAL, UNSOUND, LUNATIC, INSANE, IDIOT:

The words 'abnormal' or 'unsound' are not defined anywhere in Bangladesh laws though these words are used as synonyms.[43] These words are used to describe a state of mind which is not 'normal' and 'sound'. § 3 paragraph 5 of the Lunacy Act (Act No. IV of 1912) defines "lunatic" as an idiot or person of unsound mind. Therefore, it can be inferred that unsoundness or idiocy is requirement of lunacy. § 3 (4) of the same Act defines "criminal lunatic" as any person for whose detention in, or removal to an asylum, jail or other place of safe custody an order has been made in accordance with the provisions of § 466 or § 471 of the Code of Criminal Procedure (Act No. V of 1898) or of § 30 of the Prisoners Act (Act No. III of 1900) or of § 130 of the Army Act (Act No. XXXIX of 1952).

It is very important to note that when under English law an insane person is declared not guilty for his or her criminal activities, under the Bangladeshi Law this type of a lunatic is described as criminal lunatic, which will open the floodgate of discrimination in every sphere of life.

The reasons for lunacy as mentioned in Schedule 1, Form 1 of the Lunacy Act, 1912 (Act IV of 1912) are epilepsy, suicidal tendency, phthisis, tubercular disease, lunatic blood relation, addition to alcohol, use of opium, ganja, charas, bhang, cocaine or other intoxicant.
Unsoundness of mind and insanity are used interchangeably in Bangladeshi laws. *Pagal* or *unmad* are the Bengali synonyms of the word 'insanity'.[44]From the language of § 84 of the

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[42] WHO, *What is Mental Health?* (*lasted visited* on Nov. 21, 2011) <http://www.who.int/features/qa/62/en/index.html>.
[43]MD. ABDUL HAMID, AINCOSH[A DICTIONARY OF LAW] 5 (1st ed. 2ndrep. 2004).
[44] WHO, *Schizophrenia: Youth's Greatest Disabler* (lasted visited Nov. 21,

Penal Code (XLV of 1860) it can be inferred that an unsound is he who is incapable of knowing the nature of the act and whether the act he is doing is either wrong or contrary to law and for that he can escape his legal liability.

There is no test for determining 'insanity' like M'Naghten rule of English common law, but for Bangladesh Courts that test does have persuasive value. In the case of *State vs. Shiraj Ali,*[45] at paragraph 12, the defense of insanity under §84 of the Penal Code (XLV of 1860) was considered and it was held that if there raise a question on insanity, the standard to be applied is whether according to the ordinary standard adopted by reasonable men, the act was right or wrong, i.e. the test of 'reasonable man' should be applied.In the case of*R v Arnold* 1724 16 How St. Tr. 765, the test for insanity was expressed as whether the accused is totally deprived of his understanding and memory and knew what he was doing "no more than a wild beast or a brute, or an infant".

The word 'insanity', solely a legal and sociological concept, has no technical meaning in law or in medicine and does not connote any definite medical entity. Insanity is seen to be a social inadequacy and medically, it takes the form of a mental disease. . . insanity implies a degree of mental disturbance so menacing and so disabling that the person may be considered from the legal point of view to be immune from certain responsibilities and may disallow him certain privileges that may require a degree of competence such as a decision to marry, make business contracts or manage property . . . 'unsoundness of mind', 'insanity', 'lunacy', 'madness' or 'mental derangement' or 'disordered state of mind' are used as synonyms. . . [46]

Madness is the behaviour whereby a person flouts societal norms and may become a danger to himself and others. Greek tragedies and Shakespeare often refer to madness in this sense. Psychologically, it is a general, popular and legal term defining behavior influenced by mental instability. In modern usage, it is most commonly encountered as an informal, unscientific term, or in the narrow legal context of the insanity defense. In the medical profession the term is now avoided in favor of more specific diagnoses of mental illness such as schizophrenia and other psychotic disorders.

Mental soundness is an essential ingredient to enter into a valid contract, and a person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind and a person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.[47] Also, lunacy, unsoundness of mind and insanity are grounds of disqualification to be and to continue an important post, e.g. of Director.[48]

2011)<http://www.searo.who.int/en/Section1174/Section1199/Section1567/Section1827_8049.htm>.

[45] 1 Chancery L. Chrn.; 24 Dhaka L. Rep.69 (1972) (Bangl.).

[46] MODI'S MEDICAL JURISPRUDENCE AND TOXICOLOGY 1057 (K. Mathiharan&Amrit K. Patnaik eds.,23rd ed. 2005).

[47] Contract Act §13 (1872) (Act No. IX of 1872) (India).

[48] Bangladesh House Building Finance Corporation Order art.9, para.c (1973) (P.O. No. 7 of 1973), Bangladesh Insurance (Nationalization) Order art.11, para. 2 (1972) (P.O. No. 95 of 1972), Bangladesh Bank Order art. 13, para.d(1972) (P.O. No. 127 of 1972), Bangladesh Small and Cottage Industries Corporation Act §11(1)(c) (1957) (East Pakistan Act No. XVII of 1957), Forest Industries Development Corporation Ordinance§ 8(1)(c) (1959) (East Pakistan Ordinance No. LXVII of 1959), Bangladesh Biman Corporation Ordinance § 11(b) (1977) (Ordinance No. XIX of 1977), Road Transport Corporation Ordinance § 8(1)(a) (1961) (East Pakistan Ordinance No. VII of 1961), Industrial Development Corporation Ordinance § 9(1)(c) (1962) (East Pakistan Ordinance No. XXXVII of 1962), Bangladesh Shilpa Bank Order art.11 para.c (1972) (P.O. No. 129 of 1972), Bangladesh Banks (Nationalization) Order art.11, para. 3(e) (1972) (P.O. No. 26 of 1972), Bangladesh Inland

VI. HUMAN RIGHTS ISSUES OF PEOPLE WITH MENTAL DISORDER:

A. BASIC IDEA ABOUT HUMAN RIGHTS:

It is difficult if not impossible to give a precise definition of "human rights". It will be relevant to mention here that in this paper we are not much concerned about the theoretical debate on definitions of 'human rights'. To serve our purpose, in plain language, human rights are those inalienable rights which a human being is entitled to enjoy only because he is a human being.

Human rights are rights inherent to all human beings, irrespective of nationality, place of residence, sex, national or ethnic origin, color, religion, language, or any other status. All human being are equally entitled to these universal, inalienable, interrelated, interdependent and indivisible human rights. Internationally, these human rights are derived from major international instruments. Most of the countries in the world are member of the five most important human rights instruments i.e. international bill of human rights.[49] All States have ratified at least one, and 80% of States have ratified four or more, of the core human rights treaties.[50]

Human Rights are universal legal guarantees protecting individuals and groups against actions which interfere with fundamental freedoms and human dignity. Some of the most important characteristics of human rights are that they are guaranteed by international standards, legally protected, focus on the dignity of the human being, oblige states and state actors, cannot be waived or taken away, interdependent and interrelated, and universal.[51]

In national level, § 2(f) of the Bangladesh National Human Rights Commission Act (Act No. LIII of 2009) provides that 'human rights' means the life, liberty, equality and dignity of a person which are ensured by the Constitution of the People's Republic of Bangladesh, 1972 and the human rights, as declared in different international human rights instruments, which are ratified by the Bangladeshi government and which are judicially enforceable in Bangladeshi courts of law. Therefore, it is evident from this definition that the instead of defining 'human rights', § 2(f) of the Act, (Act No. LIII of 2009) basically

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Water Transport Corporation Order art. 8, para.b (1972) (P.O. No. 128 of 1972) (Bangl.).

[49] UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948), INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (1966), INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1966), OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1966), SECOND OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, AIMING AT THE ABOLITION OF THE DEATH PENALTY (1989).

[50] INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1965), INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1966), INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (1966), CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (1979), CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (1984), CONVENTION ON THE RIGHTS OF THE CHILD (1989), INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES (1990), INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE (2006), CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (2006).

[51] Administrative Committee on Coordination (ACC),*United Nations System and Human Rights: Guidelines and Information for the Resident Coordinator System* (Consultative Committee on Programme and Operational Questions (CCPOQ), 16th Sess., Geneva, March 2000) (*lasted visited*on Nov. 21, 2011) <http://www.who.int/hhr/activities/en/25_questions_hhr.pdf>.

describes what human rights are.

The Bangladesh Constitution of 1972 does not define 'human rights'. Though 'human rights' are not defined or described in Bangladesh Constitution except mentioning in the Preamble and Article 11, the spirit of international Bill of Human Rights was always present in the mind of the framers of the Constitution. Therefore, the framers of the constitution included most of the civil and political and economic, social and cultural rights in the constitution of the country.

In the case of *Bangladesh National Women Lawyers Association (BNWLA) Vs. Bangladesh and Others*, 2009,[52] [Writ Petition No. 5916 of 2008], the High Court Division of Bangladesh Supreme Court very recently in 2009 reiterated that:

> "The framers of the Constitution were particularly impressed by the formulation of the basic rights in the Universal Declaration of Human Rights. If we make a comparison of Part III of the Constitution with the Universal Declaration of Human Rights (UDHR) we shall find that most of the rights enumerated in the Declaration have found place in some form or other in Part III and some have been recognised in Part II of the Constitution. . ."

In the case of *Government of Bangladesh and another Vs. Sheikh Hasina and another*, 2008,[53] the Appellate Division of Bangladesh Supreme Court observed that when our founding fathers sat to incorporate the Bill of Rights in our Constitution they had before them not only the experiences of different states in the working of Bill of Rights but also had before them the International Bill of Rights and as a result we find most of the rights mentioned in the Declaration and the Covenants have been incorporated in some form or other in Part III of the Constitution and some have been recognized in Part II.

The Constitution of Bangladesh, a robust document, not only embodied the principles of constitutionalism, rule of law and human rights, it made specific provisions for realization of these lofty ideas.[54] A provision in the Constitution of Bangladesh should be treated as mandatory unless it appears from the express terms thereof, or by necessary implication from the language used, that is intended to be director.[55]

B. DIFFERENT HUMAN RIGHTS OF MENTALLY ILL PERSONS UNDER INTERNATIONAL HUMAN RIGHTS LAW:

Mentally ill persons are not alien from the rest of the world. They are ordinary human beings and entitled to enjoy all human rights as mentioned in the International Bill of Human Rights or Core Human Rights Instruments or regional human rights instruments without making any distinction of any kind. Apart from these human rights derived from general human rights instruments, there are some special international instruments which bestow specific rights to the people with mental disorder.

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[52] 38 Chancery L. Chrn. (Bangl.).

[53] 37 Chancery L. Chrn. (App. D.); 60 Dhaka L. Rep. (App. DIV.) 69 (Sup. Ct. 2008) (Bangl.).

54 MahmudulIslam, *Preface* to CONSTITUTIONAL LAW OF BANGLADESH (1st ed. 2003).

55 Gani v. Moinuddin, 27 Dhaka L. Rep. (App. D.) DLR (AD) 61(Sup. Ct. 1975) (Bangl.).

The Declaration on the Rights of Mentally Retarded Persons, proclaimed by General Assembly resolution 2856 (XXVI) of 20 December 1971 endowed the mentally retarded persons the few rights including (a) same rights as other human beings, (b) right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance to enable him to develop his ability and maximum potential, (c) right to economic security and to a decent standard of living, (d) right to perform productive work or to engage in any other meaningful occupation of his capabilities, (e) when possible, right to live with family and participate in community life (f) right to a qualified guardian to protect his personal well-being and interests (g) right to protection from exploitation, abuse and degrading treatment, (h) in case of prosecution for any offence, right to due process where his degree of mental responsibility will be considered, (i) right to legal safeguards against every form of abuse.

In addition, the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care adopted by General Assembly resolution 46/119 of 17 December 1991 has given few other rights to the persons with mental illness. These rights are- (a) right to the best available mental health care; right to be treated with humanity and respect for the inherent dignity of the human person; right to protection from economic, sexual and other forms of exploitation, physical or other abuse and degrading treatment; right to non-discrimination on the ground of mental illness; right to exercise all civil, political, economic, social and cultural rights as recognized by international bill of human rights; right to a personal representative or a counsel and fair hearing by an independent and impartial tribunal established by domestic law and right to appeal, when needed (Principle 1), (b) right of the minors to have special care and appointment of personal representative (Principle 2), (c) right to live and work in the community, (Principle 3), (d) right to determination of mental illness in accordance with internationally accepted medical standards rather than political, economic, cultural, religious or social status, (Principle 4), (e) right not to undergo medical examination with a view to determining whether or not he or she has a mental illness except in accordance with a procedure authorized by domestic law, (Principle 5), (f) right to privacy of information, (Principle 6), (g) right to be treated and cared for within community, near relatives or friends and right to treatment suited to his or her cultural background, (Principle 7), (h) right to relevant standard health and social care and protection from harm, including unjustified medication, abuse by other patients, staff or others or other acts causing mental distress or physical discomfort, (Principle 8), (i) right to be treated in the least restrictive environment based on informed and regularly reviewed and revised individual prescribed plan,(Principle 9), (j) right to be treated with free and informed consent, (Principle 11), (k) right to be informed in an understandable language of rights he is entitled to, (Principle 12), (l) right to be recognized everywhere as a person before the law, right to privacy, freedom of communication including consultation with the counsel and representative, freedom of religion or belief, right to have facilities of recreational and leisure activities, education etc., freedom of prohibition from forced and exploited labour, (Principle 13), (m) right to seek legal recourse before competent national authority in case of any injuries caused to him, (Principle 18), (n) right to information (Principle 19). However, the General Limitation Clause of these Principles provides these rights are subject to limitation as prescribed by law and are necessary to protect the health or safety of the person concerned or of others, or otherwise to protect public safety, order, health or morals or the fundamental rights and

freedoms of others.

Jurisprudentially, these two important instruments did not have binding effect as they are part of soft international law. That's why it was necessary to frame an instrument having binding effect. Finally, UN adopted the Convention on the Rights of Persons with Disabilities of 2006 (CRPD, 2006) and its Optional Protocol on 13th December, 2006 at the United Nations Headquarters in New York, and opened for signature on 30th March, 2007 was entered into force on 3rd May, 2008. The Convention is unique in a sense that there were 82 signatories to the Convention, 44 signatories to the Optional Protocol, and 1 ratification of the Convention. This is the highest number of signatories in history to a UN Convention on its opening day. It is the first comprehensive human rights treaty of the 21st century and is the first human rights Convention to be open for signature by regional integration organizations.[56]

At national level, there is no mental health legislation in 25% of countries which comprise nearly 31% of the world's population, although some countries with a federal system of governance may have state mental health laws. Of the countries in which there is mental health legislation, half have national laws that were passed after 1990. Some 15% have legislation that was enacted before 1960, i.e. before most of the currently used treatment modalities became available. The existence of mental health legislation does not necessarily guarantee the protection of the human rights of people with mental disorders. In some countries, indeed, mental health legislation contains provisions that lead to the violation of human rights.[57]

VII. MENTAL HEALTH LAWS IN BANGLADESH:

Bangladesh is a model member of the United Nations and pioneer in development issues and programs.[58]Health is a human right for the citizens of Bangladesh and the government of Bangladesh asserts that right to health is constitutionally guaranteed.[59] The citizenship laws of Bangladesh[60] do not bar a person from obtaining citizenship of Bangladesh on the ground of mental illness. Most of the rights as mentioned in Part III of Bangladesh Constitution which are judicially enforceable are given by the framers of the Constitution to the citizens. Therefore, it can be inferred that at least on its face, persons with mental disability, as citizens of Bangladesh are entitled to enjoy all human rights as contained

56U.N., *Convention on the Rights of Persons with Disabilities* (*lasted visited* on Nov. 21, 2011) <http://www.un.org/disabilities/default.asp?navid=13&pid=150>.

57WHO, *Mental Health Legislation & Human Rights* (2003) (*lasted visited*on Nov. 21, 2011) <http://www.who.int/mental_health/resources/en/Legislation.pdf>.

58Kofi Annan, U.N. Sec'y Gen. Address at the Occasion of the Twenty Fifth Anniversary of Bangladesh's Membership to the United Nations (Sept. 1999).

59 The health chapter of the Fourth Five-Year Plan (1990-95) began with the premise that access to health is a fundamental right of a person. The Fifth Five-Year Plan (1997-2002) states that: "Providing medical care is the constitutional obligation of the government."<http://www.bdix.net/sdnbd_org/world_env_day/2001/sdnpweb/sdi/metadata/fifth5-yesr-plan/325.html>.

60Bangladesh Citizenship (Temporary Provisions) Order (President's Order No. 149 of 1972), Citizenship Act (Act II of 1951) (Bangl.).

in Bangladesh Constitution, 1972.

Article 27 of the Bangladesh Constitution, 1972, provides that all citizens are equal before law and are entitled to equal protection of law. This article is plain and absolute and should be interpreted in a way that all citizens are equal irrespective of any status i.e. age, race, ancestry, place of origin, color, religion, national or ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, record of offenses, marital status, family status or disabilityetc.

The principle legislation relating to mental health in Bangladesh is the Lunacy Act, 1912 (Act No. IV of 1912). Before this Act of 1912, the previous Lunacy Act of1858 of India was enacted to provide guidelines for setting up mental asylums and procedural checks for admission and treatment on the patients with a view "to segregate those who by reasons of insanity were troublesome and dangerous to their neighbors." This Lunacy Act, 1912 is age-old legislation and after its enactment in hundred years no significant amendment was made except in 1973 when the lawmakers amended 'Bangladesh' for 'Pakistan', 'Taka' to 'Rupee' etc. The most shocking part of this law is that people with mental disability are treated as criminal lunatic which is a serious human rights concern.

Regulation 224 of the Police Regulations of Bengal, 1943 contains specific provisions which refer to roaming and dangerous lunatics. It says that it shall be the responsibility of the police officer to arrest and to send to District Headquarter and with a report containing Form No. 296. Also in his report he must inform it to Magistrate about any instance of negligence or cruel behavior in his care, treatment when his family members or friends were requested to do so. However, the officer should not disturb any such people who are not dangerous and harmful.

It is duty of police-officer to afford every assistance within his power to disabled or helpless persons in the streets, and to take charge of intoxicated persons and of lunatics at large who appear to be dangerous or incapable of taking care of themselves under § 16 (a) of the Khulna Metropolitan Police Ordinance (Ordinance No. LII of 1985).

In 2001, the government of Bangladesh enacted the Bangladesh *ProtibondhiKallayanAin* [Disable Welfare Act] and in 2006 rules i.e. *ProtibondhiKallayanBidhimala*[Disable Welfare Rules] were framed. This law is a general law and provides for different issues relating to mentally disable person. However, this law does not provide for any specific right for such people. Besides, there are some isolated provisions in different laws of the country which deals with different issues of people with mental disability like education, marriage, property etc.

VIII. LIMITATIONS OF BANGLADESH *PROTIBONDHIKALLAYANAIN*, 2001:

Both the Bangladesh *ProtibondhiKallayanAin*, 2001 and the *ProtibondhiKallayan* Rules, 2006 are general law and provides for general provisions for the welfare of disable persons and there are no specific provisions for the protection of people with mental disorder. The laws provide for duties and responsibility of National Co-ordination Committee, Executive Committee and District Committee. Without giving specific rights to the disable persons, the law tactfully incorporates rights of disable persons as the responsibilities of these

Committees. This is believed to be eyewash and this leaves ample scope for the slow implementation of the laws. Whereas, Chapter VIII, § 81 of the Indian Mental Health Act, 1987 deals with human rights issues of mentally ill persons and under this section it is mentioned that indignity (whether physical or mental) or cruelty should not be used for purposes of research, unless that research benefits him for purposes of diagnosis or treatment and unless he is a voluntary patient. Chapter VII, §§ 49 (cases of attempted suicide), 50 (confidentiality) and 51 (informed consent) of the Pakistan Mental Health Ordinance, 2001 deals with Protection of Human Rights of Mentally Disordered Persons. § 49 protects a person with mental disorder in case of attempted suicide, § 50 prohibits the publication of identity to public through press and media of such person unless he wills and § 51 provides for written informed consent before conducting any investigation and research. Chapter III of the Mental Health Act, 2007 of UK gives some safeguards to the patients.

IX. HUMAN RIGHTS OF PEOPLE WITH MENTAL DISABILITY UNDER THE UN CRPD, 2006

The UN Convention on Disabilityof 2006 equally includes mentally disable persons alongwith physical and intellectual disabilities under article 1 to the Convention. Article 2 to the Convention defines "Discrimination on the basis of disability". It means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

The United Nations Convention on the Rights of Persons with Disabilitiesof 2006 provides in broad terms the following right to persons with mental disabilities- (a) Equality and non-discrimination (Art. 5), (b) Right to life (Article 10), (c) Equal recognition before the law (Article 12), (d) Access to justice (Article 13), (e) Liberty and security of person (Article 14), (f) Freedom from torture or cruel, inhuman or degrading treatment or punishment (Article 15), (g) Freedom from exploitation, violence and abuse (Article 16), (h) right to respect for his or her physical and mental integrity on an equal basis with others (article 17), (i) right to movement and nationality (Article 18), (k) right to live independently and to include in the community (Article 19), (l) right to Personal mobility (Article 20), (m) Freedom of expression and opinion, and access to information (Article 21), (n) right to privacy and respect for home and the family (Articles 22 & 23), (o) right to education (Article 24), (p) right to health, Habilitation and rehabilitation(Articles 25 & 26), (q) right to work and employment (Article 27), (r) right to adequate standard of living and social protection (Article 28), (s) right to Participation in political and public, cultural life, recreation, leisure and sport (Articles 29 & 30).

The UN Convention on the Rights of the Persons with Disabilities of 2006 marked a "paradigm shift" in attitudes and approaches to persons with disabilities. It takes to a new height the movement from viewing persons with disabilities as "objects" of charity, medical treatment and social protection towards viewing persons with disabilities as "subjects" with rights, who are capable of claiming those rights and making decisions for their lives based on

their free, and informed consent as well as being active members of society.[61]

X. STATUS OF INTERNATIONAL HUMAN RIGHTS INSTRUMENTS IN BANGLADESH:

As mentioned earlier, in Bangladesh 'human rights' means the life, liberty, equality and dignity of a person which are ensured by the Constitution of the People's Republic of Bangladesh, 1972 and the human rights, as declared in different international human rights instruments, which are ratified by the Bangladeshi government and which are judicially enforceable in Bangladeshi Courts of law.[62] In this definition, there are two parts- (a) life, liberty, equality and dignity of a person ensured in Bangladesh Constitution, 1972, (b) human rights derived from international human rights instruments which are ratified by Bangladeshi government and judicially enforceable in Bangladesh Courts. Pertinent to mention here that the life, liberty, equality and dignity of a person ensured in Bangladesh Constitution, 1972 since they are placed in part III of Bangladesh Constitution are automatically judicially enforceable pursuant to the provisions of Article 44(1) of the Constitution, 1972, which says that *the right to move the High Court Division . . . for the enforcement of these rights . . . are guaranteed.*

Bangladesh has ratified core international human rights instruments.Though International Convention, however, could be recognized upon ratification *ipso facto* but could only be applied in our Country only when its provisions are incorporated in our Municipal laws and thus for enforcing any International Covenants under any Convention to which this Country is a signatory, the provisions of the Convention have to be incorporated in our domestic law.In the case of *M/s. Supermax International Private Ltd. Vs. Samah Razor Blades Industries, 2004*,[63]Mohammad FazlulKarim J. referred the following lines from the case of *H.M. Ershad v. Bangladesh and others*, [64] ***7 BLC (AD) 67*** [per **BimalenduBikashRoyChowdhury J.**]:

> "True it is that the Universal Human Rights norms, whether given in the Universal Declaration or in the Covenants, are not directly enforceable in national Courts. But if their provisions are incorporated into the domestic law, they are enforceable in national Courts, the local laws, both constitutional and statutory, are not always in consonance with the norms contained in the international human rights instruments. The national Courts should not, I feel, straightaway ignore the international obligations, which a country undertakes. If the domestic laws are not clear enough or there is nothing therein the national Courts should draw upon the principles incorporated in the international instruments. But in the case where the domestic laws are clear and inconsistent with the international obligations of the state concerned, the national Courts will be obliged to respect the national laws, but shall draw the attention of the law makes to such inconsistencies."

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[61]National Human Rights Commission&New Delhi and National Institute of Mental Health and Neuro Sciences, *Mental Health Care and Human Rights*, at20 (D.Nagaraja&Pratima Murthy eds., 2008) <http://nhrc.nic.in/Publications/Mental_Health_Care_and_Human_Rights.pdf>.

[62]Bangladesh National Human Rights Commission Act § 2(f) (2009) (Act No. LIII of 2009) (Bangl.).

[63] 33 Chancery L. Chrn.;Appellate Division Cases II 593 (2005) (Bangl.).

[64]7 Bangladesh L. Chrn. (App. D.) 67 (Bangl.).

Bangladesh has ratified the UN Convention on Rights of People with Disability of 2006 ("CRPD") on 30 November 2007 and the Optional Protocol on 12 May 2008. Therefore, the Bangladeshi courts of laws are bound to give effect to the provisions of this UN CRPD of 2006 and its protocol, 2008.

XI. HUMAN RIGHTS OF PEOPLE WITH MENTAL DISORDER IN BANGLADESH:

In Bangladesh people with mental disorders have been suffering from discrimination, fear, anger, embarrassment, etc. Even the parents of these patients and family members do not respect them. Persons who are experiencing mental health challenges or who have a mental health disability are experiencing routine human rights abuses by those entrusted with the care, treatment, and social support. Their inabilities to express their needs and to bring forth allegations of neglect or abuse make the situation worse.

UN Principles for the protection of persons with mental illness and the improvement of mental health care, GA Resolution No. 46/119 of December 17, 1991 ('the MI Principles') provides that there shall be no discrimination on the grounds of mental illness. "Discrimination" means any distinction, exclusion or preference that has the effect of nullifying or impairing equal enjoyment of rights. Special measures solely to protect the rights, or secure the advancement, of persons with mental illness shall not be deemed to be discriminatory. Discrimination does not include any distinction, exclusion or preference undertaken in accordance with the provisions of the present Principles and necessary to protect the human rights of a person with a mental illness or of other individuals.

The families with such patients are already in mental trauma and thus they are in need to co-operation, not hatred nor teasing, mockery from the other community members.

The Human Rights Committee in its General Comment[65] i.e. in General Comment No. 03 on Implementation of human rights at the national level (Art. 2), 07/29/1981, articulated that the implementation does not depend solely on constitutional or legislative enactments, which in themselves are often not *per se* sufficient. The Committee also observed that the obligation under the Covenant is not confined to the respect of human rights, but States parties have to ensure the enjoyment of these rights to all individuals under their jurisdiction. In doing so, the state parties should inform the individuals about their rights under the Covenant and administrative and judicial authorities should be aware of their obligations in the implementation of the Convention rights.

The Human Rights Committee in its General Comment No. 06 on the right to life (art. 6), 04/30/1982 observed that right to life is the supreme right and this right cannot be derogated even in public emergency situations.

The Human Rights Committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, color, sex, language, religion, political or other

[65] The Human Rights Committee, as established by the provisions of the International Covenant on Civil and Political Rights, provides interpretation of the content of human rights provisions on thematic issues and that is known as general comments.

opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[66]

UN Committee on the Rights of the Child also recommended Bangladesh government to develop a separate comprehensive policy on the critical issues affecting the rights of adolescents, including mental health and reproductive health services.[67]

A. RIGHT TO LIFE:

The right to life is the most important human right. Bangladesh Constitution, 1972, both in the Directive State Policy and in the preservation of the fundamental rights, provided that the State shall direct its policy towards securing that the citizens have the right to life, living and livelihood. Thus, our country is pledge bound within its economic capacity and in an attempt for development to make effective provision for securing the right to life, livelihood, etc.[68] There is a clear and positive duty cast upon the Government under the Constitution to provide for the people *inter alia,* the basic necessities of life (including food, clothing, shelter, education and medical care), the right to work and the rights of social security, which read together with the fundamental rights guaranteed by the Constitution.[69]Right to life under Articles 31 and 32 of the Constitution of Bangladesh is fundamental to all fundamental rights guaranteed under the Constitution of the Republic and that right to life includes, among others, right to adequate standard of living, right to health care, right to have unpolluted air and noise.[70] This declaration in the Constitution is not mere empty words. These guarantees are of fundamental in nature, bestowed upon the people of Bangladesh by its Constitution. The expression 'life' enshrined in Article 32 includes everything which is necessary to make it meaningful and a 'life' worth living, such as, among others maintenance of health is of utmost importance and preservation of environment and hygienic condition are of paramount importance for such maintenance of health, lack of which may put the 'life' of the citizen at naught.[71]

This expression 'life' does not mean merely an elementary life or sub-human life but connotes in this expression the life of the greatest creation of the Lord who has at least a right to a decent and healthy way of life in a hygienic condition.[72]

In the case of *KalamVs. Bangladesh*,[73]at paragraph No. 6, his Lordships Mr. Justice

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[66] Human Rights Committee, General Comment No. 18 on Non-Discriminationpara.6(Nov. 10, 1989) <http://www.unhchr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e?Opendocument>.

[67] 51st Sess., Consideration of Third and Fourth Periodic Report of the People's Republic of Bangladesh(CRC/C/BGD/4), submitted by States Parties under art. 44 of the Convention, concluding observations of the Committee on the Rights of the Child: Bangladesh, CRC/C/BGD/CO/4, para.64(b), June 26, 2009 <http://www2.ohchr.org/english/bodies/crc/docs/co/CRC.C.BGD.CO.4_en.pdf>.

[68] Blastv. Bangladesh and Others, 36 Chancery L. Chrn.; 13 Bangladesh L. Chrn. 384 (High Ct. 2008) (Bangl.).

[69] *Id.*

[70] Ullah, Advocate and Others v. Bangladesh, 31 Chancery L. Chrn. (High Ct. 2002); 55 Dhaka L. Rep. 1 (High Ct. 2003) (Bangl.).

[71] Farooque v. Bangladesh and Others, 30 Chancery L. Chrn. (High Ct. 2001); 55 Dhaka L. Rep. 69 (High Ct. 2003) (Bangl.).

[72] *Id.*

[73] 21 Bangladesh L. Decs.446 (High Ct. 2001) (Bangl.).

ABM KhairulHaque while dealing with slum dwellers observed that:

> "Bangladesh came into being as a fulfillment of the dreams of the millions of Bangalis so that they can breathe in an independent country of their own. They knew that their country is not rich but expected that social justice shall be established and the people shall be provided with the bare minimum necessities of life . . . It should not be forgotten that God in His unbounded mercy provides sunshine, air, water, food and all other amenities of life for all, high or low, rich or poor, for every living being, without any discrimination. The Constitution of the People's Republic of Bangladesh envisages a welfare state and makes all citizens equal in the eye of law. As such, all citizens have got equal rights in every sphere of life including food, shelter, health-care, education and so forth which is fundamental in nature. It is not the fault of the petitioners and slum dwellers that their Government fails to provide them with such bare necessities of life . . . the slum dwellers, poorest of the poor they may be, without any future or dreams for tomorrow, whose every day ends with a saga of struggle with a bleak hope for survival tomorrow, but they are also citizens of this country, theoretically at least, with equal rights. Their fundamental rights may not be fully honored because of the limitations on the part of the State but they should not be treated, for any reason, as slaves or chattels, rather as equal human beings and they have got a right to be treated fairly and with dignity, otherwise all commitments made in the sacred Constitution of the People's Republic, shall prove to be a mere mockery."

The same statement is also true for people with a mental disability.

People with mental illness are continuously subject to inhumane and degrading treatment, which is also a clear violation of right to life. In the case of *KalandiarKabirVs. Bangladesh and others*, 2002,[74] Justice Md. HamidulHaqque referred the judgment delivered by Justice Bhagawati in *Francis Coralie vs. Union Territory of Delhi* ***1981 AIR 746*** which postulates that:

> "We think that right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms . . . Every act which offends against or impairs human dignity would constitute deprivations *pro tanto* of this right to life . . . any form of torture or cruel or inhuman or degrading treatment would be offensive to human dignity and constitute an inroad to his right to live . . ."

B. RIGHT TO LIBERTY AND SECURITY TO PERSON:

Personal liberty and security to person are constitutionally guaranteed rights under article 31 and 32 of the Bangladesh Constitution. Not all people with mental disability are violent, albeit many of these people are reported to be kept in chains or at least compelled them to be confined in houses. To keep people with mental disability in chains or naked is

[74] 31 Chancery L. Chrn. (High Ct. 2002); 54 Dhaka L. Rep. 258 (High Ct. 2002) (Bangl.).

also serious human rights violation concern. Moreover, the situation becomes worse in times of external events like natural calamities or disasters. In such situations the people in charge of them or family members forgot about them and left these people in more danger.

C. PROTECTION AGAINST DISCRIMINATION:

All citizens are equal in the eye of law and are entitled to have equal protection of law in Bangladesh. Therefore, people with mental disorder are also equal in the eye of law and are entitled to have equal legal protection. Article 28(4) of the Constitution provides that nothing in this article shall prevent the State from making special provision in favor of women or children or for the advancement of any backward section of citizens. Here also, the scope of the article is made very limited i.e. the government can only make special provision for women, children and backward section of citizens. In the case of *State Vs. Md. RoushanMondal @ Hashem, 2006,*[75] while examining the provisions of article 28(4) of the Constitution, 1972, it was held that the framers of the Constitution have given the power even to promulgate discriminatory laws favoring the womenfolk and children. Hence it can be said that the Act is a beneficent legislation purposely enacted to give beneficial effects to a particular community of women and children and once enacted the rights which accrue cannot be frittered away by subsequent enactment. However, the phrase "backward section of citizens" means the indigenous people of the country and the scheduled class[76] and does not include the people with mental disability.

The Constitution of Bangladesh herald in articles 28(1), 28(3) and 29(2) that the state shall not discriminate any citizens to access to any place of public entertainment or resort, or admission to any educational institution and any employment or office in the service of the Republic. In these above stated articles, the grounds of discrimination are religion, race, caste, sex or place of birth only. By use of the word 'only' before these grounds makes the periphery of discrimination very limited and thus there is possible scope to interpret that other grounds of discrimination like any type of disability, color, language, religion, political or other opinion, national, ethnic or social origin, legal or social status, age or property as mentioned in different international human rights instruments can be excluded here.[77]

However, if any law is enacted with discrimination other than these grounds i.e. religion, race, caste, sex or place of birth, that law shall be tested on the touchstone of article 27 of Bangladesh Constitution, 1972 and may be found violative of the equality clause.[78] In the unreported case of *BLAST and others v Bangladesh and others* ['PSC Disability Discrimination' Case], Writ Petition No. 2932 of 2010, a lawyer with visual disabilities was denied the opportunity for admission to examinations for the Public Service Commission (PSC) because of Schedule III of the Bangladesh Civil Service (Age, Qualifications and Examinations for Direct Recruitment) Rules, 1982 ('the BCS Rules') which bars persons

[75]35 Chancery L. Chrn. (High Ct. 2006); 59 Dhaka L. Rep. 72 (High Ct. 2007) (Bangl.).
[76]HAMID, *supra* note 43, at 56.
[77]Dorairajan v. State of Madras, AIR 1951 Mad 120, IIMLJ 404 (1950) <http://www.indiankanoon.org/doc/1806386> (India).
[78]MAHMUDUL ISLAM, CONSTITUTIONAL LAW OF BANGLADESH 153-55 (2nd ed. 2003).

with disabilities from being eligible for employment in public service. The High Court Division of Bangladesh Supreme Court issued a Rule Nisi to show cause as to why those provisions of the BCS Rules should not be declared to be unconstitutional to the extent that they are inconsistent with the fundamental rights of persons with disabilities to equality, equality of opportunity and the right to a profession. Here, the Bangladesh Court considered this issue on 'equality' grounds.

D. RIGHT TO HEALTH AND MEDICINE:

Right to health and medicine are important aspects of right to life. In Bangladesh people with mental disability are continuously deprived of their right to health and medicine. It is reported that around 10 percent of mentally ill patients at the National Institute of Mental Health are discharged before completing their course of treatment because they cannot afford the inflated costs of hospital beds. In 2009 and 2010, the charge for a hospital bed has almost tripled. In 2008, the cost of a hospital bed per night was Tk. 80. Later it increased to Tk. 125 and now it costs Tk. 225. For a month long stay in hospital, patients now pay Tk. 6750 whereas two years ago it cost Tk. 2400. Though the Authority claims that 40 % of hospital beds are free of charge, it is becoming increasingly difficult to obtain one. Besides, there is no separate ward for children.[79] As a result, most of the people with mental disorders undergo treatment from local or spiritual healer and thus their rights to health and medicine are seriously violated.

In mental health hospitals or clinics people do not get proper treatment because of lack of resources and experts. In India, a country with similar socio-economic and legal set up like Bangladesh, the Indian National Human Rights Commission in an empirical study of mental health hospitals in the country, made a damning indictment of the state of mental health institutions. The Commission found two types of hospitals- (a) the first type does not deserve to be called 'hospitals' or mental health centers. They are '*dumping grounds*' for families to abandon their mentally ill member, for their economic reasons or lack of understanding and awareness of mental illness. The living conditions in many of these settings are deplorable and violate an individual's right to be treated humanely and live a life of dignity.Despite all advances in treatment, the mentally ill people in these hospitals are forced to live a life of incarceration and (b) the second type of 'hospitals' are those that provide basic living amenities. Their role is predominantly custodial and they provide adequate food and to keep patients manageable and very little effort is made to preserve or enhance shelter.[80]

Medical and support staffs working in these hospitals are not properly trained and therefore they fail to consider the special nature of these patients. Management of an institution like the mental hospital requires flow of human love and affection, understanding and consideration for mentally ill persons; these aspects are far more important than a routinized, stereotyped and bureaucratic approach to mental health issues.[81]

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[79]ShaheenMollah&MahbubaZannat, *Little Care for Mental Health, Hiked Hospital Bills Lead to Discharge of 10pc Patients Before Cure*(lasted visited Nov. 21, 2011) <http://www.thedailystar.net/story.php?nid=124176>.
[80]National Human Rights Commission,*supra* note 61, at 270.
[81]Banik v. State of West Bengal, Supp (4) Supreme Court Cases 505 (1995) (India).

XII. TOWARD THE ENACTMENT OF MENTAL HEALTH LEGISLATION IN BANGLADESH:

The fundamental aim of mental health legislation is to protect, promote and improve the lives and mental well-being of citizens. Presence of mental health legislation does not guarantee the respect and protection of human rights of people with mental disorder, because mental health legislation of most of the countries were drafted to protect the public from 'dangerous' patient and the human rights issues of them were ignored. WHO revealed that 75% of countries around the world have mental health legislation, only half (51%) have laws passed after 1990, and nearly a sixth (15%) have legislation dating back to the pre-1960s. Physical, sexual and psychological abuse is an everyday experience for many with mental disorders. In addition, they face unfair denial of employment opportunities and discrimination in access to services, health insurance and housing policies.[82]

The government of Bangladesh has established the National Human Rights Commission (NHRC) by virtue of § 3 of the Human Rights Commission Act (Act No. 28 of 2009). The responsibilities of the NHRC are mentioned in § 11 of the Act. The uniqueness of the law as it is mentioned in the explanatory note by the Minister, Ministry of Law, Justice and Parliamentary Affairs is that § 11 paragraph 1 (a) of the Act provides that the Commission is empowered, by its own initiative or on an application made by a victim or any person on his behalf, to make an inquiry regarding the violation of human rights by any person, government or public office or organization and § 13 of the same Act provides that if the violation of human rights is proved after the inquiry, the Commission shall try to settle the issue amicably and if amicable settlement is not possible then the Commission shall make a recommendation to the authority to file a suit or to start a proceeding against the person so liable. Besides, § 11 paragraph 1(c) provides that NHRC shall have the responsibility to visit places where persons are detained for medical treatment purposes and to submit reports with recommendations to improve the conditions and environment of such places. Moreover, in broad terms, it can be said that § 11 of the Act empowers the NHRC to do everything for the promotion and protection of human rights in Bangladesh.

As stated earlier, the existing Bangladesh *ProtibondhiKallayanAin*, 2001 and the *ProtibondhiKallayan* Rules, 2006 do not provide for any specific provisions for the protection of people with mental disorders rather provide for duties and responsibility of National Co-ordination Committee, Executive Committee and District Committee. Therefore, this is high time to enact a comprehensive national legislation on mental health. In SAARC region, India has enacted the Mental Health Act in 1987, Pakistan enacted the Mental Health Ordinance in 2001, Afghanistan enacted similar legislation in 1997, Nepal revised its mental health law of 1964 and has already drafted its new mental health law which awaits for approval of the parliament, Sri Lanka also revised its 1956 legislation and started drafting an updated law since 2000. In contrast, Bangladesh has also drafted the Mental Health Act in 2002 which is yet to pass in the national parliament. We are optimistic that the government

[82]WHO, *Resource Book on Mental Health, Human Rights and Legislation*, at 1 (2005) (lasted visited Nov. 21, 2011) <http://www.who.int/mental_health/policy/resource_book_MHLeg.pdf>.

shall take immediate initiative to place it before the parliament, pass it and take necessary steps for its proper implementation.

XIII. FINDINGS AND SUGGESTIONS:

1. We, the general people need to change our attitude toward mentally ill persons and treat them with respect and care. Mass media has a great role to play and to give this message to the people that mental illness is like other illness of the body and can be curable in most of the cases. And also it is not true that all persons suffering from mental illness are violent. There are a lot of misconceptions about mental illness even among general doctors; like general people they wrongly advise mental patients not to take psychotropic medications as they believe it will cause harm to their cognitive functions. Our current national attitude towards mental health and illness is very frustrating. Mental patients are regarded as burden of our family and society. The tendency of the family members of mental patients is to hide the issue rather than discuss and seek help from mental health professionals (Psychiatrists, Psychologists, doctors and other professionals trained in Mental Health). But in case of physical illness like diabetes and heart diseases they do seek help without any hesitation.[83]
2. The experts with mental health issues are very few and the facilities in the mental health hospitals are inadequate. What is also alarming is that the amount of money spent for mental health services by the government health department in 2005 was Taka 10,62,54,224.00 which was less than 0.5% of health care expenditures by the government. Of all the expenditures spent on mental health, 67% are devoted to mental hospital.[84] Allocation of at least 5 per cent of the health budget should be provided for mental health services, which is only 0.4 per cent at present. The Mental Health Act is yet to be passed even so many years after independence. The majority of development and poverty alleviation programs do not reach persons with mental or psychosocial disabilities. For example, between 75% and 85% do not have access to any form of mental health treatment. In high-income countries, between 35% and 50% of people with severe mental health conditions do not receive needed treatment.[85] Mental and psychosocial disabilities are associated with rates of unemployment as high as 90%. Furthermore people are not provided with educational and vocational opportunities to meet their full potential.[86] Inclusion of psychiatry in the undergraduate medical curriculum and incorporation of the issue of mental health in

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83 Dr. ZillurRahman Khan, *World Mental Health Day in Bangladesh, 2009: No Health Without Mental Health*(*lasted visited*on Nov. 21, 2011)<http://www.bangladesh2day.com/newsfinance/2009/October/10/No-health-without-mental-health.php>.

84 WHO, *supra* note 24.

85 WHO World Mental Health Survey Consortium.*Prevalence, Severity and Unmet Need for Treatment of Mental Disorders in the WHO World Mental Health Surveys*, 291 J. AM. MED. ASS'N2581, 2590 (2004) <http://jama.ama-assn.org/content/291/21/2581.full.pdf+html>.

86 Dr. AlaAlwan,*Mental Health and Development:Targeting People with Mental Health Conditions as a Vulnerable Group*, at 21 (WHO Mental Health and Poverty Project, 2010) (*lasted visited*on Nov. 21, 2011) <http://whqlibdoc.who.int/publications/2010/9789241563949_eng.pdf>.

school-level textbooks are important steps for achieving the desired goal.

3. Definition of the term 'mental health' should be clearly in line with the definition given by WHO. Without leaving it for judicial intervention the law should spell out clearly the definition and in doing so help can be taken from the International Classification of Diseases (ICD-10) produced by the World Health Organization (WHO).All existing legislation with mental health provisions should be revised and use of different terms e.g. different terminologies e.g. lunatic or unsound, idiot, insane, mentally retarded and defectives, mental ill-health, mental harm, mental disability, mental incapacity, mental derangement, mental infirmity should be rearranged to avoid complexities.
4. The Human Rights Committee in its General Comment No. 18 on non-discrimination dated 11/10/1989 noted that in a number of constitutions and laws not all the grounds on which discrimination is prohibited are enumerated. Same is the case of Bangladesh and articles 28 and 29 only consider religion, race, caste, sex or place of birth only the grounds of discrimination. Hence, all grounds of discriminations are not considered and therefore, the government may consider to include "**age, race, ancestry, place of origin, color, religion, national or ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, record of offenses, marital status, family status or disabilityetc.**" as grounds of discrimination.
5. It is very important to frame rules instantly with the enactment of the primary legislation i.e. the Mental Health Act. Because considering the seriousness of this issue, it will not be possible to amend the law each time, rather it will be easier to change the secondary legislations like rules. It is also expected that both in law and rules, the principal mental health problems and barriers to the implementation of mental health policies and plans will be found out and will be made in the light of international human rights standards, especially with the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (MI Principles), the Standard Rules for Equalization of Opportunities for Persons with Disabilities (Standard Rules), the Declaration of Caracas, the Declaration of Madrid and other standards, e.g. WHO's Mental health care law: ten basic principles.
6. The government can think of setting up of a special court or tribunal i.e. mental health tribunal consisting of a specially trained judge with or without psychologist and/or psychiatric to deal with different issues relating to mental health. In a number of domestic laws in Bangladesh, there are provisions that a person in incapable of holding or continue an important post if he is declared as unsound by a competent national Court. For example, Article 122 of Bangladesh Constitution provides that if a competent Court declares someone as unsound mind, he shall not be registered as a voter. It is a problem for ordinary courts of law to decide such cases. Hence, such tribunal, if established, will provide expert decision to declare a person unsound.
7. Keeping mental health patients in dumping station like hospitals without proper food, medicine, treatment and in unhygienic environment and dress are age-old ideas and do not go with the spirit of universal brotherhood. The *Declaration of Caracas* (1990) pointed out that exclusive reliance on inpatient treatment in a psychiatric hospital isolates patients from their natural environment, thereby generating greater disability.

Therefore, stress should be given to treat such people within society. One of the best way of treatment can be community psychiatry approach where people with mental illness shall be treated in community can be considered.

8. The police of Bangladesh has great role to play in dealing with mental health patients who are violent in nature. In UK, the police are commonly a first point of contact for a person in a mental health crisis. Every year, for example, some 11,000 people are taken to a police station as a 'place of safety' under the Mental Health Act. Up to 15% of incidents with which the police deal are thought to have some kind of mental health dimension.[87]
9. These mental health hospitals are reluctant to share the information about medication and treatment with the family members of such patient. Most of the time family members do not even know that they are entitled to have this information for the future treatment of such patients and also to check whether there was any wrong treatment. This is also illegal as per the provisions of the Right to Information Act, 2009. Therefore, the government should take initiative to compel these institutes to share the full and systematic medical treatment with the family members at the time of release from the hospitals.
10. We understand that the Bangladesh National Human Rights Commission (NHRC) is still in its formative stage and therefore needs some time to act as an institution in true sense. However, since NHRC is specifically empowered by its law i.e. the Bangladesh National Human Rights Commission Act, 2009, it should prioritize it to make regular visits to mental health treatment centers to monitor the overall human rights issues there. Simultaneously, the government should consider establishing a national regulatory body to monitor the activities of mental health hospitals.
11. In this whole process of mental health initiative stakeholders and NGOs should be included. Bangladesh is a breeding place and model country for NGOs and Shahdeen Malik observed that one in every four local NGOs list human right and legal aid as one of their activities.[88] These NGOs can also play lead role in making general people aware of this issue. There is no consumer association in the country who could run this campaign about this issue while there is only one family association with 40 members and about 10 NGOs in the country are involved in individual assistance activities in mental health.[89]
12. Primary health care centre is the first contact centre where people seek treatment. If mental health service is integrated into primary health care package, people with mental illness will get better and faster treatment.
13. The mental health hospitals are not properly equipped with human resources. Mental health nurses and support staffs are not well-trained in terms of standard rather these activities are performed by illiterate people. The employers do not consider this issue seriously and should be informed that because of the misconduct or unlawful dealings

[87] Paul Bather, Rob Fitzpatrick &Max Rutherford, *The Police and Mental Health* (Sainsbury Center for Mental Health, 2008) (*lasted visited*on Nov. 21, 2011) <http://www.centreformentalhealth.org.uk/pdfs/briefing36_police_and_mental_health.pdf>.

[88] Dr. Shahdeen Malik, *Human Rights and the Role of the Judiciary*, *in*HUMAN RIGHTS IN BANGLADESH, A STUDY OF STANDARDS & PRACTICES 167 (Bangladesh Institute of Law and International Affairs, 2001).

89 WHO,*supra* note 24.

of these sub-standard employees during his course of employment the employer can be vicariously liable.

14. Resource mobilization including financial support and assistance may pose a threat to the government in the implementation of development projects relating to people with mental disorders. However, if the government is truly willing to do so it should not be a problem. The government may invite financially solvent citizens to donate in the government fund and the government may declare the donation a tax free one, private-public partnership may be solicited and corporate social responsibility may be encouraged.

XIV. CONCLUSION

Mental health is more than absence of mental disorders. It is a state of well-being in which individual can realize his or own abilities, can cope with the normal stress, can work productively and fruitfully and is able to make contribution to his or her ability. Most diseases of medical science are preventable and treatable and few are curable (infectious diseases or some surgical conditions). This is also true for mental illness. The most important issue for prevention and treatment of mental illness is mass public awareness, in which both electronic and print media can play a crucial role. Besides, the government has to take pioneer role in this regard. Human rights of people with mental illness are routinely violated in every sphere of life. Therefore, we all concerned members of the society have common but differentiated responsibility to promote and protect their human rights. We will never be able to build up an ideal society based on rule of law and human rights while ignoring or violating the human rights of these people with mental illness who constitute significant part of citizens.

KEYWORDS

Human Rights, Mental Health, People with Mental Disorder, Bangladesh, Bangladesh Constitution, Bangladesh Laws, World Health Organization, International Human Rights Instruments.

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NORTH KOREAN ESCAPEES' RIGHT TO ENTER SOUTH KOREA: AN INTERNATIONAL LAW PERSPECTIVE

Andrew Wolman[*]

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ABSTRACT

This essay poses the question of whether North Korean escapees have a right to enter and reside in South Korea under international law. The answer to this question may seem obvious to those unfamiliar with inter-Korean relations. Of course, all countries have the right to determine whether foreigners may gain entry to their countries; that is a fundamental attribute of sovereignty. In the context of the Korean peninsula, however, the answer is not so simple. Under South Korean law, individuals born in North Korea are normally considered South Korean nationals, and under the International Covenant on Civil and Political Rights and (arguably) customary international law, countries have a general duty to allow entry and residence to their own nationals. The interesting question, then, is whether this general duty extends also to the specific circumstances of the Korean peninsula, when most North Koreans have relatively little connection to South Korea, despite their formal South Korean citizenship. After considering different

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aspects of the issue, this essay will conclude that South Korea does have a duty to accept North Korean escapees under the International Covenant on Civil and Political Rights. However, this duty is solely treaty-based, and customary international law does not currently impose any analogous requirements.

I. INTRODUCTION

Ever since the drafting of its nationality laws in 1948, South Korea has considered individuals born in North Korea to be South Korean nationality.[1] In general, this South Korean nationality has been more theoretical than practical. After all, South Korean authorities have little to no ability to influence the lives of individuals in North Korea, regardless of nationality. However, as more and more North Koreans have succeeded in escaping from their closed society, they are increasingly attempting to claim the natural fruit of their South Korean nationality: the right to enter and live in South Korea.

The number of such escapees was relatively small prior to the early nineties.[2] However, in the wake of the devastating famine of 1995-1998, thousands of North Koreans left their country in search of food, and the number of escapees continues to be high, due in part to economic deprivation and in part to the brutal repression of the Kim Jong Il regime. In October 2010, South Korea accepted its 20,000th North Korean escapee;[3] a substantial figure, but still small in comparison to the number of North Korean escapees currently in China (estimates range from 10,000 to 300,000)[4] or to the potential number of escapees that could result from a regime collapse or environmental catastrophe.

One of the most sensitive questions of Korean immigration policy has been how to treat these immigrants from the north. Until the early nineties, North Korean escapees – or defectors, as they were then generally called – were greeted with open arms and generous financial subsidies.[5] Over the last two decades, however, the increased volume of escapees and closer inter-Korean ties have sparked more of a debate as to whether it is good policy to always allow entry to North Koreans. To many South Koreans, a welcoming policy is an important demonstration of the fundamental unity of the Korean peninsula, as well as a humanitarian necessity. Others argue that despite their formal South Korean nationality, North Korean escapees should be admitted selectively to avoid social and economic disruption.[6] Some also fear that if South Korea truly welcomed all North Korean escapees, it would destabilize the North Korean regime, and they fear the results of sudden regime

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[1] For the sake of readability, this essay will refer to the Democratic People's Republic of Korea as 'North Korea' and the Republic of Korea as 'South Korea'.

[2] Andrei Lankov, *Bitter Taste of Paradise: North Korean Refugees in South Korea, in* THE NORTH KOREAN REFUGEE CRISIS: HUMAN RIGHTS AND INTERNATIONAL RESPONSE 53, 54 (Stephan Haggard & Marcus Noland, eds., 2006).

[3] Lee Sun-Young, *Number of Defectors to Top 20,000*, KOR. HERALD, Oct. 6 2010.

[4] Rhoda Margesson et al., *North Korean Refugees in China and Human Rights Issues: International Response and U.S. Policy Options*, 4 (Cong. Research Serv., CRS Report for Congress Order Code RL34189, Sep. 26, 2007), *available at* http://www.fas.org/sgp/crs/row/RL34189.pdf.

[5] Lankov, *supra* note 2, at 55.

[6] *Id.*, at 66.

collapse.[7]Some also object to classifying North Korean escapees as South Korean nationals because doing so may harm the escapees' chances of receiving asylum in third countries.[8]

The issue of North Korean escapees' right of entry to South Korea is usually addressed through the framework of domestic law and policy. This essay aims to take a step further, and examine the question of whether Korea has an international law duty to accept all North Korean escapees that wish to settle in the South. The answer to this question is non-obvious.While states clearly may exclude non-nationals,[9] there is, in general, an international law obligation to allow entry to nationals: as one commentator noted, "[t]he duty to admit nationals is considered so important a consequence of nationality that it is almost equated with it."[10] It is far less clear, however, whether this general obligation also applies to the situation of North Koreans seeking entry to South Korea.In one recent case involving a refugee determination for North Korean escapees in the United Kingdom, the tribunal suggested without analysis that any South Korean refusal would be challenged as a violation of international law.[11]This essay will argue that such a challenge would indeed be successful, and that deny in entry to North Korean escapees would be considered a violation of the International Covenant on Civil and Political Rights ('ICCPR').

The essay will be organized as follows. Section II will provide background on the domestic legal framework for allowing entry to North Korean escapees, and an overview of current practices. Section III will investigate whether the ICCPR requires the South Korean government to accept North Korean escapees. Section IV will address whether customary international law duties exist. Finally, section V will provide a brief conclusion.This essay will not address possible arguments that South Korea (or indeed any country) has a duty to accept North Korean escapees under the Refugee Convention or Convention Against Torture, as these arguments are well developed elsewhere in the literature.[12] Rather, it will concentrate on possible international law duties emanating from the escapees' formal South Korean nationality.

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[7]*Id*., at 57.

[8] In Seop Chung et al., *The Treatment of Stateless Persons and the Reduction of Statelessness: Policy Suggestions for the Republic of Korea*, 13 KOREA REV. OF INT'L STUD. 7, 23 (2010). This results from the definition of "refugee" in Art. 1(A)(2) of the 1951 Refugee Convention, which specifies that "in the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national". Convention Relating to the Status of Refugees, 28 Jul. 1951, 189 U.N.T.S. 137, art. 1(A)(2).

[9]*See, e..g,*PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 45 (2d ed. 1979); Rosalyn Higgins, *The Right in International Law of an Individual to Enter, Stay in, and Leave a Country*, 49 INT'L AFFAIRS 341, 344 (1973); HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 372-73 (2d ed. 1966).

[10]HARO F. VAN PANHUYS, THE ROLE OF NATIONALITY IN INTERNATIONAL LAW 56 (1959).

[11]KK and ors (Nationality: North Korea) Korea CG [2011] UKUT 92 (IAC) at para. 67 (stating in the context of a discussion of North Korean escapees' right to enter South Korea that "[i]f it were ever to be shown that a country had a general practice of not receiving its own nationals, there would be likely to be pressure through diplomatic channels, and perhaps litigation at the Hague").

[12]*See, generally,*Elim Chan & Andreas Schloenhardt, *North Korean Refugees and International Refugee Law* (2007) 19 INT'L J. REFUGEE L. 215; Russell Aldrich, *An Examination of China's Treatment of North Korean Asylum Seekers*, 7 N. KOREAN REV. 36 (2011); Eric Yong-Joong Lee, *National and International Legal Concerns regarding Recent North Korean Escapees*, 13 INT'L J. REFUGEE L. 142 (2001).

II. BACKGROUND

A. NORTH KOREANS AND SOUTH KOREAN NATIONALITY LAW

Under international law, the possible South Korean duty to accept North Korean escapees is entirely dependent on the fact that North Koreans are also considered South Korean nationals. This is the case due to the combined actions of the 1948 South Korean Constitution[13] and the South Korean Nationality Act from the same year.[14]The Constitution states in article 3 that "[t]he territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands."[15]While the exact state boundaries cannot be inferred from such a brief statement, in general terms it is clear that Korean peninsula encompasses the territory administered by both North and South Korea.[16]The Constitution also speaks to nationality in article 2, which states simply that "[n]ationality in the Republic of Korea is prescribed by law. It is the duty of the State to protect citizens abroad as prescribed by law."[17]

The prescription of nationality is implemented with the Nationality Act, which specifies that any person falling in one of the following categories 'shall be a national of the Republic of Korea at birth'[18]:

> 1. A person whose father or mother is a national of the Republic of Korea at the time of a person's birth;
> 2. A person whose father was a national of the Republic of Korea at the time of the father's death, if the person's father died before the person's birth;
> 3. A person who was born in the Republic of Korea, if both of the person's parents are unknown or have no nationality.[19]

Therefore, in principle, any North Korean would also be a South Korean national from birth, provided he or she is not descended from two foreign (i.e., non-North or South Korean) parents. This conclusion is widely (but not unanimously) accepted by Korean legal scholars.[20] It has also been confirmed by the Korean Constitutional Court.[21]

There are, however, some circumstances in which it seems clear that North Korean escapees – despite being South Korean nationals from birth – will in fact be denied entry into

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[13] Constitution of the Republic of Korea, adopted on 17 July 1948.
[14] Nationality Act (ROK), Law Number 16, 20 Dec. 1948 ('Nationality Act').
[15] Constitution of the Republic of Korea, *supra* note. 13, at art. 3.
[16] *See* Chang Hyo Sang, *Nationality in Divided Countries: A Korean Perspective, in* NATIONALITY AND INTERNATIONAL LAW: A KOREAN PERSPECTIVE 255, 257 (Ko Swan Sik ed., 1990) (citing Korea Supreme Court judgment 4292 of Sep. 28, 1961, Case of Administration Action No. 48).
[17] *Id*., at art. 2.
[18] Nationality Act, *supra* note. 14, at art. 2.
[19] *Id.*
[20] *See, e.g.,*Chulwoo Lee, *South Korea: The Transformation of Citizenship and the State-Nation Nexus*, *40 J. CONTEMP. ASIA* 230, 232 (2010); Jeanyoung Lee, *Ethnic Korean Migration in Northeast Asia, in*PROCEEDINGS OF INTERNATIONAL SEMINAR: HUMAN FLOWS ACROSS NATIONAL BORDERS IN NORTHEAST ASIA 118, 128 (2002); Chung et al., *supra* note. 8, at 22 ("the South Korean judiciary and the dominant scholarly opinion regard North Korean territory as a part of the territory of the Republic of Korea, and therefore all North Korean people as nationals of the Republic of Korea.")
[21] *Nationality Act Case*, 12-2 KCCR 167, 97Hun-Ka12 [Kor. Const. Ct.] (31 Aug. 2000).

South Korea, or at least denied the visa or passport that would allow them to board a plane or ferry bound for South Korea (overland migration is virtually impossible due to the highly fortified border with North Korea). These denials can be broken down into three categories; 1) denials under the Act on the Protection and Settlement Support of Residents Escaping from North Korea ("Protection Act");[22] 2) denials of entry to North Korean escapees present in China, and 3) denials of entry to individuals outside of China whose eligibility has not been investigated under the Protection Act (or who have been investigated and do not fall into any of that Act's categorical exclusions). Each of these categories will be reviewed in turn.

B. STATE PROTECTION ACT DENIALS

In 1993, the South Korean government passed the Protection Act, which, among other things, specifies which North Korean escapees qualify for "protection". While the South Korean government has been vague as to whether the Protection Act formally regulates entry into South Korea or solely other benefits such as resettlement assistance, as a matter of practice, it is fairly clear that the right of entry is in fact conditional upon receipt of "protection".[23]

The Protection Act limits the ability of North Korean escapees to enter South Korea in three main ways. First, it only applies to "residents escaping from North Korea", a category which it defines quite vaguely as covering "persons who have their residence, lineal ascendants and descendants, spouses, workplaces and so on in North Korea, and who have not acquired any foreign nationality after escaping from North Korea".[24]This could disqualify from protection certain individuals who would be considered South Korean nationals under the terms of the Nationality Act.[25]

Second, pursuant to article 3 and article 7 of the Protection Act, the Act has been interpreted as applying only to individuals with a "will and desire" to reside in South Korea.[26]This interpretation has been confirmed by officials of the South Korean embassy in

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[22]Act on the Protection and Settlement Support of Residents Escaping from North Korea (ROK), Law Number 6474, partial revision, 24 May 2001 ('Protection Act').

[23]*See,* Chung et al.,*supra* note. 8, at 24. ("While 'protection' in principle refers to the package of resettlement benefits available to North Korean escapees settling in the South, in practice it seems clear that protection is interpreted as a much broader concept, covering various measures ranging from admission to a diplomatic mission and then to South Korea, to providing economic, social and educational benefits on Korean territory."); Refugee Review Tribunal 1000331 [2010] RRTA 932 [Australia] (25 October 2010), para. 56 (citing a report from Pillkyu Hwang stating that South Korean citizenship does not convey an automatic right to enter the country, and that the only legal avenue for a North Korean escapee to enter South Korea is by applying for 'protection').

[24]Protection Act, *supra*, note.22, at art.2(1).

[25] There is anecdotal evidence of a few North Koreans present in South Korea who are caught in a legal limbo due to Chinese ancestry, however these individuals have to date been allowed to stay in South Korea. H. Cho, '*Wonsungimandomothan…' mugukjeoktalbukjauihansum'* ['Less than a monkey…' Sigh of a North Korean Defector who has no Nationality], NOCUT NEWS, 17 Apr. 2011, *available at*<http://www.nocutnews.co.kr/show.asp?idx=1776839>. *See also*, Chung, *supra* note. 8, at 26.

[26] Article 3 of the Protection Act states the Act "shall apply to residents escaping from North Korea who have expressed their *intention* to be protected by the Republic of Korea", while article 7 provides that '[a]ny person who has escaped from North Korea and *desires* to be protected under this Act, shall apply for protection to the

Canada[27] and representatives of the Ministry of Unification and the Ministry of Foreign Affairs and Trade.[28]This restriction is probably most relevant in the context of individuals who are seeking asylum in third countries: in an official letter from 2010, the Korean Embassy to the United Kingdom specified that "[t]he first and most important criterion in the determination of offering protection and settlement support to North Koreans is to ascertain whether the person in question desires to live in the Republic of Korea. … As such, the protection of the Government of the Republic of Korea for North Koreans does not apply to those North Koreans who wish to seek asylum in a country other than the Republic of Korea."[29]

Third, and most importantly, article 9 of the Protection Act specifically rejects protection for the following persons:

> 1. International criminal offenders involved in aircraft hijacking, drug trafficking, terrorism or genocide, etc.
> 2. Offenders of non-political, serious crimes such as murder, etc.;
> 3. Suspects of disguised escape;
> 4. Persons who have for a considerable period earned their living in their respective countries of sojourn; and
> 5. Such other persons as prescribed by the Presidential Decree as unfit for the designation as persons subject to protection.[30]

There is an administrative procedure for determining qualification for protection under the Protection Act, with the Ministry of National Unification conducting investigations and determining eligibility for protection, unless national security might be affected, in which case the Korean National Intelligence Service makes the final decision.[31]There is no appeal procedure available from outside the country.[32]

Many scholars have noted that escapees covered by the article 9 exceptions will not be allowed entry into South Korea or treated as nationals in other respects.[33]This has also been confirmed on occasion by South Korean government officials.[34]Article 9(4) provides a

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head of an overseas diplomatic or consular mission, or the head of any administrative agency ...' (*italics added*). Protection Act, *supra*, note.22, at arts.3; 7.

[27]*See* Kim v. Canada, 2010 FC 720, para. 15 [Canada] (30 June 2010) (citing a 2008 letter from the South Korean Embassy in Canada stating that North Koreansmust demonstrate that they possess the "will and desire" to live in [South] Korea in order to be considered South Korean citizens).

[28]KK and ors*,* [2011] UKUT 92, at para.35 (citing Choi Kang-sok from the Inter-Korean Policy Division at the Ministry of Foreign Affairs and Trade and Jo Jae-sop at the Ministry of Unification).

[29]*Id*., at para. 28.

[30] Protection Act, *supra* note. 22, at art. 9.

[31] Chung et al., *supra* note. 8, at 24.

[32] While two alternate mechanisms for receiving a nationality determination are available once an individual is within Korea, these are of no use to those attempting to gain entry in the first place. *Id*., at 24-5.

[33] C. Lee, *supra* note. 20, at 232; KK and ors*,* [2011] UKUT 92, at para. 34-35.

[34] For example, the South Korean embassy in Canada stated that some North Korean escapees are ineligible for South Korean citizenship, including '"bogus" defectors, persons who have resided in a third country for an extended period of time; and international criminals such as persons who have committed murder, aircraft hijacking, drug trafficking or terrorism.' Kim v. Canada, 2010 FC 720, at para. 15. The relevant officer at the South Korean Ministry of Foreign Affairs and Trade was also quoted as saying that the South Korean government can refuse to recognize or grant South Korean nationality in cases covered by article 9 of the

potentially broad and significant ground for exclusion, given the fact that many North Korean escapees spend a period of time working in China prior to continuing to a third country and attempting to settle in Korea. South Korean authorities appear in practice to have interpreted the clause as disallowing entry to individuals who have been outside of North Korea for ten years or more at the time of application.[35]

C. DENIAL OF ENTRY TO NORTH KOREAN ESCAPEES PRESENT IN CHINA

The majority of North Korean escapees live in China, which has a 1,360 km long border with North Korea that is relatively easily crossed. Some of these individuals are content to live in the Chinese border region, which has a large ethnic Korean population, despite the continuous danger or persecution or deportation back to North Korea. Many others, however, wish to move to South Korea. This is usually accomplished through clandestinely transiting China to get to Vietnam, Thailand, or Mongolia, from where Korean authorities will facilitate transport to South Korea.

The journey, however, is dangerous, and there are many other cases of North Korean escapees approaching South Korean officials within China and requesting assistance to enter South Korea directly. This assistance is, according to reports, regularly denied, and escapees are not provided the visa or passport that would allow them to board a plane to South Korea.[36]The only two exceptions to this rule have traditionally been particularly high value defectors (i.e., those who previously held important positions in the North Korean government), who have reportedly been given protection by South Korean authorities, and individuals who have successfully stormed a diplomatic compound and demanded asylum. This latter technique has been little-used in recent years because of increased security outside embassies and consulates and negative reactions from Chinese authorities.[37]

D. DENIALS OF ENTRY TO INDIVIDUALS OUTSIDE OF CHINA WHOSE ELIGIBILITY HAS NOT BEEN INVESTIGATED UNDER THE PROTECTION ACT

Finally, there is at least anecdotal evidence of other North Korean escapees outside of China being denied entry to South Korea without investigation under the Protection Act, and without being told the reason for their rejection.For example, in a widely reported incident, Kim Jong-ryul, who was formerly Kim IlSung's personal shopper, asserted that Korean

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Protection Act. KK and ors*,* [2011] UKUT 92, at para.35.

[35] An expert lawyer noted that "it is almost impossible for North Koreans who have been outside North Korea for more than ten years and applied abroad to get approved entry into South Korea and acquire South Korean citizenship."KK and ors*,* [2011] UKUT 92, at para.55.

[36] Don Kirk, *Refugee Aid Groups Say Seoul is Playing Politics*, N.Y. TIMES, June 28, 2001; Lankov, *supra* note. 2, at 58 ("Stories about would-be defectors who went to South Korean embassies or consulates but were unconditionally denied assistance are numerous. [citations omitted] In the South Korean press, one can find virtually hundreds of testimonies about this semiofficial stance toward defectors. Indeed, I have never seen a single report about a defector whose escape was seriously assisted by the China-based South Korean diplomatic staff (unless such a person was a very high-ranking individual)").

[37]Jamie Miyazaki, *'Invisible' N. Korean Refugees all too Visible in China*, ASIA TIMES, May 14, 2004.

Embassy officials had denied him permission to enter South Korea because, he suspected, they thought that he was too much of a hard-core communist.[38]

More recently, the Upper Tribunal of the United Kingdom Immigration and Asylum Chamber investigated this issue, and while it found some evidence suggesting that North Koreans are always permitted to enter and reside in South Korea, there was also considerable anecdotal evidence to the contrary.[39]For example, one solicitor noted that out of fourteen clients who had applied for assistance from the South Korean Embassy in London, none had received passports or citizenship papers.[40] In an expert submission to the Tribunal, Professor Christopher Bluth alleged that even in Southeast Asian countries, "the policy of the South Korean government remains to discourage refugees and not all 'North Korean defectors' will be accepted as such."[41]It should be emphasized, however, that these reports of denials are anecdotal and isolated.

III. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

As one of the three pillars of the international bill of rights, along with the Universal Declaration of Human Rights ('UDHR') and International Covenant on Economic, Social, and Cultural Rights, the ICCPR holds particular importance in the international system. It was ratified by South Korea in 1990 and as of July 6, 2011, has 167 parties.[42]The ICCPR protects the right to enter one's own country in article 12(4), which states that: "[n]o one shall be arbitrarily deprived of the right to enter his own country".[43] This right can only be derogated in times of public emergency which threaten the life of the nation and are officially proclaimed.[44]

First, it is worth noting that while the terminology of article 12 of the ICCPR is largely derived from the UDHR, the texts of the two documents differ in important respects. The first paragraph of article 13 of the UDHR states that "[e]veryone has the right to leave any country, including his own, and to return to his country."[45]The second paragraph provides for "freedom of movement and residence within the borders of each state."[46]Thus, article 13 of the UDHR can be interpreted as protecting four distinct rights and freedoms, namely 1) a freedom of internal movement (i.e., within the borders of a particular state; 2) a freedom of residence (again, within the borders of a particular state); a right to leave, or

[38]Kim Se-Jeong, *Kim Il-Sung's Former Crony Denied Asylum,*KOR. TIMES, Mar. 12, 2010
[39]KK and ors*,* [2011] UKUT 92, at para.44
[40]*Id.*
[41]*Id*., at 35.
[42]*See* United Nations Treaty Collection, International Covenant on Civil and Political Rights, at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en. South Korea has also ratified the Optional Protocol to the ICCPR, so an individual North Korean could challenge a denial of the right of entry in a petition to the Human Rights Committee, although none have yet done so.
[43]International Covenant on Civil and Political Rights, art.12(4), Dec. 16, 1966, 999 U.N.T.S. 171.
[44]*Id.*, at art.4(1). Korea has not proclaimed such a public emergency.
[45]Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc.A/810, art. 13(1) (Dec. 10, 1948).
[46]*Id*., at art.13(2).These rights may be subject "only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." *Id*., at art. 29.

emigrate from, any country, and 4) a right to return to one's country.[47]However, by referring to a "right to return" rather than a "right to enter", the plain language of the UDHR would not seem to protect the entry rights of an individual who has never been to "his country". While the travauxpréparatoires shed little light on this point, later interpretations have been more expansive, asserting an implied right of entry in the UDHR for nationals to their country of nationality in all circumstances.[48]

The ICCPR, on the other hand, explicitly embraces a "right to enter" rather than a "right to return." This clarifies that even individuals who have never set foot in their "own country" have a right to enter that country. As the Human Rights Committee stated in General Comment No. 27, the right to enter "includes not only the right to return after having left one's own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country (for example, if that country is the person's State of nationality)."[49]Thus, even if a North Korean escapee has never set foot in South Korea, he or she would not for that reason lack the right to enter. However, while it is well accepted that Article 12(4) may apply to individuals entering their "own country" for the first time, it is still necessary to evaluate whether a deprivation is "arbitrary", what constitutes one's "own country", and whether article 12(4) applies extraterritorially.

A. ARBITRARINESS

Commentators have long debated how the Article 12(4) arbitrariness qualifier should be interpreted. The dominant opinion holds that the legislative history of the ICCPR's drafting makes clear that only one type of denial of entry was intended to be considered non-arbitrary, namely those rare cases of lawful exile as a punishment for a crime.[50]This relatively broad conception of arbitrariness has been embraced by the Human Rights Committee, which stated in General Comment 27 that "there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable".[51]If one accepts this broad characterization of arbitrariness, then the exclusion of North Korean escapees by the South Korean authorities would in all cases be arbitrary, as such exclusions are not the result of lawful exile as punishment for a crime.

Even if one were to embrace a more narrow characterization of arbitrariness than that

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[47]AtleGrahl-Madsen et al., *Article 13, in*THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT 265, 265 (GudmundurAlfredsson&AsbjørnEide, eds., 1999). Some have inferred a fifth right, namely the right to enter any country, as a corollary of the right to leave. However, the existence of such a right has not been generally accepted by States or commentators in either the UDHR or subsequent human rights documents. *Id.*, at 276.

[48]*See*UN SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, THE RIGHT OF EVERYONE TO LEAVE ANY COUNTRY, INCLUDING HIS OWN, AND TO RETURN TO HIS OWN COUNTRY, final report prepared by C.L.C. Mubanga-Chipoya, paras. 91, 98, UN Doc. E/CN.4/Sub.2/1988/35 (June 20, 1988).

[49]HUMAN RIGHTS COMMITTEE, GENERAL COMMENT NO. 27: FREEDOM OF MOVEMENT (ART. 12), para. 19, U.N. Doc CCPR/C/21/Rev.1/Add.9 (Nov. 1, 1999). The Human Rights Committee's opinions are not binding, although they are often considered 'authoritative' interpretations of the ICCPR.

[50] Sander Agterhuis, *The Right to Return and its Practical Application*, 58 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL, 165, 172 (2005); MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 219 (1st ed., 1993).

[51]HUMAN RIGHTS COMMITTEE, GENERAL COMMENT NO.27,*supra* note. 49, at para. 21.

accepted by the Human Rights Committee, there would still be a strong argument that South Korean denials of entry that are *not* pursuant to the Protection Act (including those in China) are arbitrary, because they are not undertaken according to valid domestic legal laws and regulations. Denials of entry pursuant to the Protection Act would most likely be considered arbitrary as well, because they discriminate against South Korean nationals of North Korean origin. After all, ordinary South Korean nationals are not subject to expulsion upon conviction of a crime or denied re-entry after working overseas for ten years.[52]

Despite a stated reluctance to accept that denials of entry can be non-arbitrary, the Human Rights Committee in fact did rule in the State's favour in response to one denial of entry, in the case of *Toala v. New Zealand*.[53]The case is worth describing in detail, due to certain similarities with the Korean situation. Mr. and Mrs. Toala and Mr. and Mrs. Tofaeono were born in Western Samoa between 1932 and 1934. In July, 1982, while the Toalas and Tofaeonos were living in Western Samoa, the Judicial Committee of the Privy Council held that under the British Nationality and Status of Aliens (in New Zealand) Act 1928, all persons born in Western Samoa between 13 May 1924 and 1 January 1949 are automatically New Zealand citizens, along with their descendants.[54]Thus, it was undisputed that as of July 1982 the Toalas were New Zealand citizens. However, the Privy Council's decision was unpopular in New Zealand, and, following the negotiation of a Treaty of Friendship between New Zealand and Western Samoa, the New Zealand government enacted the Citizenship (Western Samoa) Act 1982, which effectively nullified the Privy Council's decision.[55]When this new law went into effect, in October 1982, the Toalas and Tofaeonos, who were still resident in Western Samoa, lost their New Zealand citizenship.

In 1999, the Toalas and Tofaeonos were residing in New Zealand when they received deportation orders. They then filed a claim to the Human Rights Committee, alleging that New Zealand had violated Article 12(4) of the ICCPR by depriving them of citizenship and the right to enter New Zealand through passage of the Citizenship (Western Samoa) Act.[56] The Human Rights Committee found in favor of New Zealand. It concluded that the Toalas and Tofaeonos' denationalization should not be considered arbitrary because none of them had at the time ever applied for a New Zealand passport or claimed to exercise any rights as New Zealand citizens, and they lacked ties of birth, descent, residential or other ties with New Zealand.[57]Essentially, it appears that the Human Rights Committee undertook a type of genuine links analysis (as in the well-known *Nottebohm* Case[58] from the International Court

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[52] If, however, the terms of the Protection Act were changed to deny entry to individuals who had acquired a third (i.e., non-North or South Korean) nationality, this would probably not be found to be arbitrary, as South Korean law denationalizes adult citizens who voluntarily acquire a second nationality. *See*, Helen Lee, *South Korea: Permanent Dual Nationality Allowed after 60 years*, U.S. LAW LIBRARY OF CONGRESS (Aug. 24, 2010), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402187_text (noting that despite recent amendments, the Nationality Act "remains unchanged in regard to persons who voluntarily become foreign nationals after attaining majority; in such cases there is automatic deprivation of their Korean citizenship.")

[53] Human Rights Comm., Toala v. New Zealand, Communication No. 675/1995, U.N. Doc. CCPR/C/70/D/675/1995 (Nov. 22, 2000).

[54] *Id*., at para.2.5 (citing Lesa v.The Attorney-General of New Zealand [1983] 2 A.C. 20).

[55] *Id*., at para. 2.7.

[56] *Id*., at para. 2.1.

[57] *Id*., at para. 11.5.

[58] In the Nottebohm case, the International Court of Justice determined that while international law does not determine who may be considered a national, other states are not required to recognize a state's granting of

of Justice) and found that the lack of connections with New Zealand at the time the denationalization law meant that denationalization was not arbitrary.

While the *Toala* holding suggests the possibility that the refusal of entry to North Korean escapees could be legitimate, I do not find it to be a persuasive precedent even if one accepts the (very debatable) preliminary point that the denial of entry to a national without genuine links to their state of nationality is non-arbitrary. This is because far greater links exist between North Korean escapees and South Korea than did between Western Samoans and New Zealand. Under classical *jus sanguinis* doctrine North Koreans are descendants of citizens of the Republic of Korea, assuming one accepts South Korea as successor to the pre-division Korean State, and descent has always been accepted as a valid "genuine link." Some North Koreans may have also fled their country in reliance on the presumed availability of sanctuary in South Korea, bringing up interesting questions of estoppel. In addition, it should be emphasized that the *Toala* case did not address the denial of entry to nationals (as is the case with North Korean escapees); rather, it discussed denationalization and the denial of entry to denationalized individuals. At least arguably, it is inherently arbitrary to deny entry to a national without prior denationalization, as would be the case with North Korean escapees.[59]

B. MEANING OF "ONE'S OWN COUNTRY"

The next issue that must be addressed is whether the right to enter one's "own country" encompasses the right of North Korean escapees to enter South Korea. The question of whether one's "own country" should be interpreted synonymously with "country of nationality" dates back to the drafting of the ICCPR. The ICCPR's first draft initially referred to the individual's right of entry into "the country of which he is a national".[60]Thus, the fact that the language was changed to one's "own country" would indicate, according to the principle of effectiveness, that a different meaning was intended. On the other hand, , however, in response to requests for clarification by some state delegates to the Third Committee of the UN General Assembly, the drafting committee explained that "one's own country" was meant to denote the country of which one was a citizen.[61]

For decades, commentators have debated whether "one's own country" should be interpreted *more* broadly than a simple reference to country of citizenship, to include resident aliens, for example.The dominant opinion would certainly now favour a broader interpretation.[62]General Comment 27, for example, explicitly states that the "scope of 'his own country' is broader than the concept 'country of his nationality'".[63]This statement has

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nationality to a person if there is no genuine link between that person and the nationality-granting state. Nottebohm Case (Liech. v. Guat.) (Second Phase), 1955 I.C.J. 5, 11 (Apr. 6).

[59]Pellonpää argues that the denial of entry to nationals is inherently arbitrary because the ability to reside in one's home country is integral to the concept of nationality. MATTIPELLONPÄÄ, EXPULSION IN INTERNATIONAL LAW, 25, 138 (1984).

[60]AMNESTY INTERNATIONAL, NATIONALITY, EXPULSION, STATELESSNESS AND THE RIGHT TO RETURN, 20 (Sep. 2000), AI Index: ASA 14/01/00.

[61]*Id.*

[62]*Id*., at 2.

[63]HUMAN RIGHTS COMMITTEE, GENERAL COMMENT NO.27,*supra* note. 49, at para. 20.

been repeated by the Human Rights Committee in *Stewart v. Canada*.[64]However, this general conclusion has never been made in the context of nationals with minimal links to their country of nationality.

The Human Rights Committee addressed the more specific question directly only in the *Toala* case, albeit in dicta, where it suggested that New Zealand may not have qualified as the appellants' "own country" because none of the authors had any connection with New Zealand through birth, descent, ties or residence at the time of the Privy Council decision.[65] This suggests that while dual nationals have the right to entry in both countries, some 'genuine links' must exist before a State can be deemed to be one's 'own country', and at least in certain cases formal citizenship may not be sufficient to constitute such a link.[66] Rightly or wrongly, the Human Rights Committee in *Toala* seems to have embraced the same analytical framework for determining arbitrariness and determining the identity of one's "own country".

It would be difficult to predict whether or not the Human Rights Committee or another tribunal would consider that South Korea qualifies as North Korean escapees' "own country". If one simply asserts that one's "own country" is the dominant country in cases of dual nationality, then it probably would not: clearly, North Korean escapees have greater connections to North Korea than they do to South Korea. On the other hand, if one uses a genuine links analysis, as suggested in *Toala*, then South Korea is more likely to qualify. As noted earlier, there are real links of descent between North Korean escapees and Korea (as a pre-1945 unified sovereign entity). Other links such as kinship may also be present. At any rate, to the extent that South Korea positions itself constitutionally and otherwise as the inheritor of Korea's sovereignty, it would be hard-pressed to deny being the "own country" of people born in the North.In addition, the mere fact that the escapees are attempting to enter and reside in South Korea implies that their allegiance does not lie with the North Korean state (or the regime in power there).

C. EXTRATERRITORIALITY

To the extent that South Korean officials are denying entry to North Korean escapees, such denials are taking place in embassies and consulates outside of the country – there is no real evidence of North Koreans actually being turned away once they have arrived in South Korea.[67]Thus, it is necessary to look at whether the ICCPR applies extraterritorially to the

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[64]Communication No. 538/1993, U.N. Doc. CCPR/C/58/D/538/1993 (Nov. 1, 1996), para. 12.3.

[65]Toala v. New Zealand ,*supra* note. 53, at para. 11.5 ("The Committee notes that in 1982 the authors had no connection with New Zealand by reason of birth, descent from any New Zealander, ties with New Zealand or residence in New Zealand. They were unaware of any claim to New Zealand citizenship at the time of the Lesa decision and had acquired New Zealand citizenship involuntarily. It also appears that, with the exception of MrToala, none of the authors had ever been in New Zealand. All these circumstances make it arguable that New Zealand did not become their "own country" by virtue of the Lesa decision.")

[66] SARAH JOSEPH, JENNYSCHULTZ& MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS & COMMENTARY 376 (2d. ed. 2004).

[67] There were suspicions that North Korean escapees had been returned against their will after one 2008 incident where 22 North Koreans were repatriated (and later reportedly executed) upon arriving in South Korean waters in a fishing boat. However, these allegations were refuted by South Korean government sources who asserted that the North Koreans had accidentally drifted across the border and did not wish to defect. *22 N.*

actions of South Korean officials.

Article 2(1) of the ICCPR places an obligation upon state parties to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction".[68]This clause has been consistently and repeatedly interpreted by the Human Rights Committee disjunctively, to mean that states are liable within their borders as well as for the actions of their agents when those actions take place overseas.[69] Thus, in General Comment 31, the Committee stated that the ICCPR applies to all individuals "who may find themselves in the territory *or* subject to the jurisdiction of the State Party." (*italics added*).[70]The International Court of Justice also held that the ICCPR applies extraterritorially in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.[71]This conclusion has been echoed by many commentators.[72]

The extraterritorial scope of the ICCPR is not universally accepted, however. The United States in particular has long held that the ICCPR is not applicable extraterritorially.[73]The U.S. position is based on the plain language of the treaty – the use of "and" instead of "or" in article 2(1) – as well as an examination of the travauxpréparatoires, which, the U.S. claims, demonstrate that an extraterritorial scope for the ICCPR was the subject of considerable debate before being explicitly rejected.[74]

This essay will not attempt an in depth analysis of the relative merits of the U.S. position versus the position taken by the Human Rights Committee, ICJ, and most commentators. However, as a practical matter, it is clear that the majority of international law experts, states, and institutions accept the extraterritorial scope of the ICCPR, especially in the context of overseas treatment of one's own citizens.[75]If a North Korean escapee ever

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Korean Drifters Executed after Returning Home: Source, YONHAP NEWS, at Feb. 17, 2008, *at* http://english.yonhapnews.co.kr/national/2008/02/17/95/0301000000AEN20080217001500315F.HTML.

[68] ICCPR, *supra* note. 43, art.2(1).

[69] As the Human Rights Committee stated in *Burgos/Lopez v. Uruguay*, "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."Burgos/Delia Saldias de Lopez v. Uruguay, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1, para. 88 (July 29, 1981). *See also*,Casariego v. Uruguay, Communication No. 56/1979, U.N. Doc. CPR/C/13/D/56/ 1979, paras. 10.1–10.3(July 29, 1981),

[70]Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 10, U.N. Doc. CCRR/C/21/Rev.1/Add.13 (May 26, 2004).

[71]Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) ICJ Gen. List No. 131, decided July 9, 2004, at para. 111.(''the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory'')

[72]*See, e.g.,* Theodor Meron, Agora: *The 1994 U.S. Action in Haiti: Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L 78, 79 (1995); Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Delegations, in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 74 (Louis Henkin ed., 1981); Martin Scheinin, *Extraterritorial Effect of the International Covenant on Civil and Political Rights*, *in*EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES, 73 (FonsCoomans& Menno Kamminga, eds., 2004).

[73]Matthew Waxman, Head of U.S. Delegation, Principal Deputy Director of Policy Planning, Dep't of State, Opening Statement at ICCPR Presentation (July 17, 2006) ("It is the long-standing view of my government that applying the basic rules for the interpretation of treaties described in the Vienna Convention on the Law of Treaties leads to the conclusion that the language in Article 2, Pargraph 1, establishes that States Parties are required to respect and ensure the rights in the Covenant only to individuals who are BOTH *within* the territory of a State Party *and* subject to its jurisdiction.")

[74] Patrick Walsh, *Fighting for Human Rights: The Application of Human Rights Treaties to United States' Military Operations*, 28 PENN ST. INT'L L. REV. 45, 51 (2009).

[75] Hugh King, *The Extraterritorial Human Rights Obligations of States*, 9:4 HUM. RTS. L. REV. 521, 523 (2009).

brought an article 12(4) case before the Human Rights Committee, there is little to no chance that the case would be lost on extraterritoriality grounds, and indeed South Korea would be very unlikely to argue the point.

D. CONCLUSION

As the preceding analysis indicates, the question of whether art. 12(4) of the ICCPR would prohibit South Korea from denying entry to North Korean escapees would largely depend on how the term "arbitrary" is interpreted, whether South Korea would be considered to be the "own country" of North Korean escapees, and whether art. 12(4) is considered effective extraterritorially. Given the broad interpretation of arbitrariness that has been accepted by the Human Rights Committee, it seems unlikely that such denials would be considered arbitrary, as they are not the result of lawful exile. While the Toala Case brings up the possibility that denial of entry to an individual who lacks genuine links to his or her country of nationality would be non-arbitrary, it is likely that North Korean escapees would be found to have genuine links (of descent) with the South Korean state.

It is harder to predict whether the Human Rights Committee or another tribunal would consider South Korea to be the "own country" of North Korean escapees. The Toala case indicates that a genuine links test might be used to determine one's "own country" as well as arbitrariness. If this is the case, then South Korea would likely qualify as the escapees' own country.In any event, the South Korean government might be loath to argue that it is not the North Koreans' "own country", considering its long-standing constitutional insistence that it is the true representative of a Korean state encompassing the entire Korean peninsula. Similarly, the Korean government might be reluctant to assert that the ICCPR is not effective extraterritorially, because that position, while certainly not frivolous, has been roundly rejected by the Human Rights Committee and the vast majority of commentators and states. Thus, it is likely that the Human Rights Committee or other tribunal would in fact find that South Korea's denial of entry to North Korean escapees to be a violation of its ICCPR commitments.

IV. CUSTOMARY INTERNATIONAL LAW

A country's possible duty to accept its own nationals under customary international law can be conceived of in one of two ways. First, there may be a duty owed to other states under classical customary international law.[76]Second, there is a possible duty owed to the individual being denied entry, which could potentially exist under customary international human rights law. Oftentimes, these two potential duties are not adequately differentiated in the legal literature and there is sparse case law relating to the responsibility to accept one's own citizens under customary international law.

[76] This duty is owed not simply to the expelling state or state from where entry is sought, but also to other states whose territories the individual would be forced to enter if entry was not permitted. Pellonpää, *supra* note. 59, at 26 (1984).

A. DUTY OWED TO STATES

For many years, there has been considerable disagreement among international lawyers as to whether a customary international law duty existed for states to allow entry to their nationals. Analyses by Clemens Huffman[77] and YoramDinstein[78] found there to be no such general duty under customary international law. The more widely accepted conclusion, however, is that a duty to accept nationals does indeed exist. This duty was regularly pronounced by commentators as far back as the nineteenth century[79] and more recently has been generally accepted by the major experts in nationality law.[80]In addition, a United Nations survey of international instruments and national laws from 1987 concluded that the right to leave and return is "a legal obligation according to customary international law."[81]The principle has been accepted by courts as well, most prominently in the European Court of Justice's opinion in *Van Duyn v. Home Office*, which stated that as "a principle of international law … a State is precluded from refusing to its own nationals the right of entry or residence".[82]

While it seems fair to conclude that a general customary international law rule exists that states must allow entry to nationals, it has been argued that there is an exception to that rule, which is pertinent to the situation of North Korean escapees; namely, that dual nationals have no right of entry under customary international law. After all, the reason for the international legal requirement to accept nationals is to avoid creating stateless individuals who will come to burden other countries, and, to the extent that a second state of nationality exists, such concerns do not arise.

Certainly, if one looks at state practice, there are many examples of countries that have denationalized and then expelled dual nationals, as surveyed by William Worster.[83]There are fewer cases of states refusing entry to or expelling dual nationals that have not been denationalized, but some examples exist, most significantly involving the United Kingdom.[84]Most recently, the U.K. developed a much-criticized domestic law category of

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[77] Clemens Hufmann, *Duty to Receive Nationals?*, 24 FORDHAM L. REV. 235, 263 (1955) ("general international law does not obligate States to receive back their nationals from other countries … the development of such an obligation is not desirable.")

[78]YoramDinstein, *The Israeli Supreme Court and the Law of Belligerent Occupation: Deportations*, 23 ISRAELI YEARBOOK ON HUM. RTS.1, 8-9 (1993).

[79]*See*, Siegfried Wiessner, *Blessed be the Ties that Bind: The Nexus Between Nationality and Territory*, 56 MISS L.J. 447, 483 (1988).

[80]*See, e.g.,*GUY GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES, 137 (1978); Kay Hailbronner, *Nationality in Public International Law and European Law, in*ACQUISITION AND LOSS OF NATIONALITY VOLUME I: COMPARATIVE ANALYSES 35, 78 (Rainer Bauböck et al., eds. 2006) ("Although there have often been difficulties and barriers to enforcing such duties, state practice supports the assumption of a duty of states under public international law to readmit their own nationals.")

[81]C. MUBANGA-CHIPOYA, ANALYSIS OF THE CURRENT TRENDS AND DEVELOPMENTS REGARDING THE RIGHT TO LEAVE ANY COUNTRY INCLUDING ONE'S OWN, AND TO RETURN TO ONE'S OWN COUNTRY, AND SOME OTHER RIGHTS OR CONSIDERATION ARISING THEREFROM 11, U.N. ESCOR, 39th Sess., Agenda Item 6, U.N. Doc. E/CN.4/Sub.2/1987/10 (1987).

[82]1 CMLR (1975) 18 (E.C.J. 1975).

[83]William Worster, *International Law and the Expulsion of Individuals with More than One Nationality*, 14 UCLA J. INT'L L. & FOREIGN AFF.423 450-51 (2009) 450-451 (listing examples from nineteen countries).

[84] Other examples given include cases from Mexico and Turkmenistan. *Id.*, at 497-98.

"British Nationals (Overseas)", which applied to U.K. nationals from Hong Kong without the right to reside in the European territory of the U.K.[85]Similar categories such as "British Subjects without Citizenship" and "British Protected Persons" had previously been employed to categorize other colonial subjects without the right to live in Britain, most notably applying to many Asians resident in East Africa.[86]In defending this policy, U.K. leaders expressed their understanding that international law requires that admission be granted to nationals only in those cases where they have nowhere else to go.[87]The majority opinion, therefore, is that dual nationals have no customary international law protection against expulsion or denial of entry,[88] or alternately that such protection exists only exists vis à vis the country of dominant nationality.[89]

If one accepts this limitation on the right of entry, then there would be no customary international law duty owed by South Korea to other states to accept North Korean escapees. North Korean escapees are all (at least) dual nationals, as they possess both North and South Korean nationality. To the extent that one of the two states has a legal obligation to allow entry, that duty would fall to North Korea, as the state of dominant nationality (given that most of the escapees would have never even set foot in South Korea).

B. DUTY OWED TO INDIVIDUALS

It is notoriously difficult to identify those norms that have attained the status of customary international human rights law. The Restatement of Foreign Relations, which is often cited by U.S. lawyers, provides a relatively narrow list, asserting that a country violates international law if:

> as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.[90]

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[85]*Id.,* at 496-97.

[86] Weis, *supra* note. 9 at 51-3.*See, also,*Mark McElreath, *Degrading Treatment - From East Africa to Hong Kong: British Violations of Human Rights*; 22 COLUM. HUM. RTS. L. REV. 331 (1990-1991); Randall Hansen, *The Kenyan Asians, British Politics, and the Commonwealth Immigrants Act, 1968*, 42(3) THE HISTORICAL JOURNAL 809 (1999).

[87]Frank Wooldridge & Vishnu Sharma, *International Law and the Expulsion of Ugandan Asians*, 9(1) INT'L LAWYER 30, 42(citing Sir Alec Douglas-Home (then Secretary of State for Foreign and Commonwealth Relations) statement that "under international law, a state has a duty to accept those of its nationals who have nowhere else to go.")

[88]Worster, *supra* note. 83 at 498 ("we must regard dual nationality as a valid, non-arbitrary exception to a general practice of the right to residence, if so provided under municipal law).

[89] Int'l Law Comm'n, Fourth report on the expulsion of aliens by Maurice Kamto, Special Rapporteur, para. 17, U.N. Doc. A/ CN.4/594 (Mar. 24, 2008). (arguing that in cases of dual nationality, the country of dominant nationality may not expel a national without agreement from another country to admit that person, but the other state of nationality is under no such prohibition).

[90]Restatement (Third) of Foreign Relations Law § 702 (1987).

Others have asserted that a much broader spectrum of rights should be considered as customary international law, claiming that those rights contained in the Universal Declaration of Human Rights have – at least in part – evolved into customary international law.[91]Even if one accepts this thesis, though, it would not provide for a customary right to enter one's country of nationality for the first time, and thus would not by its plain terms apply to the vast majority of North Korean escapees.[92]

It has also been claimed that the origin of customary international human rights law lies in the expanding web of multilateral treaties that have been widely accepted in the field.[93]If one accepts this premise, one can find some evidence that a new norm is emerging to protect the right to enter one's country of nationality. Article 3(2) of Protocol 4 of the European Convention on Human Rights states that "No one shall be deprived of the right to enter the territory of the state of which he is a national."[94]Article 22(5) of the American Convention on Human Rights provides that "No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it".[95]In the realm of soft law, it is worth noting the Strasbourg Declaration on the Right to Leave and Return adopted by the International Institute of Human Rights, which states that "no one shall be deprived of the right to enter his or her own country",[96] a somewhat broader formulation than found in the ICCPR, as it does not contain an arbitrariness requirement.

Nevertheless, other human rights systems fail to provide a right of entry. Article 12(2) of the African Charter on Human and Peoples' Rights echoes the narrower "right of return" language of the UDHR, stating that "Every individual shall have the right to leave any country including his own, and to return to his country."[97]The Arab Charter on Human Rights likewise protects the right to return rather than the right to enter,[98] as does the Convention on the Elimination of All Forms of Racial Discrimination.[99] Given the disparate language, it would be very difficult to claim that the right of entry to one's country of nationality has yet attained the status of customary international human rights law.

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[91]*See, e.g.,* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law,* 25 GA. J. INT'L & COMP. L. 287, 290 (1995-96) ;PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 213 (7th ed. 1997).

[92]Article 13(2) of the UDHR states that "Everyone has the right to leave any country, including his own, and to return to his country".UDHR, *supra* note. 45, at art.13(2).

[93] Anthony D'Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms,* 25 GEORGIA J. OF INT'L & COMP. L. 47, 98 (1995-96) ("the only logically satisfying and empirically validating position to take on the source of human rights norms is that they derive from provisions in treaties").

[94] Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 3(2), Europ. T.S. No. 46 (entered into force May 2, 1968).

[95] Organization of American States: American Convention on Human Rights, art. 22(5), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

[96]Strasbourg Declaration on the Right to Leave and Return, art. 6(a), adopted by a meeting of experts, Strasbourg, France, Nov. 26, 1986, *reprinted in* Hurst Hannum, *The Right to Leave and to Return in International Law and Practice*, 81 AM. J. INT'L. L. 432, 436 (1987).

[97]African Charter on Human and Peoples' Rights, art.12(2), June 27, 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58.

[98]League of Arab States, Arab Charter on Human Rights, Art. 27(2), May 22, 2004, *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005) (**"**No one shall be expelled from his country or prevented from returning thereto.")

[99] International Convention on the Elimination of all Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195 (guaranteeing equality before the law in the enjoyment of "[t]he right to leave any country, including one's own, and to return to one's country.")

V. CONCLUSION

As this essay demonstrates, while there is currently no customary international law duty for South Korea to accept North Korean escapees, such a duty does exist under the ICCPR. There are also real-world adverse consequences to a policy that claims North Koreans as South Korean nationals but then does not always permit them to enter and reside in South Korea. Most notably, third countries may choose to deny asylum to North Korean escapees on the grounds that they are South Korean nationals: some have already done so.[100]

There are three ways that South Korea could resolve this dilemma and come into compliance with its ICCPR obligations, none of which would be easy paths. The first option would be for the government to change its policy so as to accept all North Korean escapees. This would be a tremendously difficult change to effectuate and would lead to serious international tensions, considering the strong Chinese opposition to facilitating emigration of North Koreans to South Korea.There would also be deep fears that in the event of political instability, South Korea would be flooded with North Korean escapees before putting into place a process to integrate them into the society in an orderly fashion.

Thus, if South Korea does intend to continue treating entry and residence as a discretionary privilege for North Korean escapees, rather than a right, there would be two possible legislative reforms that would bring it into compliance with the ICCPR. First, the Nationality Act could be reformed to clarify that North Korean escapees are not born South Korean nationals, but must instead apply for nationality (analogously to how non-Israeli Jews must apply for Israeli citizenship, which they are entitled to under the Israeli Law of Return). This would be a controversial measure, as it would be seen as a step away from treating North Koreans and South Koreans as equals in the eyes of the law, which would perhaps not bode well for equal rights and equal treatment for North Koreans in the (widely anticipated) eventuality of a North Korean regime collapses and peninsular reunification.

The other option would be to amend the constitution, so as to clarify that the territorial boundaries of South Korea are limited to the area that it actually administers, rather than the entire peninsula. Constitutional amendment in Korea is not a simple process, however, requiring approval by two thirds of the members of the National Assembly as well as a majority of voters in a referendum attracting a turnout of at least half of eligible voters.[101] Evidently, an amendment would be extraordinarily controversial, as it would be seen by some as a sign of weakness or a sign that the government is giving up on unification. On the other hand, it could be seen by others as a gracious confidence-building measure towards the North.[102] Such an amendment would automatically result in the Nationality Act ceasing to

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[100] Many North Korean escapees have been denied asylum due to their South Korean nationality in Australia. *See, e.g.,* Australia Refugee Review Tribunal decisions 0909449 [2010] RRTA 763 [Australia] (7 Sep. 2010); 1000331 [2010] RRTA 932 (25 October 2010); 0909118 [2010] RRTA 1054 (24 Nov. 2010). Prior to 2004, asylum denials based on dual nationality status also were handed down in the United States. Nicole Hallett, *Politicizing U.S. Refugee Policy Toward North Korea* 1(2) YALE J. INT. AFF. 72, 76 (Winter/Spring 2006). This changed with the passage of the North Korean Human Rights Act of 2004, which statutorily clarified that for refugee determination purposes "a national of the Democratic People's Republic of Korea shall not be considered a national of the Republic of Korea". North Korean Human Rights Act, H.R. 4011 § 302(B) (2004).

[101] Constitution of the Republic of Korea, *supra* note. 13, at arts.128-130.

[102] *See, e.g.,* Kang Sung-Hack, *Steps to Confidence-Building for Disarmament between North and South Korea,*

apply to North Koreans, allowing for a new naturalization process to be developed, most likely based on the criteria set out in the Protection Act.

KEYWORDS
North Korea, Refugees, Right of Entry, South Korea, ICCPR

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DEVELOPMENT AND PROBLEMS OF NORTH KOREA'S FOREIGN INVESTMENT LEGISLATION AND TASKS AHEAD

Hyun Yoon Shin[*]

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ABSTRACT

Since its founding in September 1948, North Korea had committed itself to socialism and self-reliance, and it has eventually caused an extreme shortage of hard currency.In a desperate move to overcome the hardship, Pyongyang opened

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its door to foreign investment by promulgating the Equity Joint Venture Law in September 1984. However, the regime's first-ever attempt to bring foreign capital and technology failed to produce meaningful results.

There is no doubt that Pyongyang must open up and embrace capitalistic remedies to a significant extent to achieve tangible results for its economy. However, establishing a legal framework comparable to that of western countries in a short period of time in a country bent on a socialist regime will surely prove a daunting task. Compounding the challenge Pyongyang government officials are accustomed to a centralized command economy and incapable of understanding the need for complex rights and obligations among individual enterprises from capitalistic perspectives. The North Korean leadership also has tried to pace itself in adopting the key features of the market economy out of the fear that a rapid opening of the economy would pose a significant threat to the regime. Once inter-Korean cooperation and exchanges return to normalcy without drastic changes to political systems of the two countries, Pyongyang may well gradually seek to enhance its foreign investment legislation. Sluggish improvement of North Korea foreign investment system will reduce the likelihood of achieving the ultimate goal of promoting economic growth and political stability through foreign capital and technology.By benchmarking the success that China, Vietnam and Eastern European countries have achieved in attracting foreign investment through bold market-opening initiatives, North Korea must make a concerted and comprehensive effort to substantially improve its foreign investment legislation.

I. INTRODUCTION

Since its founding in September 1948, North Korea had committed itself to socialism and self-reliance[1] in running its economy. However, the inherent limitations of a closed economy, together with failed external economic policies since the 1970s, have caused an extreme shortage of hard currency.

In a desperate move to overcome the hardship, Pyongyang opened its door to foreign investment by promulgating the Equity Joint Venture Law in September 1984. However, the regime's first-ever attempt to bring foreign capital and technology failed to produce meaningful results. In the wake of the collapse of the Soviet Union and the Eastern Bloc in the 1990s, North Korea designated the Rajin-Sonbong area, the north-eastern part of the country bordering China and Russia, as a free economic trade zone in December 1991. It also amended its constitutional law in 1992 and 1998, setting forth a legal framework for foreign investment and some elements of the market economy. On the basis of the constitution, Pyongyang enacted and revised a number of laws and supporting regulations governing

[1] Economic self-reliance, which stems from the normative belief that a self-sufficient economy is required for maintaining political independence and autonomy, refers not only to an economic system that guarantees the self-supply of personnel and material resources, but also a state in which a nation-state can self-sufficiently achieve reproduction through a thorough connection between production and consumption. SOCIAL SCIENCE PUBLICATIONS (NORTH KOREA),GYUNGJESAJUN II [Dictionary of Economics II] 208 (1985).

foreign investment. While making continued efforts to improve the legal infrastructure for foreign investment in the 2000s, North Korea began to pursue capital investment from South Korea. Building on the historic June 15 Joint Declaration in 2000 and the July 1 Economic Reform in 2002, Pyongyang also promulgated the Gaeseong Industrial Complex Law and the Geumgang Mountain Tourism Zone Law. It also passed the Law for Economic Cooperation between North and South Korea, which provided a legal framework for economic cooperation between the two Koreas.

Despite the efforts to create a more foreign investment-friendly climate, however, North Korea managed to attract interest from only a few countries such as China and the EU, mostly due to Pyongyang's rigidity. Wary of negative political consequences of opening up its economy, it has granted only limited autonomy to foreign-invested enterprises and has kept the domestic economy strictly isolated. Furthermore, a myriad of challenges such as a chronic shortage of goods, an insufficient economic infrastructure, and an inefficient social system complicated by political and military instability and unpredictability (as demonstrated by the regime's pursuit of nuclear programs) have raised frequent concerns from jittery investors. If these issues remain unresolved, North Korea will not be able to achieve the stated goal of attracting foreign investment, i.e., to rebuild its economy by enticing foreign capital and technology.

This article chronicles the development of the legal regime governing foreign investment over the past 25 years since the adoption of the Equity Joint Venture Law in 1984 and analyzes the main contents of and changes to the so-called three major investment laws: the Equity Joint Venture Law, the Contractual Joint Venture Law, and the Wholly Foreign-owned Enterprise Law. The article then examines the prospects for these foreign investment laws and the challenges North Korea faces in improving them when the inter-Korea relations return to normalcy from the current stalemate, which is primarily caused by the North's nuclear and missile programs and issues relating to the Gaeseong Industrial Complex.

II. DEVELOPMENT OF LEGAL REGIMES GOVERNING FOREIGN INVESTMENT

A. THE 1980S

North Korea had largely depended on loans from other countries until the 1970s but opened its door to foreign investment in September 1984 with the enactment of the Equity Joint Venture Law. Article 1 of the 26-article law stipulates that the purpose of the law is to facilitate the expansion of North Korea's economic and technological cooperation and exchange with the world. This was an inevitable move to overcome the shortage of hard currency caused by North Korea's inability to service foreign debt or obtain commercial loans in the international credit market since 1975. North Korea was also influenced by China's enactment of Sino-foreign Equity Joint Venture Law and the success of its special economic zones. Irrespective of Pyongyang's motivation, the Equity Joint Venture Law merited recognition as it permitted profit-seeking business by an equity joint venture and allowed the venture to operate on its own account in a country that denies individuals rights to generate profits.

The Equity Joint Venture Law comprehensively governs matters regarding joint venture investment. However, it failed to yield meaningful results because its provisions were generally passive and provided no concrete protection for foreign investment.[2]

B. THE 1990S

The collapse of the socialist economies in the early 1990s served as a wake-up call to North Korea on the need for more aggressive policies to entice foreign capital while maintaining an ideological commitment to its socialist regime. In December 1991, a free economic trade zone was established in the Rajin-Sonbong area as part of the Tumen River Area Development Program initiated by the United Nations Development Program in July 1990 with the goal of facilitating economic cooperation among the member countries, particularly North Korea, China and Russia. Following the establishment of the special economic zone in Rajin-Sonbong, North Korea promulgated the Free Economic Trade Zone Law on January 13, 1993, as a basic law for fostering development and foreign investment in the region.

This law seeks to ensure uninterrupted business operations by foreign enterprises that invest in the Rajin-Sonbong economic trade zone and to promote investment by giving preferential treatment in investment type, tax rate, leasing of land, wage, immigration, and foreign currency control.

North Korea also amended the Constitution in April 1992 to set out a legal framework for foreign investment. Under Article 16 of the Constitution , the legal rights and interests of foreigners in the country are guaranteed, while Article 37 provides that "[t]he State shall encourage institutions, enterprises or associations of the DPRK to establish and operate equity and contractual joint venture enterprises with corporations or individuals of foreign countries." These constitutional provisions formed a legal basis for a number of subsequent legislation between October 1992 and September 1994, including the Foreign Investment Law (a general law governing foreign investment), the Contractual Joint Venture Law, and the Wholly Foreign-Owned Enterprise Law.[3] These new legislation provided the legal infrastructure needed for businesses that resembled capitalist enterprises.

The Implementation Regulations on Wholly Foreign-Owned Enterprises that came immediately after the law set forth detailed procedures on the establishment, liquidation, and dissolution of foreign-invested businesses. Under the new legal regime, a foreign-invested

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[2] There were 144 joint venture projects until 1993, of which 90% were invested by companies associated with Jochongnyeon, the pro-North Korean residents' league in Japan. The investment total was $150 million, setting the average investment per project at around a mere $1 million. Among the 120 Jochongyeon joint venture companies, only about 70 are still known to be operating. Compared to the $100 billion foreign capital that was invested into China during the same period, North Korea has been unsuccessful in attracting foreign investment. Moreover, the joint venture projects that were implemented were mostly concentrated in the primary industry, the service industry, and the light industry, rather than in sectors that North Korea had hoped to develop, such as the heavy chemical industry or the high-tech industry. NORTH KOREA ECONOMIC FORUM, BUKHANGYUNGJERON [A Study of North Korea's Economy] 227-28 (1996).

[3] Laws related to the opening of the economy include the Land Leasing Law, the Foreign Investment Bank Law, the Foreign-invested Enterprise and Foreign Individual Tax Law, the Foreign Currency Law, the External Economic Contracts Law, the External Civil Relations Law, and the External Economic Arbitration Law.

enterprise took the form of either an equity joint venture, a contractual joint venture, a wholly foreign-owned enterprise, or a foreign-based enterprise.[4]

These laws were interpreted as a turnaround in North Korea's external economic policies because, compared to the Equity Joint Venture Law, they (i) were more open to elements of the market economy, (ii) were more transparent and specific, (iii) permitted more diverse forms of foreign investment, (iv) designated special zones that granted preferential treatment for investors, and (v) expanded the scope of qualified investors. In September 1998, North Korea reiterated its commitment to encouraging foreign investment when it again amended the Constitution by adding to Article 37 language that promoted business enterprises in a special economic zone.

This also established a constitutional basis for the creation of the Rajin-Sonbong economic trade zone and the implementation of the Foreign Investment Law together with the supporting rules and regulations. A series of major amendments to the Foreign Investment Law, the Equity Joint Venture Law, the Contractual Joint Venture Law, and other foreign investment-related laws were made in line with the revised Constitution beginning with the renaming of the Free Economic Trade Zone Law into the Rajin-Sonbong Economic Trade Zone Law in February 1999. In reality, however, North Korea's foreign investment laws regressed during this period as the amendments focused on tightening state control over foreign-invested enterprises amid concerns about the political impact of opening of the economy, i.e., the weakening or collapse of the regime.

C. THE 2000S

Faced with economic hardship at the turn of the century, North Korea endeavored to restructure its socialist planned economy. The efforts led to adoption of the July 1 Economic Reform, which was primarily aimed at taking the best advantages of the market economy on the basis of socialist ideology. The reform measures included adjustment of wages and prices to realistic levels, appreciation of the foreign exchange rate, partial abolition of the public rationing system, granting greater autonomy to business enterprises, and the adoption of incentives systems.

Less-than-expected inflow of foreign capital into the Rajin-Sonbong trade zone in the 1990s also prompted North Korea to embark on phased improvement to the foreign investment and capital regimes. Following amendment to the Equity Joint Venture Law in May 2001, the Contractual Joint Venture Law, the Equity Joint Venture Law, the Foreign Investment Law, and the Wholly Foreign-owned Enterprise Law were partially revised. The

[4] "A contractual joint venture" is a business venture in which investors from North Korea and a foreign country jointly invest, the management is assumed by the partner from North Korea and, depending on the provisions of the contract the portion of the investment made by the foreign investor is redeemed or the share of the profits to which the foreign investor is entitled is allotted. "An equity joint venture" is a business venture in which investors from North Korea and from a foreign country invest jointly, operate the business jointly, and profits are distributed to the investors in accordance with the share of their investment. "A wholly foreign-owned enterprise" is a business enterprise in which a foreign investor invests and which the foreign investor manages on his own account. "A foreign-based enterprise" is an institution, enterprise, individual or other economic organization that is based in a foreign country but has a source of income in the North Korean territory (Article 2 of the Foreign Investment Law).

Foreign Investment Bank Law was enacted in November 2004 to coincide with a cabinet reshuffling. In April 2005, Pyongyang amended the Rajin-Sonbong Economic Trade Zone Law and in January 2006 enacted the Law on Registration of Foreign-invested Enterprises that laid out the principles and procedures for address/tax/customs registration of foreign-invested enterprises. The Equity Joint Venture Law and the Contractual Joint Venture Law were revised again in May 2006 to expand the regions and sectors allowed for foreign-invested enterprises. North Korea is also taking the External Economic Arbitration Law—a basic law for resolving disputes regarding a wholly foreign-owned enterprise's investment in the region—to the next level with wholesome revisions that include the adoption of the principle of the party autonomy.

Knowing it cannot solely depend on foreign investment, North Korea took bold moves in September 2002 by adopting the Basic Law of the Sinuiju Special Administrative Region. The law was unprecedented because it granted the Sinuiju Special Region a substantial degree of legislative, administrative and judicial autonomy similar to that of Hong Kong Special Administrative Region. Furthermore, seeking investment from South Korea Pyongyang enacted the Gaeseong Industrial Complex Law and the Geumgang Mountain Tourism Zone Law in November 2002, under which the two areas were officially set aside for South Korean investors. It also enacted the Law for Economic Cooperation between North and South Korea,[5] equivalent to the Inter-Korean Exchange and Cooperation Act of South Korea, in July 2005, which set out a systemic legal framework for economic cooperation between the two Koreas.

Legislation Governing Foreign Investment in North Korea (1984 – 2011)

	Enacted	Amended	Note
The 1980s	● Equity Joint Venture Law (84.9) ● Equity Joint Venture Income Tax Law (85.3) ● Foreign Individual Income Tax Law (85.3)		

[5] According to the Law for Economic Cooperation between North and South Korea, the related parties of both North and South Korea can cooperate by utilizing monetary, in-kind, and intellectual assets, and the investment asset is protected by a bilateral investment protection treaty (Article 16 of the Law for Economic Cooperation between North and South Korea). A South Korean company that operates in North Korea should, in principle, hire North Korean workers, and must obtain permission from the Central Agency for Economic Cooperation when hiring South Korean or third country workers (Article 17 of the Law for Economic Cooperation between North and South Korea). Also, a South Korean company in North Korea must conform to the North Korean law regarding tax payment, the use of fixed and movable assets, and insurance policies, following the territorial principle. However, if a mutual agreement exists between the two countries, this can be followed instead of the North Korean law governing the matter (Article 20 of the Law for Economic Cooperation between North and South Korea).

The 1990s	● Foreign Investment Law (92.10) ● Contractual Joint Venture Law (92.10) ● Wholly Foreign-owned Enterprise Law (92.10) ● Free Economic Trade Zone Law (93.1) ● Foreign Currency Law (93.1) ● Foreign-invested Enterprise and Foreign Individual Tax Law (93.1) ● Land Leasing Law (93.10) ● Foreign Investment Bank Law (93.11) ● External Economic Contracts Law (95.2) ● External Civil Relations Law (95.9)	● Equity Joint Venture Law (94.1)	● Amendment to the Civil Law (90.9) ● Amendment to the Constitution (92.4) ● Death of the President Kim Il-sung (94.7)
	● External Economic Arbitration Law (99.7)	● External Civil Relations Law (98.12) ● Equity Joint Venture Law (99.2) ● Contractual Joint Venture Law (99.2) ● Foreign Investment Law (99.2) ● Wholly Foreign-owned Enterprise Law (99.2) ● Rajin-Sonbong Economic Trade Zone Law (99.2) ● Foreign Currency Law (99.2) ● External Economic Contracts Law (99.2) ● Foreign Investment Bank Law (99.2) ● Foreign-invested Enterprise and Foreign Individual Tax Law (99.2) ● Land Leasing Law (99.2)	● Amendment to the Constitution (98.9) ● Amendment to the Civil Law (99.3)
The 2000s	● Foreign-invested Enterprise Bankruptcy Law (00.4) ● Basic Law of the Sinuiju Special Administrative Region (02.9) ● Gaeseong Industrial Complex Law (02.11) ● Geumgang Mountain Tourism Zone Law (02.11)	● Equity Joint Venture Law (01.5, 04.11, 06.5) ● Rajin-Sonbong Economic Trade Zone Law (02.1, 05.4) ● Foreign Currency Law (02.2) ● Foreign-invested Enterprise and Foreign Individual Tax Law (02.11)	● June 15 Joint Declaration (00.6) ● July 1 Economic Reform (02.7) ● Amendment to the Constitution (09.9)

	● Law for Economic Cooperation between North and South Korea (05.7) ● Law on Registration of Foreign-invested Enterprises (06.1)	● Foreign Investment Bank Law (02.11) ● Contractual Joint Venture Law (04.11, 06.5) ● Foreign Investment Law (04.11) ● Wholly Foreign-owned Enterprise Law (04.11, 05.5, 06.5) ● External Economic Arbitration Law (08.7)	

III. CURRENT PROBLEMS WITH NORTH KOREA'S FOREIGN INVESTMENT LEGISLATION

A. FORMALISTIC EXAMINATION

1. THE LEGAL STRUCTURE IS UNSOPHISTICATED

North Korea's investment laws have much room for improvement with regards to their legal structure. Critically, some of the provisions of the supporting regulations are meaningless repetitions of the laws, while in some cases the laws have no supporting regulations, creating a void in the legal system and demonstrating a need to enhance the basic administrative support system for inducing foreign investment. Moreover, laws, including the Constitution, are arbitrarily superseded by orders, plans, or instructions from the regime's leaders and the communist party. The rule of law, therefore, is not the defining feature of North Korea's legal system.[6]

Not surprisingly, the investment laws purport to deal with foreign-invested enterprises without providing the necessary protection for their profit-generating opportunities or laying the ground rules for complex private interests. Even as the laws endorse the modus operandi of capitalist businesses, their primary focus is on administrative controls such as business approval, supervision, and taxation, not on the rights and obligations of business enterprise in its internal and external relationships. As such, elements of the public law and the private law are mixed together, and matters to be dealt with by the private law are subject to administrative or criminal sanctions. This is illustrated by a number of provisions, one of which states that a wholly foreign-owned enterprise that fails to invest within a prescribed period is subject to damages, if not penalty. Similarly, a foreign-invested enterprise that does not comply with the requirements for document submission, approval and supervisory control is subject to administrative, or even criminal, sanctions if the breach is deemed serious. This not only constricts business activities, but also exposes business enterprises to arbitrary rule interpretation by the administrative authorities. This is problematic not only because of the regulatory uncertainty, but also because it is against the "*nullumcrimen sine lege, nullapoena sine lege*" principle of no crime and punishment except in accordance with fixed,

[6] HONG-TAEKCHEON& KANG-SOO OH, BUKHANEUWEGUKINTUJAJEDOWADAEBUKTUJACHUJINBANGAN[North Korea's Foreign Investment System and Plans for Foreign Investment in North Korea] 95 (1995).

predetermined law.

2. THE LEGAL CONCEPTS LACK CLARITY

As a socialist economy long accustomed to centralized economic planning and state control, North Korea has failed to develop legal terminologies that are sophisticated enough for modern commerce. This is self-explanatory in many foreign investment-related laws and aggravated by inconsistent usage of terminologies with other laws or supporting regulations.

3. THE REGULATIONS ARE AMBIGUOUS

North Korea's foreign investment laws are also characterized by declaratory and ambiguous provisions that merely stop at general principles. For instance, provisions that prohibit enterprises which threaten national security, which are technically obsolete or which hinder the development of the national economy are rather declaratory, subjecting businesses to arbitrary sanctions by the North Korean authority.[7] In addition, a wholly foreign-owned enterprise is prohibited where the type of business and the mode of management do not conform to or may have a negative impact on the political ideology of the people or the way of life. Wholly foreign-owned enterprises are therefore subject to vague rules on prohibited investments and face risks if they are deemed to pose a potential threat to the regime's security.

Ambiguity caused by an absence of specific criteria puts the interest of foreign investors at the risk of arbitrary decisions and interpretations by the North Korean authority, which ultimately undermines regulatory stability.[8] For instance, capital contributed to an equity joint venture in kind is to be evaluated by a mutual agreement based on international market prices prevailing at the time of the contribution. This is likely to lead to overvaluation of the land and buildings that will mostly come from North Korean partners since no objective price standard is available. It is also open to question whether industrial property rights, technical know-how and other forms of intangible property rights from foreign investors can be fairly valued. The law provides for fair compensation in the event of "unavoidable" circumstances that make it necessary to nationalize or seize the assets of foreign-invested enterprises or foreign investors without clearly defining"unavoidable circumstances" or "fair compensation." In addition; what is provided for is ambiguous pledge to protect managerial secrets of foreign-invested enterprises. The scope of managerial secrets or liabilities for revelation of the secrets is rarely made public, increasing risks for foreign investors.[9]

Ambiguity of the law, in general, can be supplemented by plans, guidelines and instructions of the state institutions including the political party. In short, it is unrealistic to

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[7] Dong-Yoon Chung, *BukhanDaewegyungjebubeuHwoegowaJeonmang* [Retrospect and Prospect of North Korean International Trade Law], 10 BUKHANBUBRYULHAENGJEONGNONCHONG 271, 299 (1995); Jin Kim, *BukhaneuWegukintujagwanryunbubgyu* [North Korea's Foreign Investment Regulations], 31 BUBHAK 133, 148 (1990).

[8] Jong-RyulBae, *BukhanWejabubryungeuMoonjejumgwaDaechaek* [Problems in North Korea's Foreign Capital Regulations and Its Solutions], 6 BUKHANYEONGU 118-19 (1995).

[9] SEONG-HO JHE, BUKHANWEJAYOOCHIBUBRYUNGEUMOONJEJUM [Problems in North Korea's Legislation for Attracting Foreign Capital Investment] 87 (1998).

expect stability in foreign investment programs in North Korea where the rule of man trumps the rule of law.

B. TEXTUAL STUDY

1. STATE CONTROL IS MAINTAINED

With a firm commitment to its command socialist economy, North Korea maintains significant state control over foreign-invested enterprises from the establishment to the dissolution that in other countries should be and is governed by the laws of commerce. Transactions with institutions or enterprises of North Korea, labor management, and finance/foreign currency management are particularly prone to state intervention.

Transaction control is exerted in various forms. If a foreign-invested enterprise is to purchase materials needed for operation from a North Korean enterprise or sell its products in the country, it must submit an annual purchase or sales plan to the authorities. With the purchase of material and sales of goods tied to the state's plan, a foreign-invested enterprise is bound to be constrained from flexible business operation. The regime also imposes strict control over trade by requiring foreign-invested enterprises that import materials needed for operation or export goods it produces to obtain approval from a state trading oversight body or the Rajin-Sonbong People's Committee. In particular, equity joint ventures must sell consumer goods to institutions or enterprises designated by the state in local currency. The proceeds can only be used to pay wages, expenses for business activities, and taxes. The laws also provide that all the goods and technologies that a contractual joint venture sells within North Korea be priced at the level set by a state institution, leaving no room for consideration of production costs and profits.

Foreign-invested enterprises are heavily regulated with regards to labor management, as well. They must employ North Korean nationals for jobs in the country and for transfer of advanced technologies through a labor service agency at the place of their domicile with no freedom to hire employees on the basis of their skills. If an enterprise is to dismiss North Korean employees before the expiration of the employment contract, it must reach an agreement with the labor service agency in accordance with the terms of the contract. Furthermore, foreign-invested enterprises must guarantee monetary contribution to the trade union,[10] which is largely political in nature.

For effective control of financial management, North Korea requires foreign-invested enterprises to open an account at a local bank upon an agreement with the foreign exchange control organization. Wholly foreign-owned enterprises in particular are required to open accounts at the Trade Bank of the DPRK. Stricter control applies to foreign currency management with transactions and clearing in foreign currencies to be conducted only through the enterprise's account in the bank. If it opens an account with a bank of a foreign

[10] Although they take the form of an association for workers, trade unions in North Korea are quasi-government organizations under the full control of the Workers' Party. They focus more on propagating the communist party policies and infusing socialist ideology than on protecting rights of the workers. *A Systematic Study of North Korean Laws (III)*, 216 THE LAW INFORMATION 418 footnote 324 (1997).

country, the enterprise must submit to the foreign exchange control organization records of receipts and payments within 30 days of the end of each quarter.

2. THE INTERESTS OF THE REGIME TAKES PRIORITY

North Korea's foreign investment laws contain several self-serving provisions that may result in unequal rights and obligations of North Korean investors and their foreign counterparts.

With the goal of maximizing in-kind capital contribution, North Korea requires the estimated value of industrial property rights and technical know-how at a wholly foreign-owned enterprise not to exceed 20 percent of the registered capital. Foreign-invested enterprises are also prohibited from reducing the registered capital, which hinders rational restructuring. In a contractual joint venture, the foreign partner has to endorse the operation of business conducted in a socialist mode, however inefficient, as it is only allowed to invest capital, not to participate in management.[11] Redemption of the portion of the investment or the distribution of profit to the foreign investor is to be realized primarily in goods produced by the contractual joint venture. This puts the burden of investment recovery on the foreign investors as they can recover their investment only through the sales of such products.[12] The requirement that a foreign-invested enterprise, in principle, be insured by a North Korean insurer provides another example of the self-serving nature of the law.

Finally, what would be taken as legitimate repatriation elsewhere is restricted in North Korea because the law virtually requires retention or reinvestment of such profits within the country. An example may be provisions in the Foreign Currency Law stipulating that the North Korean Won legitimately earned in the territory shall be put in the North Korean Won-denominated account and may not be exchanged for foreign currency. This is obviously contradictory to the provision that foreign investors can remit the entire profits and other incomes free of tax and transfer equity capital without limitation.

C. IN THE ASPECT OF THE APPLICATION OF THE LAWS

1. INADEQUATE PROCEDURAL RULES

On its face, North Korea's investment approval process does not appear cumbersome because most of its foreign investment law provisions specify the period of time to be taken for the procedure. The approval, however, is followed by registration that substantially prolongs the total process of investment application. For instance, a contractual joint venture seeking to change the type of business must obtain approval from the appropriate review organization. Upon approval, it then must go through a separate process for regaining a

[11] By putting the priority on job creation, rather than profit generation, North Korean enterprises tend to hire people until they have no profit. They lag far behind South Korean counterparts in business administration and production management techniques. Thus, it is difficult to expect them to generate profits by improving productivity.

[12] HYUNDAI RESEARCH INSTITUTE, BUKHANGYOYUK·TOOJA GUIDE [Aguide on Trade and Investment in North Korea] 80 (2000).

business license.

An enterprise denied an approval is allowed to appeal the rejection, but it is questionable how successful it would be because of the inflexible, authoritarian nature of the North Korean regime. In particular, a wholly foreign-owned enterprise aggrieved by a decision must bring the case to the court within 10 days from the date of the settlement of appeal, a period too short to make the process a meaningful avenue to pursue.

Meanwhile, Pyongyang has adopted arbitration and litigation procedures to resolve disputes that cannot be settled through agreement. However, the actual operation of the court and the arbitration bodies is closed off to the outside parties, raising obvious questions about their credibility. It also remains to be seen whether the regime will allow arbitration by international arbitration institutions and enforcement of the outcome in its territory because North Korea (i) has not set forth provisions in the Foreign Investment Law on arbitration by international organizations other than those of the third countries; (ii) has never entered into a treaty on dispute resolution with any western countries; and (iii) is not a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (also known as the ICSID or the Washington Convention).[13]

2. IMPLEMENTATION IS NOT GUARANTEED

North Korea provides no assurance on the autonomy of business operation or fair compensation for potential damage for foreign investors, whose primary objective is profit generation.

An equity joint venture is bound by provisions that the role of the top decision-making body should be assumed by the board of directors, which must convene with a quorum of two-thirds of the entire directors. Important matters such as revising the articles of incorporation, transferring equity shares, increasing the type of business and registered capital, extending period of operation, and dissolving the enterprise require unanimous resolution by the board. This will likely hinder timely and reasonable decision. The absence of specific provisions on liability for damage to an enterprise leaves unclear requirements, procedures and statute of limitation for damages. Therefore, a foreign investor or creditor may not be able to claim damages unless it has separately agreed on such liability in their individual contracts. A contractual joint venture, in particular, is granted no legal means against lax management by the North Korean partner.

Furthermore, given the dearth of hard currency, it is questionable how much North Korea will be committed to enforcing its Foreign Currency Law provisions that allow a foreign-invested enterprise to borrow foreign currency needed for its operation from North Korean banks or to repatriate lawful profits, incomes, or funds remaining after the liquidation of an enterprise.

[13] *Id.* at 109.

IV. THE TASK AHEAD

A. REFORM OF THE INVESTMENT LEGISLATION

1. STRUCTURAL REFORM

As is the case in other socialist countries, North Korea's foreign investment legislation - including the Equity Joint Venture Law and the Contractual Joint Venture Law - serve as a transitional corporate law to attract foreign investment. However, a host of problems exist in the foreign investment laws because they reserve the state's right to intervene in the establishment, operation, and liquidation of foreign-invested enterprises, most likely in fear of political and economic influence from foreign capital and technologies. In addition, the laws are more like administrative rules rather than private laws in many aspects, s and come with supporting regulations with redundant provisions and inconsistent terminologies that create confusion in interpretation and application. In order to address these problems and promote more investment from South Korea and western countries, Pyongyang needs to rectify (i) laws and regulations that have been enacted unsystematically in various forms for transient needs; (ii) conflicting legal provisions caused by legislative incompetence; and (iii) provisions in the implementation regulations or enforcement rules that merely repeat provisions of the law.

2. GREATER AUTONOMY AND FLEXIBILITY IS NEEDED

Because foreign capital and technology can be the lifeblood for the crippled North Korean economy, infusing elements of the market into the foreign investment legislation as aggressively as China, Vietnam and other socialist countries that have opened up to foreign investors is the key to survival. This includes guaranteeing autonomy in the establishment, operation, capital management, liquidation/dissolution, and dispute resolution of an enterprise in order to provide assurance on stability and efficiency. Among others, this means enacting regulations that permit various forms of profit-generating investment, direct or indirect, as well as many types of enterprises such as a corporation or a limited company because generating and retaining profit is of the utmost importance to investors. It is also imperative that the regime guarantee the autonomy of investors in operating business while adopting mechanisms to align corporate management with accountability. At the same time, the state's interference in domestic sales, employment and dismissal of workers and transfer of equity shares should be lifted to ensure flexible business operation, in particular, of equity joint ventures and contractual joint ventures. Additionally, the legislation should, with a clear understanding of the concept of capital, provide specific guidelines on the disposition of investment and profits as well as incentives for investment rather than simply declaring general principles.

3. NEW LEGISLATION NEEDS TO BE ENACTED

To properly function, foreign investment laws should be supplemented by other laws

including civil law (particularly, the contract law), corporate law, labor law, land law and tax law. These laws in North Korea, however, are not as sophisticated or effective as they need to be in order to help foreign-invested enterprise properly function in the country.

In general, foreign investment laws are special laws governing foreign investment activities and thus cannot be separated from such basic laws as civil law, corporate law and securities law. In North Korea, all the basic matters pertaining to property are governed by the Civil Law because of the absence of commercial law. Inevitably, this means applying the Civil Law to matters for which no special law has been adopted. However, the Civil Law is not appropriate for foreign investment because, as a law based on the principles of absolute socialism, it does not allow private ownership of property or freedom of contract. Moreover, the Civil Law governs not only the legal relationship between private individuals, but also matters pertaining to property and economic activities of state organizations. Therefore, the application of the Civil Law to supplement foreign investment legislation can lead to discrepancy between the law and the real world.

If Pyongyang seeks large-scale capital and technology investment from capitalist countries, it may wish to benchmark the former Eastern Bloc countries such as Russia and countries such as China and Vietnam, which have adopted foreign investment legislation. At a minimum, the North Korean regime should adopt an independent civil law, particularly corporate law, which is aimed at businesses for prompt and safe transactions, along with anti-competition law and securities law to protect foreign-invested enterprises from unfair transactions and promote capital transactions.

B. Stability in Legal Interpretation and Application

1. Credibility and Uniformity in Interpretation of the Law

Fair interpretation and application of the foreign investment laws is just as critical. In most socialist countries, laws are regarded as subordinate to politics such as orders from the communist party or the Mass Line. As a consequence, orders from the communist party take precedence over legal stability, and interpretation of the law is viewed as an activity to better understand the spirit of the law as well as the political intention of the party. Interpretation of North Korea's foreign investment laws is particularly challenging because they commonly do not provide for the definition of the terminologies, the applicability, and the relationship with other laws. This increases the risk of arbitrary interpretation based on political needs, which then undermines consistency in interpretation and application of the foreign investment legislation.

It is, of course, the role of investors to put clarity on their contracts for equity/contractual joint ventures. However, legislators should also endeavor to clearly define legal terminologies and concepts that have hitherto been ambiguously used in foreign investment laws and other related legislation as well as establishing clear and specific provisions on the requirements, effect, period, and statute of limitation, etc. to prevent disputes on their interpretation.

2. PREDICTABILITY OF APPLICATION OF THE LAW

In general, the principle of freedom of contract does not fit in the socialist countries where economic activities are conducted by socialized organizations under the state's command and control. Additionally, like government officials of other socialist countries who are not accustomed to interpreting and applying laws at their discretion, North Korean officials put priority on the decision of the supreme ruler over the law[14], which makes it difficult to predict how the laws will apply. One additional factor that undermines credibility in the application of the law in the country is that little is known about how the court or the arbitration system actually functions. It is open to question whether the regime will honor a ruling by arbitration authorities in a third country since there is no mention of dispute resolution through a third party arbitration in the Contractual Joint Venture Law and the Wholly Foreign-owned Enterprise Law.

For countries like North Korea that have failed to earn the trust of the international community, compliance with agreements or regulations on very basic matters such as travel, communications and customs clearance bears critical importance in gaining credibility and attracting investment from the outside world. In that regard, North Korea has significantly destroyed its credibility. For instance, the ban on visits by Daewoo International Corporation and LG International to North Korea led to the discontinuation of business with tremendous investment losses. Moreover, Pyongyang unilaterally banned access to the Gaesung Industrial Complex and took arbitrary measures on protection of South Korean workers in the industrial park in 2009. Together with many similar instances, these episodes have damaged North Korea's credibility, and it is uncertain whether it can be restored in the foreseeable future.

C. OTHER TASKS

1. UPGRADING LEGISLATION TO GLOBAL STANDARDS BY JOINING INTERNATIONAL ORGANIZATIONS AND CONVENTION

All member countries of the World Trade Organization (WTO) should fulfill obligations prescribed in the WTO agreements. For instance, China has made continued efforts since joining the WTO in January 2002 to bring its legal infrastructure for foreign investment up to the global standard by giving equal treatments to domestic and foreign investors. It also improved foreign currency control measures on the three major forms of foreign-invested enterprises (Sino-foreign equity joint venture, Sino-foreign contractual joint venture and wholly foreign-owned enterprise), expanded sectors allowed for foreign investment, and observed the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs Agreement) and the Agreement on Trade-related Investment Measures (TRIMs Agreement).

Following in China's footstep, Vietnam also embarked on an entire revision of its

[14] In North Korea, a law is a means of executing policies of the communist party and is implemented through guidelines, instructions and principles provided by the party. The party policies, however, are determined by the will of party leadership. Therefore, rule of man i.e. the supreme ruler prevails over the rule of law.

foreign investment law and corporate law as preparatory efforts to join the WTO in November 2006 in a bid to create a foreign investment-friendly environment and make a fundamental shift to a market economy. If North Korea intends to break out of its isolation, it should continue efforts to join the WTO and to improve its foreign investment legislation to the global standards.

As for investment dispute resolution, North Korea's Foreign Investment Law holds that disagreements concerning foreign investment shall be settled through consultation. It also stipulates that, where a dispute cannot be resolved through consultation, it should be settled by a court or an arbitration body of North Korea or may be taken to an arbitration institution in a third country. However, foreign investors remain unconvinced as North Korea has not acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention); nor is it a signatory to the ICSID Convention. Signing international conventions on arbitration is not an option but a prerequisite for enhancing credibility on dispute resolution, and ultimately attracting foreign capital.

2. SANCTIONS FROM THE INTERNATIONAL COMMUNITY

(1) FINANCIAL SANCTIONS

Having been in a moratorium on foreign debt since the mid-1970s, North Korea was declared a sovereign default in 1996. Moreover, the decades-long self-reliance policy has generated few foreign currency-earning industries and an extreme shortage of hard currency. This has been further complicated by an inability to obtain loans from overseas because sluggish trade and political/social instability of the country have resulted in the world's lowest credit rating. In order to overcome the foreign debt issues and restore investor confidence, Pyongyang should pursue debt-restructuring through international forums such as the Paris Club and the London Club and improve its sovereign credit rating in the global capital market.

One way out of this may be to join international institutions such as the IMF, the IBRD, the IDA, and the ADB. Long-term loans with low interest rates (public loans), financial aid, and support for infrastructure expansion and foreign investment projects from such international financial organizations will be a viable mid- to long-term solution.

(2) POLITICAL/MILITARY SANCTIONS

North Korea is under a number of sanctions by the international community, most notably the U.N. Security Council Resolution 1718 and 1874, and the Wassenaar Arrangement, due to its nuclear /missile programs and criminal allegations. In particular, under the Wassenaar Arrangement, exportation of strategic goods and technologies to North Korea is strictly controlled. Accordingly, the importation of most of electronic equipment, including computers and parts into North Korea is prohibited. This substantially constrains investors from the member states from investing modern equipment and advanced technologies, all high on Pyongyang's wish list, in North Korea. It is hard to underestimate the effect of this constraint alone. For investment and technology from western countries,

North Korea must continually work to improve its image.

V. Conclusion

Since the promulgation of the Equity Joint Venture Law in September 1984, North Korea has warmed up to foreign capital at a modulated pace and scope and experimented with capitalistic legal regimes for foreign investment while trying to maintain its self-reliance ideology. By enacting the Gaeseong Industrial Complex Law, the Geumgang Mountain Tourism Zone Law (and the supporting regulations), and the Law for Economic Cooperation between North and South Korea, the North Korean regime also demonstrated its commitment to active economic cooperation with South Korea, which it believed would extend the most generous support to the North Korean economy following the June 15 Joint Declaration. These are notable developments that should encourage North Korea to be more responsive to the call for change and move toward a society ruled by law.

The inflow of foreign investment into North Korea, however, has been disappointing due to strained relationships with the U.S. caused in part by drug trafficking, counterfeiting U.S. currency and nuclear/missile testing and the consequent political/military instability. Moreover, foreign investment laws have failed to provide strong incentives to capital and technology investment because of their insistence on maintaining socialistic ideology such as the state's right to nationalize production and intervene in business operation. Unlike corporate laws in a capitalist economy that govern complex interests and profit motivations of business enterprises, North Korea's foreign investment legislation are a mix of private law and public law. In fact, they prioritize administrative controls such as approval and oversight of business activities and taxation. Unsophisticated legal structure and ambiguity, characteristics common in socialist countries, are also found in North Korea's foreign investment laws, raising concerns about arbitrary interpretation by the state. Even laws and regulations enacted almost simultaneously are not closely aligned, resulting in inconsistency and redundancy.

There is no doubt that Pyongyang must open up and embrace capitalistic remedies to a significant extent to achieve tangible results for its economy. However, establishing a legal framework comparable to that of western countries in a short period of time in a country bent on a socialist regime will surely prove a daunting task. Compounding the challenge Pyongyang government officials are accustomed to a centralized command economy and incapable of understanding the need for complex rights and obligations among individual enterprises from capitalistic perspectives. The North Korean leadership also has tried to pace itself in adopting the key features of the market economy out of the fear that a rapid opening of the economy would pose a significant threat to the regime. Although relations between the two Koreas are at their lowest levels in years, a breakthrough may still be possible given the intermittent nature of inter-Korean relations. Once inter-Korean cooperation and exchanges return to normalcy without drastic changes to political systems of the two countries, Pyongyang may well gradually seek to enhance its foreign investment legislation.

Sluggish improvement of North Korea foreign investment system will reduce the likelihood of achieving the ultimate goal of promoting economic growth and political

stability through foreign capital and technology. This state of affairs is compounded by the fact that North Korea faces acute shortages of internal resources and lags behind competitors aggressively seeking foreign investment such as China, Vietnam and other socialist states in terms of their political-economic stability, their guarantees granted to foreign investors, their degree of globalization, their convertibility and use of foreign currency, size of their domestic market, labor productivity and other market infrastructure. By benchmarking the success that China, Vietnam and Eastern European countries have achieved in attracting foreign investment through bold market-opening initiatives, North Korea must make a concerted and comprehensive effort to substantially improve its foreign investment legislation.

KEYWORDS
North Korea, Foreign Investment Legislation, Pyongyang, Equity Joint Venture Law in North Korea, Gaeseong Industrial Complex Law

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TO BE OR NOT TO BE: AQUESTION TO THE UNITED STATES ON THE COUNTERVAILING MEASURESTOTHOSE NON-MARKET ECONOMIES

Jiaxiang Hu[*]

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ABSTRACT

When China acceded to the World Trade Organization in 2001, it was not recognized as a market economy by the United States and other WTO Members. The treatment of the non-market economies varies from one country to another. For many years, the United States did not impose countervailing duties on the imports from a country designated as a non-market economy. This policy rested on two principles established in 1984 and was confirmed by the Second Federal Circuit Court of Appeals. On November 21, 2006, the US Department of Commerce decided to initiate an antidumping and countervailing investigation on the imports of coated-free sheet paper from China. This decision changed the long-standing judicial precedent that a non-market economy was not subject to the US countervailing measures on the presumption that the extent of such subsidies could not be accurately identified or measured. China regarded this change of trade policy as the major impediment to the promotion of Sino-US relationships, and opposed the investigation from the very beginning. With the increasing political reliance on each other, the United States and China will need more mutual trust and cooperation than ever. It is important for the US government to consider whether or not to apply countervailing measures on the imports from China while it is balancing the bilateral relationship in particular and the multilateral relationships in general.

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I. LEGAL ARGUMENTS AND HISTORICAL BACKGROUND

On September 14, 2007, China filed a complaint with the WTO Dispute Settlement Body to consult with the United States concerning the US preliminary anti-dumping and countervailing duty determinations on the imports of coated-free sheet paper from China (hereinafter as the "*Coated Free Sheet Paper Case*").[1] China alleged that the US measures were inconsistent with its obligations under Article VI of GATT1994,[2] Articles 1, 2, 10, 14, 17, and 32 of the SCM Agreement, and Articles 1, 2, 7, 9, and 18 of the AD Agreement. Specifically, China contended that: (1) the United States failed to demonstrate the specificity required under Article 2.1 of the SCM Agreement with respect to the subsidies identified in the preliminary countervailing investigations, and to substantiate these determinations of specificity on the basis of positive evidence as required by Article 2.4 of the SCM Agreement; (2) the United States failed to make a proper determination of benefits under Articles 1 and 14 of the SCM Agreement with respect to the alleged "government policy lending program" practiced by China; (3) the United States failed to ensure that the preliminary affirmative determination of subsidization and the imposition of provisional countervailing duties were based on the amount of subsidies found to exist, which is required by Articles 17 and 19 of the SCM Agreement; and (4) the United States failed to ensure that the preliminary affirmative determination of dumping and the imposition of provisional anti-dumping duties were based on the amount of dumping found to exist, which is required by Articles 7 and 9 of the AD Agreement.

Shortly after a mutual solution for the *Coated Free Sheet Paper Case* was reached, a similar file of complaint came up. On September 19, 2008, China requested consultations with the United States on the latter's definitive anti-dumping and countervailing duties on certain imports from China. These restrictive measures were the result of decisions made by the US Department of Commerce (hereinafter as the "*Definitive Anti-Dumping and Countervailing Duty Case*").[3] China pointed out that these measures were inconsistent with the obligations of the United States under, *inter alia*, Articles I and VI of GATT1994, Articles 1, 2, 10, 12, 13, 14, 19, and 32 of the SCM Agreement, Articles 1, 2, 6, 9, and 18 of the AD Agreement, and Article 15 of the Protocol on the Accession of the People's Republic of China (hereinafter as the "*Protocol*").[4]

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[1] *United States---Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China*, WD/DS368/1.

[2] Paragraph 5 of Article VI provides that "no product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization" (the so-called "double remedies").

[3] *United States---Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/1.

[4] Article 15 of the Protocol partly provides that: "Article VI of the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following: (a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules: (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability; (ii) The importing WTO Member may use a

The legal reasoning in these two cases seems complicated, and a summary of all of the legal points in both cases is obviously beyond the scope of this article. Rather, the focus here is on the change of US trade policy towards the non-market economies like China. The *Coated Free Sheet Paper Case* and the *Definitive Dumping and Countervailing Duty Case*, in terms of international trade, are just two normal disputes out of a total of 427 among WTO Members.[5] However, they are quite abnormal in terms of *realpolitik* as the United States, by doing so, changed its long-standing practice to refrain frommaking a countervailing investigation on the imports from a non-market economy. The then US Secretary of the Department of Commerce, Carlos M. Gutierrez, commented on the relevant measures as the following: "Times have changed. When the US Department of Commerce made the decision not to impose countervailing duties on the imports from the communist countries [of the Soviet Union, Czechoslovakia, Poland and German Democratic Republic], the enterprises in these countries would not adjust their production for the government subsidies. Nevertheless, China is different from those countries. The Chinese enterprises will react quickly to these subsidies, and we can expect their reactions."[6]

The remarks of Mr. Gutierrez reflect the double-standard approach taken by the US government in trading with China. On the one hand, the United States tends to regard China as a country dominated by State trading and refuses to recognize its market economy status. On the other hand, however, the US government has realized that China is different from the former Soviet Union and other Eastern European countries which were the prototypes of non-market economies during the GATT period. In the eyes of some US politicians like Gutierrez, China is not only an important cooperator, but also a potential competitor.

II. THE DILEMMA FOR THE MEASURES AND THE INCONSISTENCY OF THE PRACTICE

A. THE DEFINITION AND APPLICATION OF THE "NON-MARKET ECONOMY"

The concept of the "non-market economy" can be traced back as early as the bilateral trade agreement reached between the United States and the Soviet Union in 1935. This agreement provided that, in exchange for the most-favored-nation treatment, the Soviet Union would accept an obligation to import products from the United States worth at least $30 million every year. In the post-war period, while addressing the issue of non-market economy, both official documents and economic texts employed the term "State Trade

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methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product. (b) In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14 (a), 14 (b), 14 (c) and 14 (d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use a methodology for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such a methodology, where practicable, the importing WTO Member should adjust those prevailing terms and conditions before considering the use of terms and conditions prevailing outside China."

[5] *Chronological list of disputes cases*. http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (*last visit* on December 1, 2011)

[6] Emphasis added. See First Finance Daily: *Who stands behind the countervailing duties?* 2 April 2007.

Countries." This was due to the overwhelming role that the State played in the foreign trade of a group of countries, predominantly in Eastern Europe.[7] The text of GATT1947 was silent on this issue because none of the 23 original signatories belonged to this group. With the addition of new entrants and in some of which the "the centrally planned economy" was dominated, the GATT CONTRACTING PARTIES later adopted *Ad* Article VI which provides that

> It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.[8]

No further guidance has been given on the application of the above provision. Article 2.7 of the AD Agreement acknowledges the validity of this supplementary provision.[9] WTO Members have generally taken advantage of this provision to reject cost and price information provided by those countries considered to be non-market economies. Such a practice has been consolidated by Article 17.6(i) of the AD Agreement, which provides that "in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned."

By contrast,WTO Members make their decisions based on the information from third party surrogate countries with market economy systems. In each case, the market economy country chosen is to be at a level of development comparable to that of the non-market economy that is subject to the antidumping investigations.[10] The treatment to the non-market economies varies greatly, depending on how the importing nations interpret the agreement.[11] The US anti-dumping statute defines the "non-market economy" as "any foreign country that the administering authority determination does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of

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[7] Alexander Polouektov, *"The Non-Market Economy" Issue in International Trade: In the Context of WTO Accessions*, United Nations Conference on Trade and Development, UNCTAD/DITC/TNCD/MISC, 20, October 9, 2002.

[8] GATT BISD, Volume IV, at.64. This provision dates from the 1954-55 Review Session of the GATT and has its origins of consideration of issues relating to the Working Party on the Accession of Poland.

[9] Article 2.7 of the AD Agreement provides that "this Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT1994."

[10] Article 10 of the SCM Agreement provides that "Members shall take all necessary steps to ensure that the imposition of a countervailing duty on *any product* of the territory of *any Member* imported into the territory of another Member is in accordance with the provisions of Article VI of GATT1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture." (*Emphasis added*) The SCM Agreement does not distinguish market economies or non-market economies in its application. Therefore, whether a WTO Member should be considered a non-market economy is a domestic consideration rather than a multilateral one.

[11] OlehMalskyy, *The concept of the non-market economies in the antidumping investigations of the United States of America, the European Union and the law of the World Trade Organization*, Lviv (2005), at 12.

the merchandise."[12]

B. CHINA'S CURRENT STATUS

When China acceded to the WTO in 2001, it failed to receive the recognition as a market economy from other WTO Members. Paragraph (d) of Article 15 of the Protocol on the Accession of the People's Republic of Chinaprovides that "once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession…" In other words, within 15 years after the accession to the WTO (2001-2016), the issue whether China should be considered as a market economy or non-market economy shall be determined by the relevant WTO Member.

C. THE US JUDICIAL PRECEDENT RELATED TO THE ISSUE OF NON-MARKET ECONOMIES

The US practice not to apply countervailing investigations to the imports from a non-market economy was not set by Congress, but by federal courts. In November 1983, Georgetown Steel Corporation, Raritan River Steel, Atlantic Steel Company (hereinafter as "Georgetown Steel") and Continental Steel Corporation (hereinafter as "Continental Steel") filed two petitions to the US Department of Commerce (hereinafter as "DOC") on behalf of US domestic producers of carbon steel wire rod (hereinafter as the "*Wire Rod Cases*"). The petitions alleged that the wire rod imported into the United States from Czechoslovakia and Poland had been subsidized by their governments and were therefore subject to countervailing investigations under the provisions of Section 303 of US Tariff Act of 1930, as amended, 19 U.S.C.§ 1303(1982).[13] Based on these petitions, the DOC initiated countervailing duty investigations on those imports. After finishing the hearings, the DOC issued final negative determinations and held that Section 303 did not apply to Czechoslovakia and Poland as both of them were non-market economies. According to the DOC, a subsidy was any government financial action that distorted or subverted the market

[12] In making the above determination, the US administering authority shall take into account: (i) the extent to which the currency of the foreign country is convertible into the currency of other countries, (ii) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management, (iii) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country, (iv) the extent of government ownership or control of the means of production, (v) the extent of government control over the allocation of resources and over the price and output decisions of enterprises, and (vi) such other factors as the administering authority considers appropriate. See Section 771(18) of the Trade Act of 1930 as amended, 19 U.S.C. § 1677(18).

[13] According to the petitions, the subsidies provided for the exported wire rod involved (1) the receipt of exchange rates higher than the official rates; (2) direct payments on goods sold abroad at prices below domestic prices; (3) retention by the exporting entity of part of the "hard currency" obtained from the export sales; (4) application of "trade conversion coefficients" to change the exchange rate and thereby create a more favorable return on the exports; and (5) granting of income tax rebates for such sales. See *Georgetown Steel Corp. v. United States*, 801 F. 2d 1310 (Fed. Cir. 1986).

process and resulted in a misallocation of resources, and this analysis had no relevance to a country in which production was mainly controlled by the central government.[14]

While the *Wire Rod Cases* were pending at the DOC, Amax-Chemical Incorporated and Kerr-McGee Chemical Corporation also filed their petitions to the DOC, alleging that the Soviet Union and German Democratic Republic had provided subsidies for their potash products exported to the United States (hereinafter as the "*Potash Cases*"). After having decided the *Wire Rod Cases*, the DOC rescinded its investigation in the *Potash Cases* and dismissed the complaints on similar grounds. Following the steps of Georgetown Steel and Continental Steel,[15] Amax Chemical and Kerr-McGee sought judicial review of the DOC's decisions in the US Court of International Trade. In view of the similar nature of these two lawsuits, the Court consolidated these cases.

The International Trade Court reversed the decisions of the DOC on the *Wire Rod Cases*, and held that the US anti-subsidy law did apply to non-market economies. The Court stated that the premise of the DOC's decisions "that a subsidy can only exist in a market economy" was a "fundamental error."[16] The Court said that "the only purpose of the anti-subsidy law [was] to extract the subsidies contained in the merchandise entering the commerce of the United States in order to protect domestic industry from their effect… [and that] its effectiveness [was] clearly intended to be complete and without exception."[17] The Court remanded the cases to the DOC for further proceedings consistent with its opinion.

In appealing to the Second Federal Circuit Court of Appeals, the DOC changed its strategy and contended that the US Court of International Trade did not have jurisdiction over the *Wire Rod Cases* because the petitioners had not brought suit to the Court in a timely manner.[18] The Second Circuit Court accepted the argument of the DOC and reasoned that since Section 1516(a)(2)(A) specified the terms and conditions upon which the United States had waived its sovereign immunity in consenting to be sued in the Court of International Trade, those limitations must be strictly observed and were not subject to implied exceptions. Based on these deliberations, the Second Circuit Court vacated the order of the International Trade Court insofar as it set aside the negative countervailing duty determination made by the DOC in the *Wire Rod Cases* and remanded those cases to the International Trade Court to dismiss Georgetown Steel's complaint for lack of jurisdiction. Meanwhile, the Second Circuit

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[14] *Id.*

[15] Georgetown Steel and Continental Steel sought judicial review in the US Court of International Trade of the negative countervailing duty determinations made by the DOC.

[16] *Continental Steel Corp. v. United States*, 614 F. Supp (1985), at 548- 50.

[17] *Id.*, at 553.

[18] Continental Steel did not appear as a party in the Second Federal Circuit Court of Appeals. The timeliness question arose out of the fact that Georgetown Steel followed the bifurcated procedure for bringing the lawsuit to the US Court of International Trade permitted in Section 516A of the Tariff Act of 1930, as amended by the Trade Agreement Act of 1979 (19 U.S.C. § 1516(a)(2)(A)), of first filing a summons and then filing a complaint. Georgetown Steel timely filed the summons by mailing it to the clerk of the Court on May 24, 1984, which was within 30 days of the publication in the Federal Register of the negative countervailing duty determination. Georgetown Steel mailed the complaint to the clerk of the Court by certified mail on June 22, 1984, which was within 30 days of the filing of the summons. The Postal Service, however, returned the complaint on July 6, 1984, because of insufficient postage. On that same day, Georgetown Steel remailed the complaint accompanied by a motion for leave to file the complaint out of time. The DOC opposed that motion, but the Court of International Trade granted it.

Court duly reviewed the merits of the International Trade Court's reversal of the DOC's determinations in the *Potash Cases* as the summons and complaints in these cases were timely filed.[19]

Section 303 of the Tariff Act of 1930 (as amended, 19 U.S.C. § 1303 (1982)) authorizes the levy of countervailing duties under the following situations: "Whenever any country…or other political subdivision of government…shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country…or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether…imported directly…or otherwise…there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed." According to the Second Circuit Court, whether the economic incentives and benefits that the Soviet Union and German Democratic Republic granted in their exports of potash to the United States constituted a "bounty" or a "grant" was a key issue in these cases.

The DOC defined a non-market economy as one "that operates on principles of non-market cost or pricing structure so that sales or offers for sale of merchandise in that country or to other countries do not reflect the market value of the merchandise."[20] As the DOC explained in the *Wire Rod Cases*, in a non-market economy, "resources are not allocated by a market." "With varying degrees of control, allocation is achieved by central planning."[21] The Second Circuit Court noted that Congress did not define the term "bounty" or "grant" in the anti-subsidy law, nor did it distinguish the application of the term between a market economy and a non-market economy. As a matter of fact, there was no state-controlled economy at all when the law was first made. Since then, the US Congress has reenacted Section 303 six times, without making any reference to the non-market economy at all.[22]

In light of these considerations, the Second Circuit Court made it clear in its judgment that whether Section 303 applied to non-market economies or not could not be decided by reference to the language of the statute. The Second Circuit Court disagreed with the International Trade Court's determination that the "plain meaning" of the statutory language reflected "an intent to cover as many beneficial acts (for the exporter) as possible." Instead, the Second Circuit Court concluded that "Congress has not attempted to exclude non-market economies from what the US Court of International Trade believed to be the sweeping reach of the section."[23] The Second Circuit Court thus held that the economic incentives and benefits that the Soviet Union and German Democratic Republic had provided for the exports of potash to the United States did not constitute "bounty" or "grant" under Section 303.[24]

The Second Circuit Court based its conclusion on the fact that a government subsidy on exports to the United States enabled a foreign producer to sell in the American market in a situation in which it otherwise would not be in the seller's best economic interest to do so.

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[19] See *Georgetown Steel Corp v. United States*, 801 Federal Report, 24 Series, at 1308-18.
[20] 49 Fed.Reg (1984), at 23428-29.
[21] *Id*, at 19371 and 19375.
[22] Trade Agreement Act of 1979, Pub. L. No. 96-39, §§ 103, 105(a), 93 Stat. 190, 193, which was, after the *Zenith Case*, reenacted the section the sixth time.
[23] 614 F. Supp. at 550-52 and 555-57.
[24] *Georgetown Steel Corp v. United States*, *supra* note 19, at 1318.

This apparently was what the DOC had in mind when it stated in the *Wire Rod Case* that "a subsidy [bounty or grant] is definitionally any action that distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient production and lessening world wealth."[25] It was this kind of "unfair" competition, resulting from the subsidies to the foreign producers that gave them a competitive advantage they otherwise would not have, against which the US Congress sought to protect in the anti-subsidy law.
According to the Second Circuit Court, in exports from a non-market economy, this kind of "unfair" competition could not exist. Although a non-market country might engage in foreign trade through various entities, the government controlled those entities and determined where, when and what they would sell, and at what prices and upon what terms. All the profits would go to the government and all the losses would be covered by the government. In the *Potash Cases*, the benefits might encourage the exporters to accomplish the economic goals and objectives the central planners set for them, the exporters, however, did not create the kind of unfair competitive advantage over American firms against which the countervailing duty was directed.

Having taken all these factors into account, the Second Circuit Court did not believe that if theSoviet Union or German Democratic Republic had sold the potash directly rather than through a government instrumentality, this product would have been sold in the United States at higher prices or on different terms. Unlike the situation in a competitive market economy, the economic incentives the country provided to the exporters did not enable them to make sales in the United States that they otherwise might not have made. Even if one were to label these incentives as a "subsidy" in the loosest sense of the term, the governments of those non-market economies, in the view of the Second Circuit Court, would in effect be subsidizing themselves. The governments of the Soviet Union and German Democratic Republic were not providing the exporters of potash products with the kind of "bounty" or "grant" prescribed by Section 303.[26]

III. The Anti-Dumping Measure: A Practical Substitute?

Subsidy and dumping originate from the same practice. That is why Article VI of GATT1947 was first designed to regulate both anti-dumping and countervailing practices. Dumping is usually based on the government subsidies as the dumping price is lower than the normal price which consists of the cost and reasonable profits of a product. The economic factors for dumping and subsidies are various. Not all dumping or subsidy practices are inconsistent with the multilateral agreements. WTO rules only prohibit those which have caused material injuries to the domestic industries. The decision made by the Second Circuit Court is not the only legal source for the argument that the current US anti-subsidy law does not apply to those non-market economies. More recent legislation has also reinforced this argument. These newly amended statutes showed that the US Congress preferred to use the anti-dumping law to deal with the imports from the non-market economies. There is nowhere

[25] 49 Fed.Reg (1984), *supra*note 20, at 19375.
[26] *Georgetown Steel Corp v. United States*, *supra*note 19, at 1316.

to indicate in any of these statutes or their legislative history that the US Congress intended or understood that the anti-subsidy law would also apply to those non-market economies.

In the Trade Act of 1974, the US Congress amended the antidumping law to deal with the imports from the non-market economies.[27] A substantial change was the creation of "surrogate country" methodology for determining whether imports from a non-market economy are being "dumped" in the United States. This change provides that a third country may be chosen as a surrogate country to calculate the price of imports if the United States does not trust the cost and price information provided by the exporter. Reasoning that in "state-controlled-economy countries … the supply and demand forces do not operate to produce prices, either in the home market or in third countries, which can be relied upon for comparison",[28] Congress provided that the foreign market value of the goods from the non-market economies should be determined on the basis of either a constructed value or the actual selling price of some other market economy countries that sell same or similar merchandise either for home consumption or to other countries.[29] Meanwhile, in Section 331 of the 1974 Act, Congress also amended the anti-subsidy law.[30] There was no indication that Congress intended to change the scope of that law or believed that it applied to the non-market economies. Had Congress so intended, then, surely it would have provided some indication on this issue, particularly in view of the specific changes it made in the antidumping law to deal with the similar problems.

In the Trade Agreement Act of 1979, the US Congress reenacted the special surrogate country provision that it had previously authorized in the 1974 Act.[31] The relevant provision provides that if the economy of the exporting country is state-controlled to such an extent that sales or offers of sales of same or similar merchandise in that country or to countries other than the United States do not permit a determination of foreign market value under subsection (a) of this section, the foreign market value of the merchandise shall be determined on the basis of normal costs, expenses, and profits as reflected by either---(i) the prices, determined in accordance with subsection (a) of this section, at which such or similar merchandise of a non-state-controlled-economy country or countries is/are sold either for consumption in the home market of that country or countries, or to other countries, including the United States; or (ii) the constructed value of such or similar merchandise in a non-state-controlled-economy country or countries as determined under subsection (e) of this section.[32]

In the same statute the US Congress approved the Subsidies Code which was one of the achievements of the Tokyo Round Negotiations. Article 15 of the Subsidies Code permitted the signatory countries to regulate imports from those state-controlled economies based on a surrogate cost methodology under either antidumping or countervailing duty legislation enacted in the particular signatory country. Whichever legislation the signatory country chose to use, it was required to calculate the margin of dumping or the amount of subsidy by comparing the export price with "(a) the price at which a like product of a country other than

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[27] The current version is at 19 U.S.C. §§ 1673-1673i (1982).
[28] S. Rep. No. 1298, 93d Cong. 2d Sess. 174 (1974), reprinted in 1974 U.S. Code Cong. & Ad. News, at 7186 and 7311.
[29] 19 U.S.C. § 164(c) (1976).
[30] Trade Act of 1974, § 331(a), 88 Sta. 2049.
[31] Pub. L. No. 96-39, title I § 101. 93 Stat, at 182.
[32] 19 U.S.C. § 1677b(c) (1982).

the importing signatory (or exporting country)…is sold, or (b) the constructed value of a like product in a country other than the importing signatory (or exporting non-market-economy country)."[33] "If neither price nor constructed value as established under (a) or (b) above provides an adequate basis for determination on dumping or subsidies, then, the price in the importing signatory, if necessary duly adjusted to reflect reasonable profits, may be used."[34] Again, there was no indication that Congress understood or intended to extend the application of US anti-subsidy law to the non-market economies. As a matter of fact, Congress's realization, reflected in both the 1974 and 1979 Acts, that changes in the antidumping law were necessary to make that law more effective in dealing with the imports from the non-market economies, coupled with its silence about the application of anti-subsidy law to such imports, has strongly indicated that it did not believe that the latter law applied to those non-market economies.

A retroactive study of the WTO dispute settlements further supports the argument that it is not the US practice to apply countervailing investigations to the imports from the non-market economies. By the time when the *Coated Free Sheet Paper Case* and the *Definitive Dumping and Countervailing Duty Case* were filed, the United States had been engaged as a respondent in 15 cases concerning subsidies and countervailing measures (see Table One).[35] The complainants include Chile, the European Communities, India, Brazil, Canada, Mexico. None of them is classified by the United States as a "non-market economy."[36] In other words, the United States had never applied its anti-subsidy law to a WTO Member with non-market economy status before it initiated its countervailing investigation on the imports from China. This can be seen in Table One.

Table One: WTO countervailing duty cases concerning the United States as respondents when the *Coated Free Sheet Paper Case* and the *Definitive Dumping and Countervailing Duty Case* broke out

Case Number	Case Title and the Complainant	Result of the Case
DS97	*United States — Countervailing Duty Investigation of Imports of Salmon from Chile* (Complainant: Chile)	Consultations requested — no panel established nor settlement notified
DS138	*United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (Complainant: European Communities)	Appellate Body and panel reports adopted

[33] Tokyo Round Subsidies Code, paragraphs 2 of Article 15.
[34] *Id.*, at paragraph 3 of Article 15.
[35] *Chronological list of disputes cases, supra* note 5.
[36] Except China, all other countries in the list were transferred from the GATT contracting parties to the WTO Members on 1 January 1995 without questioning their status as a market economy.

DS167	*United States — Countervailing Duty Investigation with Respect to Live Cattle from Canada* (Complainant: Canada)	Consultations requested — no panel established nor settlement notified
DS206	*United States — Anti-Dumping and Countervailing Measures on Steel Plate from India* (Complainant: India)	Panel report adopted and mutual agreement reached
DS212	*United States — Countervailing Measures Concerning Certain Products from the European Communities* (Complainant: European Communities)	Appellate Body and panel reports adopted
DS213	United States — Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (Complainant: European Communities)	Appellate Body and panel reports adopted
DS218	*United States — Countervailing Duties on Certain Carbon Steel Products from Brazil* (Complainant: Brazil)	Consultations requested — no panel established nor settlement notified
DS236	*United States — Preliminary Determinations with Respect to Certain Softwood Lumber from Canada* (Complainant: Canada)	Panel report adopted and mutually agreed solution reached
DS257	*United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* (Complainant: Canada)	Appellate Body and panel reports adopted, and mutually agreed solution reached
DS262	*United States — Sunset Reviews of Anti-Dumping and Countervailing Duties on Certain Steel Products from France and Germany* (Complainant: European Communities)	Consultations requested — no panel established nor settlement notified
DS277	*United States — Investigation of the International Trade Commission in Softwood Lumber from Canada* (Complainant: Canada)	Appellate Body and panel reports adopted, and mutually agreed solution reached
DS280	*United States — Countervailing Duties on Steel Plate from Mexico* (Complainant: Mexico)	Panel established, but no report circulated
DS296	*United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea* (Complainant: Korea)	Appellate Body and panel reports adopted, and mutually agreed solution reached

DS311	*United States — Reviews of Countervailing Duty on Softwood Lumber from Canada* (Complainant: Canada)	Consultations requested and mutually agreed solution reached
DS345	*United States — Customs Bond Directive for Merchandise Subject to Anti-Dumping/ Countervailing Duties* (Complainant: India)	Appellate Body and Panel reports adopted
DS368	*United States — Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China* (Complainant: China)	Consultations requested — no panel established nor settlement notified
DS379	*United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (Complainant: China)	Appellate Body and Panel reports adopted, and mutually agreed solution reached

The same conclusion can even be traced back to the GATT period when only four cases were connected with the US anti-subsidy law. Once again, all the complainants engaged in these disputes were market economies according to the US criteria.[37] Therefore, for the United States to have a bifurcated approach towards China is simply extraordinary. On the one hand, the US government regards China as a non-market economy and uses the surrogate country methodology in the anti-dumping investigations. On the other hand, it also applies countervailing investigations on the imports from China regardless of the Second Circuit Court's rulings that the US countervailing measures would not apply to those non-market economies.

Compared with the countervailing measure, the anti-dumping measure was the more frequently-used instrumentality for the US authority to penalize the imports from a non-market economy during the same period. As a respondent, the United States had been engaged in 32 anti-dumping cases in the WTO dispute settlement proceedings.[38] The victims of the anti-dumping measures are more diversified than those of the countervailing measures. The number of WTO Members as complainants against US anti-dumping measures is 14, compared to 7 as that of countervailing measures. From 2003 to 2009, the US International Trade Commission completed 27 remedy investigations concerning imports from China.[39] Except the two cases regarding the US safeguard measures on certain imported steel and

[37] These four cases are *United States---Measures Affecting Imports of Softwood Lumber from Canada* (Report of the Panel adopted on 27-28 October 1993, SCM/162, BSID, No.40, at 358-517), *United States---Countervailing Duties on Non-rubber Footwear from Brazi*l (Report of the Panel adopted on 13 June 1995, SCM/94, BSID, No.42, at 208-33), *United States---Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* (Report of the Panel adopted on 28 April 1994, SMC/153, BSID, No.41, at 576-718), *United States---Countervailing Duties on Fresh, Chilled and Frozen Pork From Canada* (Report of the Panel adopted on 11 July 1991, DS7/R, BSID, No.38, at 30-47).

[38] Five of these cases were connected with both US anti-dumping measures and countervailing measures. See DS206, DS345, DS362, DS368, DS379.

[39] 13 of them are mixed investigations which are designated to the exports from both China and other country (countries). See http://www.usitc.gov/trade_remedy/731_ad_701cvd/investigations/completed/index.htm (*last visit*on 10 April 2011).

tyreproducts from China[40] and the two countervailing investigation cases mentioned above, China did not challenge the United States for any other restrictive measures. The remedy investigations of these cases have resulted in either a mutual agreement of the two governments or the payment of antidumping duties by the Chinese exporters. The Chinese government did not bring a case before the DSB against the United States solely for its antidumping measures. This partly accounts for the reason why the *Coated Free Sheet Paper Case* and the *Definitive Dumping and Countervailing Duty Case* have so much significance for China.[41]

Since the US Congress has amended the trade law which now permits to use the "surrogate country" methodology, it is much easier for the US government to impose antidumping measures on the imports from China instead of applying countervailing measures, even if the US government has determined that they are unable to get best information available from the exporters. Furthermore, before any substantial amendment of the US anti-subsidy law or major change of the judicial precedent is made, there always remain some unresolved issues caused by imposing countervailing measures on the imports from a non-market economy.[42] Taking all these factors into account, one might conclude that the change of the US approach towards the imports from China is a political consideration rather than a legal one.

IV. THE ALTERNATIVE OF ENDING CHINA'S NON-MARKET ECONOMY STATUS: BILATERAL OR MULTILATERAL?

As one of the three foundation stones for the Bretton Woods System, the GATT is widely believed to be designed by market economies for market economies.[43] The post-war international trading system is obviously based on the rules and principles that are more or less market-oriented.[44] The World Trade Organization has inherited all of these and kept the

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[40] *United States---Definitive Safeguard Measures on Imports of Certain Steel Products*, DS252; *United States---Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, DS399.

[41] China has long been ambivalent towards its non-market-economy status. On the one hand, China has always regarded the refusal of recognizing its market economy status as an unfair treatment. On the other hand, China has also taken the advantage of the US practice not to apply countervailing investigations to the imports from non-market economies to subsidize its enterprises.

[42] A position paper prepared for the US-China Economic and Security Review Commission emphasizes that "any decision to graduate China to market economy status, whenever that decision is made, must be made in the context of a formal, quasi-judicial proceeding in accordance with Section 771, subparagraph 18(b) of the Tariff Act of 1930, as amended, and would be based solely on facts in evidence placed on the administrative record of such proceeding. As in previous proceedings undertaken pursuant to this statute, the record would be developed from data and information gathered from expert third party sources such as the OECD and World Bank, as well as from comments received from interested parties and the public." Position Paper: *Any Change To China's Non-Market Economy Status Must Be Based On The Criteria Specified Under U.S. Antidumping Law*, Trade Lawyers Advisory Group, 18 August 2005.

[43] Alexander Polouektov, *supra* note 7. Paragraph 3 of Article 1 of the *Havana Charter* lists one of the objectives for the proposed International Trade Organization as "to further the enjoyment by all countries, on equal terms, of access to the markets, products and productive facilities which are needed for their economic prosperity and development." Based on this general objective, Articles I and III of GATT1947 defined the Most-Favored-Nation Treatment and the National Treatment as the basic principles regulating the trade between GATT contracting parties.

[44] John H. Jackson, *State Trading and Nonmarket Economies*, International Lawyer, Winter, 1989, Special Issue:

international economic structure basically unchanged.[45] Therefore, countries which are not "market oriented", especially those which are dominated by state-controlled economies, are considered not well fitted to this economic structure. These countries have been either excluded from the multilateral trading system, or permitted to join with some conditions.

The WTO system is not a closed system and neither is the organization.[46] It is now generally accepted that WTO rules are part of the wider corpus of public international law.[47] Any sovereign State or separate customs territory possessing full autonomy in the conduct of its external commercial relations may apply for its membership.[48] Therefore, it is a big challenge for the WTO to apply unified rules to an increasing body of Members and keep the multilateral trade system viable and efficient.[49] While it is necessary to prevent possible evasion of WTO rules and disciplines, there is also a need to develop a gradual integration of those non-market economies into the multilateral trading system. With the occurring of the *Coated Free Sheet Paper Case* and the *Definitive Dumping and Countervailing Duty Case*, the issue of China's non-market economy status has again touched the Sino-US relationship.

There are several reasons accounting for the popular belief that the non-market economy methodology produces an odd and unjust result and thus is an effective tool of protectionism. One is that the concept of non-market economy is more likely a policy-driven tool as the applying country is free to withdraw the status when it wishes. One of the early US House bills (H.R. 4800, 99th Cong.) stated that for the purpose of this section, "non-market economy country" meant any country dominated or controlled by communism.[50] Such a definition is obviously out of date as few countries in the current world stick to communism both in politics and economics, and proves that a pure economic reasoning is not the only controlling component of the concept.[51] Furthermore, most Eastern European countries, which were the prototype of non-market economies when the concept came into being, have either modified their political belief or evolved into democratic countries. Even China, which still keeps communism in politics, has given up the state-planned economic pattern and adopted the market mechanism to promote its economic development.[52]

Section's Tribute to Sir Joseph Gold.

[45] Paragraph 1 of GATT1994 provides that it shall consist of "(a) the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947, amended to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (excluding the Protocol of Provisional Application), as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement…"

[46] As for the difference between a closed international organization and a universal international organization, see HU Jiaxiang, *WTO and Its Dispute Settlement Mechanism---From a Developing Country's Perspective*, Chapter Three, Section One, Zhejiang University Press (2005).

[47] JoostPauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?* The American Journal of International Law, Vol. 95, 2001. Donald M. McRae, *The WTO in International Law: Tradition Continued or New Frontier?* Journal of International Economic Law, No.3, 2000. Donald M. McRae, *The Contribution of International Trade Law to the Development of International Law*, Recueil des Cours, Vol.260, 1996. Hu Jiaxiang, *The Role of International Law in the Development of WTO Law*, Journal of International Economic Law, No.1, 2004.

[48] See Article XII of the WTO Agreement.

[49] At the time of writing, there are altogether 153 Members in the WTO.

[50] Bennett Caplan, *The Role of the Non-market Economies in the New Round of Trade Negotiations*, Conference Paper, American Society of International Law Proceedings, 8-11 April 1987.

[51] OlehMalskyy, *supra* note 11, at 48.

[52] For example, Article 15 of the Constitution of China was amended in 1993 as the following: "The State practices socialist market economy."

Another criticism of the non-market economy methodology is that the selection process of a surrogate country is often an arbitrary one, and eliminates any comparative advantage the exporting country may have. Although the relevant US statute requires that the surrogate countries chosen to determine the factors of production or producers of comparable items in question should be at a comparable stage of development,[53] the difficulty is how to define the extent of comparability. Since the US Department of Commerce usually states that the selected country will be considered as a non-market economy until the status is withdrawn and the DOC may make its decision at any time without being subject to judicial review,[54] it is only natural that people will question the justification of the selection.

Another relevant question is how much economic reasoning should be counted in the decisions concerning non-market economies. Is the WTO the right place to decide on these purely macroeconomic terms as which country is, or which country is not, a market economy? Why should the WTO and not, for instance, the IMF deal with such issues?[55] These questions have been the subject of some serious academic research. As Alexander Polouektov pointed out: "It is unclear why nowadays, when all acceding transitional economies are members of the IMF and provide considerable volumes of various economic and statistical information in the framework of their accession process [to the WTO] , quite a number of criteria falling outside the sphere of the WTO become prerequisites for receiving non-discriminatory treatment within that organization."[56] Therefore, the issue as how to end the non-market economy status is essential to some WTO Members in their integration into the multilateral trading system and to the stability and viability of the system as well.

Within the multilateral trade system, there are several alternatives for the WTO Members to deal with the issue of non-market economies. GATT Article XXXV provides that "this Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting party and any other contracting party if: (a) the two contracting parties have not entered into tariff negotiations with each other, and (b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application." Similar words can be found in the WTO Agreement.[57] If the United States and other Members, at the time of China's accession to the WTO, considered that China had not met the criteria as a market economy, they could have applied Article XIII of the WTO Agreement. The fact, however, was that China had agreed to accept this discriminatory treatment in exchange for the application of WTO rules with all other Members. In other words, in the *Coated Free Sheet Paper Case* and the *Definitive Dumping and Countervailing Duty Case*, all China can do is to challenge the US practices, not the multilateral trading system. The alternative ending of China's non-market economy status is, *de facto*, not a multilateral one, but a bilateral one.

Since China decided to end its non-market economy status earlier than the set date

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[53]U.S.C § 1677b (4) (C).

[54]19 U.S.C. § 1677(18)(D)(1994 & Supp. III 1997): "Notwithstanding any other provision of law, any determination made by the administering authority under subparagraph (A) shall not be subject to judicial review in any investigation conducted under part II of this Subtitle."

[55]OlehMalskyy, *supra*note 11, at 49.

[56]Alexander Polouektov, *supra* note 7.

[57] Paragraph 1 of Article XIII provides that "This Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application."

(December 11, 2016), it has launched another round of negotiations with other Members shortly after it acceded to the WTO. This is a time-consuming and diplomacy-oriented process. Some members may bargain with China for more market opening concessions while others wish to use it to press China for some political goals. China's efforts have resulted in remarkable progress. By the end of May 2010, nearly 150 countries have signed a Memorandum with China to recognize its market economy status.[58] Unfortunately, these signatories do not include the United States and the European Union.

V. TO BE OR NOT TO BE: THIS IS THE QUESTION FOR THE UNITED STATES

On September 14, 2011, Chinese Premier Wen Jiabao said at the Annual Meeting of the New Champions 2011 (Summer Davos) that "Based on WTO rules, China's full market economy status will be recognized by 2016. If EU nations can demonstrate their sincerity several years earlier, it would be the way a friend treats a friend."[59] Wen's remarks came as global markets have been rocked by the renewed fears that Greece will default on its debt obligations. With the increasing support from China to help EU nations to deal with their debt crisis, the European Union may step ahead of the United States to recognize China's market economy status.

The United States is one of the most important trade partners of China and *vice versa*. Bilateral trade of goods between the two countries in 2010 was 385.34 billions US dollars, which was about 15 percent of China's total foreign trade of that year.[60] Over 60 percent of China's GDP comes from the industries which are more or less connected with foreign trade.[61] Most exports are from those labor-intensive enterprises which have absorbed a large portion of surplus labor. As more and more people are emigrating from rural areas to the cities, the question of how to create more job opportunities is a big challenge to the current Chinese government. Therefore, any trade policy change from the United States will have a significant impact on China's economic development.

As mentioned in the previous paragraphs, the issue of ending China's non-market economy status is a bilateral one. In this regard, the decision of when to recognize China as a market economy largely depends on the considerations of the US government. To apply countervailing measures on the imports from China does not breach the US concessions and obligations under the WTO rules, but changes the long-time US practice and will impair the Sino-US relationship significantly. To prevent the bilateral relationship from worsening, the United States may choose one of the following steps.

First, the United States, as many other WTO Members have done, may formally recognize China's market economy status. The reasons why there is a strong impetus for the Chinese government to input financial support to exports partly derive from its belief that the

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[58] People's Daily: *It is predictable that the European Union and the United States recognize China's market economy status*, 14 June 2011.
[59] China Daily: *China vows to boost European investment*, 15 September 2011.
[60] The statistics were made public by the General Customs Office of China. http://www.chinacustomsstat.com/aspx/1/NewData/Stat_Data.aspx?state=4&year=2010&month=12 (last visit: 16 September 2009).
[61] WU Ying *et al*, *The Prediction and Analysis of China's Foreign Trade*, Foreword, Science Press (2005).

United States, impeded by the judicial precedent, will not apply countervailing measures on the imports from China before it formally recognizes China's market economy status. This is perhaps an unexpected opportunity which China could currently make use of as the SCM Agreement only prohibits those subsidies specified in Article 2. If the United Statesrecognizes China's market economy status, the imports from China will possibly meet either anti-dumping measures or countervailing measures under the US trade law. The advantage of this option is that the US measures become more predictable and acceptable to the Chinese government and the exporters. The disadvantage is that by doing so the United States will lose the manipulation to choose the surrogate country in either anti-dumping investigations or countervailing investigations, and has to accept the cost and price information provided in a due process by the Chinese exporters. Also connected with this choice is the US concern about the convertibility of Chinese currency. The US government has been using this issue as one of the preconditions to recognize China's market economy status.[62] If China is recognized as a market economy, the United States will lose one of the important leverages to press the Chinese government to reform its currency policy, which is often complained by some US politicians as grabbing the unreasonable profits in the Sino-US trade.[63]

Secondly, the United States, as the European Union has done,[64] may take a "list" approach. In other words, the US authorities will give the market economy status to certain Chinese industries or enterprises where market conditions prevail, but regard China in general as a non-market economy. The advantage of this option is that there is much room for the United States to maneuver in trading with China without changing the anti-subsidy law. The US authorities may accept, under certain conditions, the information provided by the Chinese enterprises during the anti-dumping investigations while applying countervailing investigations on some imports which are believed to be subsidized by the Chinese

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[62] The US government will usually take the following factors into account when it determines the market economy status: (i) the extent to which the currency of the foreign country is convertible into the currency of other countries; (ii) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management; (iii) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country; (iv) the extent of government ownership or control of the means of production; (v) the extent of government control over the allocation of resources and over the price and output decisions of enterprises, and (vi) such other factors as the administering authority considers appropriate. Among these factors, the first one, i.e. the convertibility of Chinese currency into the currency of other countries, is the issue which the United States cares most. See *supra* note 42.

[63] In the recent years, the United States has been complaining that the Chinese currency has been devalued and China has benefited from the current exchange rate. One of the negotiating issues between Chinese Vice Premier Wang Qishan and the then US Minister of Finance Henry Paulson in Washington in June 2008 is the Chinese currency rate. See http://www.news.xinhuanet.com/newsscenter/2008-06/19/content_8403166.htm (last visit: 19 July 2011).

[64] The European Union maintains a "list" approach concerning the division of countries into market or non-market economies. According to that list, countries can be divided into four groups: (1) Market economies: all countries that are not determined otherwise in the remaining three groups. (2) Non-market economies that had achieved progress in economic reforms with individual companies that may operate under market conditions. To this group as of today belong Ukraine, Vietnam and Kazakhstan. China is also assigned to this group, but can also fit into the third group. (3) Non-market economies that are WTO Members on the date of initiation of the investigation and their individual companies benefit from the same treatment as group two. To this group as of today belong Albania, Armenia, Georgia, the Kyrgyz Republic, Moldova and Mongolia. (4) Non-market economies. To this group as of today belong Azerbaijan, Belarus, North Korea, Tajikistan, Turkmenistan and Uzbekistan. See EC Regulation 384/96.

government. The risk of doing so is the possibility of conflict with judicial precedent. The selection of the industries or enterprises with the market economy status is often an arbitrary one.

Thirdly, the US Congress, by amending the anti-subsidy law, may make clear that there is no differencein the application of this law. This is the least-debated option. By doing so, the United States may apply its countervailing investigations on the imports from all WTO Members regardless of a market economy or non-market economy. The judicial precedent set in the *Potash Case* will be nullified accordingly. In this regard, the US trade remedy measures will become more predictable. Recent developments have indicated that the US government may prefer this approach. OnJuly 27, 2005, the House of Representatives approved the *US Trade Rights Enforcement Act* which proposed to amend the current anti-subsidy law. Although this Act has not received the approval from the Senate and there is still a long way to go before it is enacted, such a proposal has sent us a clear message that the United Stateswill take stricter measures against the rapid increase of imports from China. This may push China to quicken the adjustment of its economic structure.

With a long history of a state-planned economy,[65] many enterprises in China are still not efficient and rely on the government inputs. Although the Chinese government is dedicated to transforming its economy to be market-orientated, it is not possible to stop the government support overnight. If many labor-intensive enterprises become bankrupted due to the cut-off of government subsidies, the unemployment rate will skyrocket. This, in turn, will risk social instability in China. Furthermore, in order to attract more investment, many local governments in China tend to offer the investors with tax reductions and more favorable loans. The various forms of subsidies provided by all levels of governments are so complicated that they are already beyond the control of the central government.

Both China and the United States have realized the importance of each other. As the biggest developing country and the biggest developed country, they are playing important roles in maintaining the world order. While China wishes that the United Stateswould help it to speed up China's industrialization process, the United States also needs the help from China in the dismantlement of nuclear facilities in Democratic People's Republic of Korea, the Iran's unclear issues, and in reducing its own financial deficits. In the fight against the current global financial crisis, many countries, including China and the United States, have been aware that the only way to overcome this crisis is to unite the efforts from all sides of the world.[66] Taking all these factors into consideration, both countries are unlikely to turn to confrontations or hostilities simply because of the subsidy issue.

Facing the increasing trade deficits with China, the US government is receiving more and more pressure from domestic industries. In order to balance the Sino-US trade relationship, China is taking measures to cool down its over-heating exports and diversify the

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[65] In 1949, when the Nationalist government was overthrown by the Communist Party, all the private enterprises were either expropriated by the government or transformed into the State-owned ones. Since 1978, China has implemented many new policies with market elements to encourage the establishment of private enterprises. Nevertheless, the substantial part of the current Chinese economy is still owned by the State.

[66] The G-20 summit, which was held on 15 November 2008 in Washington DC, indicated their joint efforts to fight against this crisis. The first paragraph of the Statement of the Summit provides that "we are determined to enhance our cooperation and work together to restore global growth and achieve needed reforms in the world's financial systems."

exporting markets in recent years. As a substantial step, China has lowered or abolished the tax refunds to 2,831 varieties of commodities sinceJuly 1, 2007. This effort has achieved a noticeable success. China's trade surplus fell to 99.03 billion U.S. dollars in the first half of 2008, 11.8 percent down compared with the same period of the previous year. China's exports to the United States rose 8.9 percent in the first half of 2008, 8.9 percentage points lower than that of the same period of the previous year.[67]

Nevertheless, in order to balance the Sino-US trade relationship, more efforts are requiredto make it work from both sides. Various factors account for the huge trade surplus Chinahas with the United States. Apart from the reason that the Chinese inexpensive and quality products are still welcomedby US consumers and might be more popular as the global economy slows down, another important fact is that the United States still limits the exports of certain high technology products to China. In other words, there are some ways available for the United States to fill the gap without limiting the imports from China. As for thenon-market economy issue, the United States has three options for consideration. Of course, whichever it chooses, it will not be an easy one. The point is which one has the least negative impact on both sides.

Keywords
Countervailing Measures, United States, China, Non-Market Economy, Antidumping Measures

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[67]*China's Trade Surplus Falls Nearly 12% in H1*, http://english.cri.cn/3130/2008/07/10/1601s379040.htm (*last visit* on 20 July 2008).

THE NEW PARADIGM OF THE SUSTAINABLE ECONOMIC GROWTH OF KOREA: CLEAN ENERGY

Don-Man Han[*]

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ABSTRACT

Given its current industrial structure that heavily relies on fossil fuels for economic growth, energy security and climate change are two of the most pressing issues that must be collectively addressed by the international community in an urgent manner. Korea is now pursuing a national plan of transforming the nature of its industry to be less dependent on fossil fuels, maximizing the use of clean energy. In order to facilitate the transition from fossil fuel energy toward clean energy and to achieve the goal of sustainable development, Korea has adopted the national strategy of 'Low Carbon, Green Growth', which aims to shift its developmental path toward balancing economic growth and environmental sustainability. Under this strategy,

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the Korean government has dramatically increased investment in the domestic renewable energy sector and actively participated in international efforts to promote the use of renewable energy, such as the International Renewable Energy Agency (IRENA), Global Green Growth Institute (GGGI), G20, and Rio+20 Summit. In addition, Korea will continue to utilize nuclear energy as an important energy source, even though there are worldwide concerns about the safety of nuclear power plants after the Fukushima accident. Since nuclear power is the most viable alternative energy to fossil fuels satisfying the aspects of cost, safety, and effect on the environment, Korea will push ahead with its current policies while enhancing the nation's safety measures for nuclear energy.

I. INTRODUCTION

With the impending exhaustion of fossil fuels and the threat posed by climate change, global society is faced with an urgent call for a paradigm shift from a traditional, fossil fuel dependent economy to anenvironmentally-sustainable, green economy. Reducing greenhouse gases to address the problem of climate change is a common global challenge which requires the endeavours of both industrialized and developing countries, based on the spirit of collective responsibility. In the UN State of the Futurepolicy statement, 15 global challenges such as sustainable development, climate change, and water shortage as well as energy security were listed as the prime agenda items to be collectively addressed in the international community. Among others, energy security and climate change have become two of the most critical international issues for countries around the worlddue to the continued heavy reliance on fossil fuels and heightened volatility in the international energy market. To solve these challenges, it is clear that the global community needs to transform the current energy sector that primarily relies on fossil fuels to one that rationally utilizes renewable energies. In this respect, clean energy[1] technology andenergy efficiency are critically important in our efforts to overcome the present challenges.

This paper covers the Korean government's policies on green growth strategy, renewable energy, nuclear power and international cooperation. The first part will discuss the national strategy of 'Low Carbon, Green Growth' that aims to create a new national development paradigm based on new technologies and clean energies—renewable[2] and nuclear energy. The second part of the paper will look into Korea's participation in the international community's efforts to promote the wide use of renewable energy. The last part of the paper will contemplate the importance of nuclear energy in the world's energy market. Despite the newly risen concerns after the Fukushima nuclear accident, the Korean government is expected to push ahead with current nuclear energy policies while enhancing the safety and security of nuclear energy by establishing an independent safety regulatory

1. According to the "Clean Energy Progress Report 2001", IEA defines six categories of clean energy technologies includingnuclear energy along with renewable energy andbiofuels. However, there also exists a view opposing this definition in view of the fact that nuclear power produces radioactive wastes that often engender troublesome issues relating its disposal.

2. Renewable energy comes from natural resources such as sunlight, wind, tides, and geothermal heat, which are renewable. REN21, RENEWABLES 2011 GLOBAL STATUS REPORT17 (2011).

framework.

II. INSTITUTIONAL FRAMEWORK OF KOREA'S CLEAN ENERGY POLICY

A. BACKDROP FOR PROCLAMATION OF THE POLICY

In approximately 60 years, Korea has achieved tremendous economic growth that isvirtually unmatched inmodern world history. Korea has sustained rapid industrialization for the last few decades through the intensive use of fossil fuels. In particular, since the mid-1970s, Korea's energy demand has skyrocketed due to rapid economic growth. It has been a period of economic expansion during which the government and businesses did not seriously consider sustainability or the environment.

Korea, the 11th biggest energy consumer and the 4th largest oil importer in the world, has become increasingly vulnerable with its energy bill reaching about 30% of the total imports. The amount of dollars spent by Korea on importing energy far exceeded the amount of dollar earned by exporting its three main export items: semiconductors, automobiles, and shipbuilding. Korea is also the 7th biggest greenhouse gases emitter due to itsindustrial structure, which is based on the manufacturing industry, a so called brown economy.[3] Therefore, the paradigm shift to the use of clean energy is critical for Korea to continue economic growth and prosperity. No more procrastination is allowed in fighting this common issue facing the global community.

Korea established the National Basic Energy Plan (2008-2030) in 2008 to set the direction for its mid and long term energy policy. The goal of Korea's energy policy is to reduce dependency on fossil fuels and to increase the share of renewable energy and nuclear energy in its energy mix. Successfully implemented, the plan is also expected to contribute to stabilizing energy security of Korea by mitigating high dependence on imported fossil fuels.

B. DECLARATION OF LOW CARBON, GREEN GROWTH VISION

The Korean Government has a new strategy for development. On August 15, 2008, President Lee, Myung-bakdeclared that 'Low Carbon Green Growth' would be the key strategy for economic growth for the next 60 years. He explained the green growth strategy as follows:

> "Green Growth is paradigm shift toward sustainable development based on reduction ofgreenhouse gas emissions and environmental pollutions. It stands for a new national development program in which new growth engines and jobs are to be created from green technologies and clean energies"[4]

The strategy allocates a substantial portion of new spending in the government's economic stimulus package to measures designed to encourage investment in environment-friendly

3. According to the document issued by the British Petroleum (BP) on June 28, 2011.
4. For more details on Korea's green growth policy, see the book titled "Green Growth in Motion: Sharing Korea's Experience", issued by the Global Green Growth Institute, 2011.

technologies and facilitate the sustainable development. The initiative could help launch a new wave of high-tech driven economic growth in Korea and may serve as a model to other nations.

Along with these, as the institutional and legal foundation of the green growth initiative, Korea legislated the Framework Act on Low-Carbon Green Growth on December 29, 2009 and enacted Enforcement Decree of the Framework Act on Low Carbon, Green Growthon April 14, 2010 to facilitate the implementation of the strategy in the energy sector. The Act defines four policy areas of the energy sector that the government efforts should focus on—reducing greenhouse gas emissions, conserving and increasing energy efficiency, enhancing energy independence, and deploying renewable energy.

These approaches seek to open up new ways of economic development that harmonizes economic growth and environmental sustainability. They also sum up the Korean government's determination to turn its future developmental pathaway from the one that heavily depends on fossil-fuels toward a new path that utilizes a variety of alternative clean energies, minimizing the negative environmental consequences and rendering sustainable economic growth.

C. REACTIONS FROM THE WORLD

The United Nations Environment Programme(UNEP) selected Korea's Green Growth policy as a best practice case study of the year 2010. UNEP's assessment of Korea's contribution to the internationalefforts dedicated to fighting climate change is as follows:

> "The Republic of Korea's National Strategy and Five-Year Plan for Green Growth represent a major attempt to fundamentally transform the country's growth paradigm from'quantitative growth' to a low-carbon, 'qualitative growth.'" "Korea is demonstrating engagement and leadership at the international level by boosting global efforts toward achieving a green economy. Korea was instrumental in the adoption of the Declaration on Green Growth by the Ministerial Council Meeting of the OECD on June 25, 2009."[5]

There also has been wide recognition at the international level, as clearly demonstrated by the 66th Session of UN ESCAP's adoption of the "Incheon Declaration" in May 2010 which includes Korea's national strategy for Low Carbon,Green Growth.If the objectives and strategies encapsulated in all these are constantly applied as planned, Korea's overall use of clean energy is expected to grow to a significant extent, and the country's economy will be on the new track in the pursuit of sustainablegreen growth. The OECD adopted a Green Growth Strategy propelled by Korea on the occasion of its 50th anniversary in May 2011."[6]

Korea is strengthening cooperation on green growth not only at multilateral levels such as the UN, OECD, and G20, but also at bilateral levels. In May 2011, Korea forged an unprecedented Green Growth Alliance with Denmark, pledging to contribute to the

5. U.N. Environment Programme,*Overview of the South Korean Green Growth National Vision* (2009).
6. U.N. Economic and Social Commission for Asia and the Pacific,*United Nations Asian Pacific Commission Session Closes with Adoption of Incheon Declaration* (2010).

international community through their "alliance of value."

III. THE IMPORTANCE OF CLEAN ENERGY AND ENERGY ACCESS

A. *RATIONALE OF DEVELOPING CLEAN ENERGY*

The economy, social development, and environmental protection are the three pillars of sustainable development.[7]It is because these pillars are intertwined, a holistic approach is necessary. In addition, in order to solidify the link between the economy and the environment even further, it is vital to implement a green growth concept which can yield both economic growth and environmental protection. One of the main objectives of the green growth strategy is to create new engines of growth on multiple fronts with the aim of creating new investment opportunities.Various fiscal measures and incentives are instrumental in mobilizing green investments and can be expected to produce environmental, as well as economic benefits.Providing sustainable energy in developing countries will require an increased use of renewable energy sources, because they contribute to ensuring a secure supply of energy. Furthermore, increasing the efficiency of energy use is a necessary complement to renewable energy.[8]

The world's vast renewable energy resources remain largely untapped. With the global population projected to reach 9.3 billion in 2050, abundant renewable energy sources worldwide can make a significant contribution to the world's growing demand for energy. Use of renewable energy must, and will increase dramatically in the coming years because of its key role in enhancing energy security, reducing greenhouse gas emissions, mitigating climate change, alleviating energy poverty, supporting sustainable development, and boosting economic growth. Renewable energy technologies are widely deployed and are seen as one of the key energy solutions for the future by all countries. The communities without a reliable energy supply can take advantage of renewable energy as the base for their economic and social development.[9]Use of renewable energy is not an option. It is an absolute must. All countries should implement country-specific policies to increase the use of renewable energy. This is the best way to develop a green economy.

B. *THE WORLD'S CURRENT STATUS OF USING RENEWABLE ENERGY*

The renewable energy industry is expected to grow drastically to the extent that its growth rate may be comparable to the information technologies (IT) industry's initial growth rate of 16.8% during the IT revolution in the late 1990s and the early 2000s. Renewable energy-related investments are increasing at an annual rate of 60-80%. Major countries in the world are competing, and, at the same time, seeking strategic cooperation to gain a market

7. According to the United Nations'"2005 World Summit Outcome Document", sustainable development is buttressed by the three "interdependent and mutually reinforcing pillars": economic development, social development, and environmental protection. WHO, 60th Sess., U.N. Doc.A/60/L.1 (2005).
8. Dong-man Han, *The Importance of Clean Energy and Energy Access*,KOREA HERALD, Apr. 27, 2011.
9. VISION OF THE INTERNATIONAL RENEWABLE ENERGY AGENCY (IRENA).

share in ever-increasing global renewable energy markets.

The report released by the Intergovernmental Panel on Climate Change (IPCC) predicts that renewable energy, such as wind and photovoltaic power, will provide most of the energy resources the world needs in the future."The UN Secretary-General, Ban, Ki-moon, also put emphasis on renewable energy in future energy use. He proposed three energy goals for the global community to achieve by 2030. The first is to secure universal access to conventional energy; the second is to increase energy efficiency by 40%; and the last is to expand the share of renewable energy up to 30% of the overall global energy mix.[10] The size of the market of renewable energy exceeded $347 billion in 2009, which is larger than the world's semiconductors market and is expected to reach $600 billion by 2015 and$1 trillion by 2020. If the current renewable-supportive policies are implemented in a consistently way in the coming future, the share of renewable energy can potentially grow from less than 15% in 2008 to 26.5% of the world energy mix by 2035.[11]

Some argue that renewable energy cannot fulfil the world's energy demands due to its limited availability. However, according to the report of the IPCC, approximately $1.4-5.1 trillion are needed for next 10 years; and $1.5 – 7.2 trillion, from 2021 to 2030,in order for renewable energy to meet 80% of the world demand. This number is estimated to be less than 1% of the world's GDP in 2030 as stated by RajendraPachauri, the Chairman of the IPCC.[12] Many countries including the European Union have already announced that they will replace the current source of power generation with renewable energy up to 20% by 2020. In particular, the report also presents renewable energy as the ideal type of energy that can simultaneously prevent global warming and meet the energy demand in the developing countries in Africa.

However, the current use of renewable energy is still limited in spite of its vast potential. The obstacles are manifold: insufficient awareness of the opportunities of renewableenergy, structural political and market barriers such as the underpinned environmental risk of conventional technologies, technical barriers caused by the variable and disperse nature of renewable energy sources, and increasedfinancial costs of renewable energy projects.

IV. KOREA'S RENEWABLEENERGY POLICY

A. The Status of Renewable Energy in Korea

Apart from the ambitious greenhouse gas emission-reduction targets, one policy option under consideration in Korea is to set a renewable energy portfolio standard, which would make it mandatory for utility companies to produce 3 percent of their electricity from renewable sources in the next three years. The requirement would rise to 10 percent by 2020.

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10. U.N. Industrial Development Organization,*Secretary-General Ban Ki-moon: 2012 Will be International Year for Sustainable Energy for All* (2011).
11. INTERNATIONAL ENERGY AGENCY, WORLD ENERGY OUTLOOK 2010 (2010).
12. "Yes, We can avoid climate catastrophe. Time to grunt up the renewable big time", retrieved from <http://www.celsius.com/article>.

Such a target would give clear encouragement to investors in renewable energy and for existing fossil fuel-based businesses to make adjustments toward renewable energy.The Korean government aims to double new and renewable energy in its total energy supply by 2030, expanding to 11 percent, from 2009's 2.7 percent. Korea is a pioneer in terms of research and development (R&D) in areas such as electronics and vehicle manufacturing. More R&D is needed in the area of renewable, including clean-energy systems such as wave power and ocean thermal-energy conversion, essentially tapping the heat difference between the upper and lower levels of the seas and oceans.[13]

Renewable energy is becoming an important energy resource in Korea. The domestic distribution rate of fuel cell increased by 23.9 times; solar photovoltaic, 10.9 times; and wind power, 2.2 times during the period from 2007 to 2010. According to the data released by Ministry of Knowledge and Economy on August 8, 2011, Korea's total amount of sales of renewable energy increased from $1.2 billion in 2007 to $8.8 billion in 2010 while exports surged from $625 million to $4.5 billion.

In addition, the investments in the private sector expanded up to $4.5 billion from $70 million. According to Korean Energy Economics Institute (KEEI), the private sector will invest $4.5 billion in 2011, among which $3.8 billion will be funnelled to the photovoltaic power sector and $500million to the wind power sector, expanding facilities and conducting research. The Korean government will also invest $40 billion in solar photovoltaic and wind power industries to attain a 15% worldwide market share in 4 years similar to that for the semiconductor or shipbuilding sectors in the future.[14]

B. THE ON-GOING RENEWABLE PROJECTS IN KOREA

There are several types of renewable energies in Korea that have potential to be greatly expanded in the near future. Geothermal power plants utilize the heat of underground water. In Korea, there are several places in which the deep parts—1-2km below the ground—are around 80 degrees Celsius. The heat contained in the underground can be used for heating.

The Korean government supports 80% of expenses occurred when farming households build geothermal systems. The newly developed systems are expected to replace Bunker C fuel and diesel used in horticultural farming, reducing expenses for heating by 70-80%. The Government is also planning to spend $2 million every year on this project until 2017. Korea also conducts research on localizing geothermal pumping technology.[15]

Marine energy includes tidal, wave, and ocean thermal energy. Tidal power plants generate electricity using the energy created when the sea level rises and falls. High waves also can turn turbines and produce power. Ocean thermal power plants convert solar energy trapped by ocean into useable energy. In Korea, the biggest tidal power plant in the world, the Si-hwapower plant, completed in August 2011, is expected to save 862,000 barrels of oil imported per year. The operational capacity of Si-hwatidal power plant (552 GWH) exceeds

13. Achim Steiner, *Korea's Green New Deal, in*KOREA 2020: GLOBAL PERSPECTIVES FOR THE NEXT DECADE (2010).
14.Ministry of Knowledge and Economy, Oct. 13, 2010.
15. Korean Energy Management Corporation<http://www.kemco.co.kr>.

that of Lens's (544GWH) in France. Currently, there are only 4 other countries—France, Canada, China, and Russia—operating tidal power plants in the world.[16]

In addition to the above projects, the adoption of the smart grid system will greatly facilitate the distribution of renewable energy technologies by linking wind, solar, tidal and other power plants now being built at various places throughout the country. According to the Presidential Committee on Green Growth, Korea is planning to complete the construction of the smart grid, whichwill be the world's first nationwide smart grid, by 2030. The first test bed for the projectwas located in Jeju Island.[17]

V. KOREA'S PARTICIPATION IN INTERNATIONAL ENDEAVOUR FOR CLEAN ENERGY

A. KOREA'S PARTICIPATION IN IRENA

As for international organizations in the renewable energy sector, Korea has actively participated in the International Renewable Energy Agency (IRENA) which aims to become the leading international organization for renewable energy and a platform for exchange and development of renewable energy knowledge. IRENA opened its first Assembly in April 2011 in Abu-Dhabi with the aim of enhancing international cooperation in the development and dissemination of renewable energy. It is the first and largest organization of its kind, comprising of 149 signatory countries and is envisaged to serve as a "global umbrella" of renewable energy in the international community.[18]

Recognizing the importance of the IRENA, Korea actively participated in providing assistance for the establishment of the organization.Korea has served as aChair of the Secretariat Selection Committee. It also has participated in various working groups including the Governance Working Group and the preparatory committee as a vice chair to support IRENA's transformation to an Assembly. Furthermore, "IRENA-Korea Joint Workshop on Asia-Pacific Renewable Energy Policy", which was held in Seoul in October 2010,has played a pivotal role in fostering networking among all the participants.[19] It is encouraging that Korea has assumed a leading role in an international organization at a time when its significance in the world's energy sector cannot be exaggerated. As one of IRENA Council members, Korea will continue to make further meaningful contributions to the international community's cooperation on renewable energy.

B. GLOBAL GREEN GROWTH INSTITUTE (GGGI)

In addition to the development of clean energy including renewable energy, ensuring developing countries' access to a stable energy supply has drawn more attention in the world,

16. TAE-YONGYOO, REVOLUTION OF LAND451-54 (2007).
17. *Korea Conceives Smart Grid on Jeju*, KOREA HERALD, Sept. 15, 2009.
18. Soogil Young, *Korea's Green Growth: Visionary Leadership, Me-First Spirit, and Comprehensive Planning* (2010).
19. Dong-seok Min,Korea's Policies on Green Growth: Building a Planet-Responsible Civilization, Remarks at the U.N. Academic Impact Forum in Seoul (Aug. 10, 2011).

as about 1.4 billion people are living without electricity, with 31 percent of them in Sub-Saharan Africa. Many less developed and developing countries lack the means to fully carry out the tasks for developing clean energy and increasing energy efficiency. Access to energy is vital for rural populations, and key to their economic and social development.

Noting that green technologies are an integral part to its transition to a "Low Carbon, Green Growth" economy,the GGGI, a Seoul-based, international institute, was established in June 2010 in order to provide developing countries with economic strategy for the shift from fossil-fuelintensive growth toward low carbon growth. The founding belief of the GGGI is that sustainable economic growth is possible only when accompanied by environmental protection. The advice and support from the GGGI focus on energy subjects such as promoting the use of renewable energy and reducing reliance on fossil fuels,as well as the assistance for developing countries to devise their own green growth plans and achieve their sustainable development goals.

Thanks to the regional office in the United Arab Emirates (UAE), it has become possible for the GGGI and UAE to provide developing countries in the region with policy advice and technical support in order to help them turn their economic growth strategies toward a green economy. It is a great geographical advantage that the regional office is located close to Masdar, a planned city of the UAE that depends solely on renewable energy to provide the entire city with its energy needs, as well as to the headquarter of IRENA. Its proximity to these important places will help the newly opened office create synergy effects in the energy sector of the region.

Apart from the UAE, some countries including Denmark, Japan, and Australia joined the GGGI which would help expand its operations into many countries.[20] It also has conducted projects in countries, such as Brazil, Indonesia, and Ethiopia. The new paradigm of economic development and use of renewable energy will more broadly diffuse if the participation of countries in the GGGI increases.

In addition to the GGGI, Korea has committed to provide USD 200 million over a period of five years, beginning in 2008 through the East Asia Climate Partnership, to developing countries to help them address climate change issues and achieve green growth. In line with this commitment, Korea is currently pursuing to earn grantsfor projects in five areas of clean energy, water management, forestation, waste management, and high efficiency power generation. Furthermore, Korea declared to establish the Green Technology Centerand introduce the Global Green Technology Award during the Global Green Growth Summit(GGGS) in June2011 in Seoul.

C. G20 and Rio+20 Summit

Korea assumed the chairmanship in the Group of 20 (G20) summit convened in Seoul in November 11-12, 2010 where the leaders of the G20 committed to support to country–led green growth policies that promote environmentally sustainable global growth along with employment creation while ensuring energy access for the poor. To that end, the leaders

20. For more details, see <http://www.gggi.org/about/overview>.

agreed to take steps to create, as deemed appropriate, the enabling environments that are conducive to the development and deployment of energy efficiency and clean energy technologies.

Korea is assuming the co-chairmanship of the preparatory committee for the UN Conference on Sustainable Development Summit (Rio+20 summit) to be held in Rio, Brazil next year, as well as the co-chairmanship of the working group for the G20 Clean Energy and Energy Efficiency Initiative, the final report of which will be presented to the G20 Cannes Summit during November 3-4, 2011.

The global community has enormous expectations regarding the Rio+20 Agenda, which is to be implemented at the Rio+20 Summit. The priority agenda is to promote sustainable development and re-launch the fight against climate change. UN Secretary General Ban, Ki-moon also has identified sustainable development as one of his top priorities during his second term period.[21]

In addition to these endeavours, Korea will continue to take the initiative in the field of renewable energy and share its experience of green growth with developing countries to embark on the most resourceful path toward a positive and thriving future for humanity.

VI. KOREA'S NUCLEAR ENERGY

A. THE AFTERMATH OF THE FUKUSHIMA NUCLEAR ACCIDENT

The accident at the Fukushima Daiichi nuclear power plant in last Marchdealt a severe blow to confidence in nuclear safety. Unfortunately, since the Fukushima nuclear accident, the world has been divided over the sustainability of nuclear power. One side including Germany and Swiss argues that the safety of nuclear power is not guaranteed and, therefore, should be abandoned while replacing the source of power generation with renewable energy. The other side including the U.S., India, China,etcinsists that nuclear power should be promoted while reinforcing its safety because it is an essential means to solve the electricity shortage. While there are requests to enhance the nuclear safety, many countries opt for favourable policies toward nuclear energy in order to meet the growing demand for energy.

In this respect, countries should adopt their own individual strategies for nuclear power, rather than completely withdraw their nuclear energy programs. Nuclear energy is still regarded as the most realistic, alternative to conventional energy for many countries. Even Japan and Russia that had experienced nuclear accidents did not choose to completely abandon nuclear power. Rather, they implemented policies that would enhance the safety and accountability of the system. The environmental fundamentalism opposing the use of nuclear power does not help in overcoming the energy problem we are facing. The energy policy should always have a balance between the grim reality of climate change and the practicality of technologies.

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21. Ban Ki-moon, *A Global Agenda for Seven Billion* (Sept.26, 2011) <http://www.project-syndicate.org/commentary/kimoon19/English>.

B. THE COMPELLING ADVANTAGE OF NUCLEAR ENERGY

Nuclear energy is superior to other types of renewable energies in terms of its green-gas emissions, fuel-efficiency, and energy security. Particularly, nuclear power hardly emits greenhouse gases. A nuclear power plant emits only 10g of CO2 per KWH while a coal-fired power plant emits 991g per KWH;and an oil-fired power plant emits 782g per KWH. This means that a nuclear power plant emits 7 million tons of less CO2 than a thermo-electric power plant. Without nuclear power plant, global CO2 emissions could be 10% higher than the current level. Moreover, since nuclear energy is highly dense, the amount of electricity produced with 1kg of uranium is equal to that generated using 9000 drums of oil or 3 tons of coal. Nuclear energy also has the advantage in the aspect of energy security because Korea has uranium reserves that are equivalent to 2 years usage; coal, 2 months; oil, 180 days. Nuclear energy is, therefore, still an attractive energy source for Korea, even though there are concerns about the safety of nuclear energy after the Fukushima nuclear accident.[22]

Whilst nuclear energy has the advantage of being an inexpensive and clean energy source, greater attention should be paid to safety measures in order for it to be more widely used with confidence. To this end, it is important that each country establishes a rigorous nuclear safety framework. International cooperation and coordination led by the International Atomic Energy Agency (IAEA) also needs to be promoted. In this regard, Korea welcomes the efforts by the IAEA to strengthen the international nuclear safety framework by establishing global norms on nuclear safety such as the Convention on Nuclear Safety, setting the IAEA Safety Standards, providing IAEA peer reviews, and creating a network of experts.[22] Korea was the first country to host the IAEA IRRS(Integrated Regulatory Review Service) after the accident at Fukushima. After conducting the investigation in July of this year, the IAEA IRRS team, composing of 21 experts from 14 different countries commended Korea's effective regulatory framework, its contribution to the global nuclear safety community, and its adequate response to the Fukushima accident.[23]

In addition, utmost transparency should be guaranteed to increase confidence in nuclear energy. Not only should information on nuclear safety be adequately disseminated to the public, but systematic education and training programmes should also be provided for stakeholders to nurture a culture of transparency in the nuclear field.

C. KOREA'S POSITION REGARDING NUCLEAR ENERGY

The Korean government views nuclear power as thepractical alternative to cope with high oil prices, climate change, and energy security problems and thereforewill push ahead with its current nuclear power programs. It is unavoidable to build more nuclear power plants, given the imbalance in energy demand and supply, as well as the seriousness of climate

22.Hyo-sun Chung, *Impact of Nuclear Power in Korea* (2011).
23.For more details, see the press release of July 22, 2011 "International Nuclear Safety Experts Concluded IAEA Peer Review of Korea's Regulatory System".

change. Generating power is a matter of combining relevant factors. For instance, the Korean government considers three factors when deciding which energy to use—the cost, safety, and effect on the environment—and chooses the policy that best satisfies these three criteria. Hence it is rational to consistently use the nuclear energy while enhancing the safety measures.[24]

In anaddress at the UN HighLevel Meeting on Nuclear Safety and Security on September 22, 2011, President Lee, Myung-bak mentioned that the Fukushima accident should be an opportunity to promote the safe use of nuclear energy based on scientific evidence, and introduced the Korean government's plan to enhance the nuclear safety as follows:

First, the Korean government will establish an independent safety regulatory framework. While a nuclear accident is rare, a single mistake can bring about disastrous outcomes. Institutional arrangements are, therefore, needed to secure safety above all. To this end, the Korean government launched a Presidential Commission on Nuclear Safety and Securityas an independent agency.

Second, the Korean government will maximize the transparency of the nuclear energy system. Korea established an 'International Nuclear Safety School' to assist countries embarking on a nuclear power programme. The school will provide training of safety experts to help those countries create a regulatory infrastructure and build technological capacity. Korea is also making efforts to enhance public awareness on nuclear safety through various educational programs. Korea will set up an integrated information system on nuclear safety to facilitate the public's access to relevant information.

Third, Korea will strengthen regional cooperation, because a nuclear accident is trans-national in nature and could, therefore, have an enormous impact on neighbouring countries. Accordingly,the neighbouring countries that may be affected by a nuclear accident should be recognized as important stakeholders and be given full information and consultations.

D. THE CURRENT STATUS OF KOREA'S NUCLEAR ENERGY

Korea is the fifth largest nuclear power producer in the world. Korean nuclear power plants are well known for their safety and economic feasibility. According to the analysis of the IAEA and World Nuclear Association, Korea has been free of nuclear accidents for last 33 years since building the first nuclear power plant in 1978. Korea also has the advantagein construction costs and shorter time period of completion. Building a Korean reactor APR 1400 costs $2,145 per kW which is far less than that of the U.S ($3,852) or Japan ($2,900). Korea also builds reactors in the shortest period of time compared to any other country. It takes only 52 months for Korea to build a reactor while it takes57 months for the U.S., 60months for Russia,and 83months for France. Thus, nuclear power plant is one of the most promising fields that can lead Korea's future economic growth.

The Korean government has set a goal to win 80 contracts for the construction

24. Dong-man Han, *Korea's Nuclear Cooperation Policy*, KOREA TIMES, Oct. 11, 2011.

ofnuclear power plants by 2030, which is estimated to be $400 billion, exceeding the total exports of Korea in 2009.[25] It will also create about 1.5 million jobs as well as additional exports in machinery and equipment that are worth $26 billion. To support this plan, the Government is planning to invest $400 million in research until 2017 in cooperation with the private sectors. Through continuous research and technical improvement, Korea will make considerable contribution to the world's safe use of nuclear energy.[26]

VII. CONCLUSION

We face the imperative task of transforming the energy sector within the first half of this century. Sir Nicholas Stern, the world-renowned economist, has said that if we act now, the cost will only amount to 1 percent of global GDP per year. But delaying action could result in a cost of as much as 20 percent of global GDP.[27]

Shifting to clean energy is not a matter of choice, but the mandate of our era. As a global society, we cannot respond to the urgent environmental issues unless we adopt a new concept of economic growth with alternative energy. Korea has successfully adopted the new concept of economic development that can secure our future growth and an environmental conservation simultaneously. During this endeavour, clean energy, such as renewable and nuclear energy, has become an essential part in meeting the surging energy demand and to cope with the daunting environmental challenges the world is facing.

The Korean government will continue to support the development and distribution of clean energy to reduce its dependence on fossil fuels. Along with these, the Korean government will contribute to the world's safe use of nuclear power while continuing its venture on overseas nuclear power plant markets. It goes without saying that international cooperation is of paramount importance. Alongside the consistent effort of the global community, the Korean government will contribute to rendering the world's energy economy more sustainable.

KEYWORDS
Green Growth Strategy, Clean Energy: Renewable and Nuclear Energy

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25. According to the projection of the World Nuclear Association, 559 nuclear reactors will be operable in 2030.
26. Korea Nuclear Association, retrieved from <http://www.knef.or.kr/home/information/uae export.asp>.
27. NICHOLAS STERN, STERN REVIEW ON THE ECONOMICS OF CLIMATE CHANGE at vi (2006).

IMPLICATIONS OF THE KOREA-EU FREE TRADE AGREEMENT (FTA)FROM THE PERSPECTIVE OF KOREA'S FTA POLICY AND LEGAL FRAMEWORK

Hee-Sang Kim[*]

TABLE OF CONTENTS

ABSTRACT

The aim of this paper is to try to have an understanding of the overall policy and legal framework for Free Trade Agreements (hereafter "FTA"s) in Korea based on the example of the Korea-EU FTA and at the same time to better understand the implications of the FTA from Korea's policy and institutional perspectives.

As a late starter into FTAs, Korea is pursuing very active FTA policy in order to establish a global FTA network. For the purpose of both ensuring its export market for domestic businesses and reforming its domestic business environment into a more investor friendly one, Korea's FTA policy is aiming at very comprehensive and high level trade liberalization. The comprehensive and high level commitment contained in the Korea-EU FTA implies that Korea's current FTA policy is fully reflected in the Agreement and it will be a very important precedent for the negotiations for future FTAs.

In terms of procedural aspects, the process of negotiating and ratifying this FTA has taken every step under current domestic regulations to accommodate various interests of the domestic constituency. Reflecting the comprehensive and high level nature as well as the huge economic stakes of this FTA, this implementation stage has attracted significant attention compared with previous FTAs. 12 laws and other enforcement regulations have been amended to implement this FTA. The Trade

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Committee, which is the Ministerial level consultation body, and specialized committees and working groups as well as detailed dispute settlement mechanisms have been established. This implementation experience will be a good example when Korea has to implement other FTAs with large economies in the future.
The Korea-EU FTA heralds a new era of FTA policy in Korea. With the completion of the Korea-EU FTA, Korea has entered the next stage of its FTA policy by accomplishing its first objective on the mid to long term list of its 2003 FTA road map. The fact that it has finalized FTA negotiations with the largest economy in the world and made it take effect will be a good foundation of Korea's future FTA policy.

I. INTRODUCTION

The Korea-EU FTA became effective on July 1 2011.[1]There is a concurrence of opinion amongst governments and industries of both sides that this FTA is the most comprehensive and ambitious agreement either side has ever concluded.[2] In this regard, it is considered as the flagship FTA and a model for FTAs to be pursued with other countries in the future.

With such a high level of trade liberalization, the impact of the FTA on the domestic economy is significant and thus it has also been a controversial issue in domestic politics for both sides. In Europe, voices from the auto industry against this FTA were very strong, while there were serious concerns in the Korean agriculture and dairy sectors regarding this FTA. Considering these domestic sensitivities, both European and Korean negotiators made every effort to ensure that every detail of the domestic rules of procedures for concluding FTAswere abided by in order to prevent any political obstacle to approval by the domestic constituency.

For Korea, the starting point of the Korea-EU FTA can be found in the FTA roadmap established in 2003. Since Korea first identified the EU as a candidate FTA partner froma mid-to-long term perspective on the road map, the FTA has gone through complex domestic procedures in each stage of pre-negotiations, negotiations, and post-negotiations. In particular, special attention by both administrations has been accorded to the implementation of this FTA. Various institutions such as government ministries, the National Assembly, interest groups and think tanks have been involved in the process. Thus the whole process of preparing, negotiating, concluding and implementing the Korea-EU FTA in Korea is in fact a reflection of the Korea's policy and institutional framework for FTAs. It may also be argued that the deeper our understanding of the policy and institutional framework for FTAs in Korea, the deeper our understanding of the Korea-EU FTA.

The aim of this paper is to try to offer a grasp of the overall policy and legal framework

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*Counsellor for Economic Affairs, Korean Embassy to EU. This paper represents the personal view of the author and does not represent in any way the position of the Korean government.

[1] To use the term in Article 15(10) of the Korea-EU FTA, the FTA is provisionally applied from July 1, 2011.

[2] European Commission, *European Exporters to Benefit from Free Trade Agreement Between EU and SouthKorea from 1 July*(June 29, 2011) < http://trade.ec.europa.eu/doclib/press/index.cfm?id=720>, Korea International Trade Association (KITA), *Facts About the EU-Korea FTA*(2011).

relating to FTAs in Korea from the case of the Korea-EU FTA, and at the same time to achieve a better understanding of the implications of the FTA from Korea's policy and institutional perspectives. This paper will first review Korea's trade policy, focusing on why it is pursuing FTAs so actively, and then the implication of the Korea-EU FTA on its FTA policy. Lastly, the overall legal framework with regard to FTAs will be reviewed while specific procedures of the Korea-EU FTA will be reviewed.

II. KOREA'S FTA POLICY AND KOREA-EU FTA

A. KOREA'S TRADE POLICY AND THE CHANGE IN ITS POSITION ON FTAS[3]

Trade is a very important aspect of Korea's overall economic policy. As is well known, Korea was one of the poorest countries in the world in the aftermath of the Korean War in the1950s. Its GDP stood at 2.3 billion US dollars in 1962. However, since then the Korean economy has achieved impressive economic growth andits GDP has nowreached over 1,000 billion dollars. This may be attributed to various possible factors, but it is generally accepted that its active participation in world trade is one of the main reasons for this rapid economic growth. Korea's economy is still highly dependent on trade. In 2010, trade accounted 87.9% of Korea's GDP.

In view of the importance of trade, Korea maintains a consistent trade liberalization policy. Even during the Asian economic crisis in the late 1990s and in the midst of the current global financial crisis, this policy direction has not changed. Rather, Korea decided to overcome the crisis by more actively integrating itself into the world economy. As Chair of the 2010 G20 Summit, it made a substantial contribution toward the adoption of the Leaders' Declaration expressing the commitment to resisting all forms of protectionist measures.[4]

Korea's trade liberalization policy is based on the WTO multilateral trading system. It joined GATT in 1967 and was a member of the WTO since its establishment in 1995. Since Korea's rapid economic growth in the past was possible due to the trade liberalization of major export markets, it is regarded as one of the main beneficiaries of the multilateral trading system. The focus of its trade policy was on strengthening the multilateral trading system with the WTO at its center rather than pursuing bilateral trade deals. Thus, it wasas late as in 2003 when over 100 preferential trade agreements worldwide had already been notified to the WTO, that Korea concluded its first FTA with Chile.

However, Korea's trade policy faced significant changes in the early 2000s due to the proliferation of FTAs on aglobal scale.As of May 2011, a total of 297 preferential trade agreements have been notified to the GATT and the WTO. In particular, after the conclusion of the Uruguay Round in 1994, there has been a rapid increase in the number of bilateral and regional preferential trade agreements. It is noteworthy that during the 47 years of the GATT, 91 preferential trade agreements were notified, two per annum on average, but in the 16 years since the establishment of the WTO in 1995, 206agreementshave been notified. Consequently,

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[3] This Chapter is written mostly by summing up the contents of the website, <http://www.fta.go.kr>.
[4] G20 Seoul Summit Leaders' Declaration para. 9 (Nov. 12, 2010).

trade based on preferential agreements now accounts for more than 50% of the total world trade. Korea could not afford to ignore this global trend and be left isolated.

Three considerations may be said to have been factors in influencing Korea's change in its policy towards FTAs. First, the success stories of regional economic integration motivated Korea to look at the positive side of regionalism. The formation of the European Economic Community (EEC) in 1957 and its development into the European Union (EU) was a watershed in the history of regionalism. Starting from six countries, the European Community (EC) had doubled the number of member states before completing the move to a single European market for goods, services, capital and labor in the mid-1980s. The countries of North America responded by forming another economic bloc to counter the initiative in Europe. NAFTA negotiations were concluded in 1993 together with the Uruguay Round negotiations. The moves towards economic integration in Europe and North America prompted similar common market initiatives in Latin America and East Asia. This "domino effect" – as some scholars call it - led to MERCOSUR and the ASEAN Free Trade Area, respectively.

Second, the uncertainty of the WTO DDA (Doha Development Agenda) negotiations and other difficulties in advancing further trade liberalization at the multilateral level are another reason behind the change in Korea's trade policy. Although it is hoped that some solution can be found at the WTO Ministerial to be held in December this year, it is true that confidence in the early conclusion of the DDA is already diminishing. This slow and uncertain progress on the multilateral front is further encouraging countries to accelerate their current regional or bilateral free trade negotiations in an effort to seek alternatives.[5]Against such a backdrop, Korea also could not simply wait for the conclusion of DDA negotiations.

Third, pressure from domestic businesses that feared being shut out of export markets by a growing number of FTAs drove the Korean Governments to change its attitude towards bilateralism. The loss of export markets to other competing countries is a serious problem for countries like Korea whose economy depends heavily on trade. In 2004 when Mexico concluded an FTA with Japan, over 20% of tariffs on tires were eliminated only for Japanese products while the Mexican government raised the tariff rates for tires from other countries. As a result, Korea, which held a large share in the Mexican tire market in previous years, almost stopped its export of tires to Mexico in 2004.[6]

B. KOREA'S CURRENT FTA POLICY[7]

Under such circumstances, Korea decided to pursue bilateral FTAs more actively as an alternative way of trade liberalization while still actively participating in the DDA multilateral negotiations as well. The Korea-Chile FTA was Korea's first attempt at bilateral market liberalization. Since it was Korea's first attempt, it took five years to complete, from early planning to the final stage of ratification in 2004.

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[5]RAZEEN SALLY, NEW FRONTIERS IN FREE TRADE: GLOBALIZATION'S FUTURE AND ASIA'S RISING ROLE 77 (2008).

[6]*Tire Exports to Mexico Almost Non-Existent This Year*, YONHAP NEWS AGENCY, May 5, 2004.

[7] This Chapter is written mostly by summing up the contents of the website, <http://www.fta.go.kr>.

As a late starter into FTAs, Korea has been actively pursuing an ambitious FTA policy to establish a global FTA network in order to respond to the rapid proliferation of regionalism throughout the world. Since the successful conclusion of the Korea-Chile FTA in February 2003, seven FTAs have entered into force so far and Korea's trade volumes with FTA partners accounted for 27.8% of its total trade. Korea aims to increase this level up to 50% in the near future through the early conclusion of the FTA negotiations it has been undertaking with its trading partners and finally, to over 80% in the long-term.

For the sake of the more systematic pursuit of its FTA negotiations, the Korean government adopted a so-called 'FTA Road Map" in 2003. Under the road map, Japan, Singapore, ASEAN, Mexico, and EFTA were suggested as candidates for FTA negotiations in the short term (within 1-2 years) while large economies such as the US, EU and China were proposed as long term (over 3 years) FTA candidate partners.[8]

Eight years have passed since Korea adopted its FTA road map. Since the commencement or conclusion of FTA negotiations does not depend upon the willingness of only one partner, the current status of the Korea's FTA is not exactly the same as was planned in 2003. However, it has been continuing to pursue its FTA policy basically in accordance with its road map. Korea succeeded in concluding three FTAs with those identified as short term candidates, namely with Singapore, ASEAN and EFTA. Even among the mid to long term candidates, Korea concluded FTAs with the US and EU. Currently Korea has actively engaged in FTAs with more than 60 countries:

① 7 FTAs in effect

- The Korea-Chile FTA entered into force in April 2004.
- The Korea-Singapore FTA entered into force in March 2006.
- The Korea-EFTA FTA entered into force in September 2006.
- The Korea-ASEAN FTA entered into force in June 2007(Goods), in May 2009(Services) and in September 2009(Investment).
- The Korea-India CEPA(Comprehensive Economic Partnership Agreement) entered into force in January 2010.
- The Korea-EU FTA entered into force(provisional application) on July 1 2011.
- The Korea-Peru FTA entered into force on August 1 2011.

② 1 FTA concluded

- The Korea-US FTA was signed on June 20, 2007 and is currently under ratification procedures.

③ 7 FTAs under negotiations

- The Korea-Australia FTA negotiations were launched in May 2009 and the 5th round of negotiations was held in May 2010.
- The Korea-Colombia FTA negotiations were launched in December 2009 and

[8] Jong-hoon Kim, *Aiming for "Balance of Benefit" in the Korea-U.S. FTA – Not Disadvantageous for Korea* (Apr. 14, 2006) <http://cms.korea.kr/goadmin/newsViewOld.do?newsId=155084458>.

the 5th round of negotiations was held in October 2011.
- The Korea-Turkey FTA negotiations were launched in March 2010 and the 3rd round of negotiations was held in March 2011.
- The Korea-New Zealand FTA negotiations were launched in June 2009 and the 4th round of negotiations was held in May 2010.
- The Korea-GCC FTA negotiations were launched in July 2008 and the 3rd round of negotiations was held in July 2009.
- The Korea-Canada FTA negotiations were launched in July 2005 and the 13th round of negotiations was held in March 2008.
- The Korea-Mexico FTA negotiations were launched in December 2007 and the 2nd round of negotiations was held in June 2008.

④ Other FTAs under consideration
- Korea-Japan FTA: The 1st Director-General-Level Consultation on the Korea-Japan FTA was held in September 2010.
- Korea-China FTA: The 1st meeting on the exchange of views concerning sensitivities regarding a possible Korea-China FTA was held in September 2010.
- Korea-China-Japan FTA: The 6th meeting of the Joint Study Committee on an FTA among China, Japan and Korea was held in August 2011.
- Korea-Mongolia FTA: Korea and Mongolia agreed to launch a joint feasibility study on a possible FTA in October 2008.
- Korea-Vietnam FTA: The 6th Joint Working Group Meeting was held in October 2011.
- Korea-Indonesia FTA: The first round of Joint Study Group Meeting was held in July 2011.
- Korea-Malaysia FTA: Korea and Malaysia agreed to launch a feasibility study in May 2011
- Korea-Israel FTA: Korea and Israel completed the joint feasibility study in August 2010.
- Korea-MERCOSUR FTA: Korea and MERCOSUR signed the "MOU for the establishment of Joint Consultative Group to Promote Trade and Investment between Korea and the MERCOSUR" for discussions on the follow-up action regarding the results of the joint study on the feasibility of a Korea-MERCOSUR Trade Agreement.
- Korea-Central America FTA: The joint feasibility study started in October 2010.

One of the key objectives of the Korean government in pursuing a vigorous FTA policy is to increase the global market access and provide Korean exporters with a competitive edge. But trade expansion is not the sole purpose. The more important goal is to enhance the efficiency of the domestic economy by strengthening the transparency and predictability of Korea's regulatory regime. Since trade and investment liberalization can bring greater competition and a more transparent business environment, the FTA initiative can be utilized as a tool for locking-in domestic reform. This is an important point. Furthermore, FTAs set a legal and institutional framework up around the economic relationship between the parties,

substantially increasing business opportunities.

In this regard, the Korean government has been pursuing 'WTO plus' trade liberalization and comprehensive FTAs, covering trade in services, investment and discipline issues as well as the elimination of duties regarding trade in goods, in order to maximize the benefits from the agreements. The position of the Korean government is that as high quality and comprehensive FTAs can further advance and deepen liberalization, they will eventually support the multilateral trading system. At the same time, the Korean Government has been exerting arduous efforts to address sensitivities in the process of negotiations.

C. THE IMPLICATIONS OF THE KOREA-EU FTA ON KOREA'S FTA POLICY

Having reviewed the current FTA policy of Korea, it can be said that the Korea-EU FTA, with its comprehensive nature and high level of trade liberalization, has achieved the goal of 'WTO plus' trade liberalization' which Korea has been pursuing in its FTA negotiations.[9] Three separate aspects of Korea's current FTA policy provide evidence to support this statement.

Firstly in terms of coverage, the Korea-EU FTA covers much wider scope of areas than those under the current WTO agreement by introducing rules in the new areas such as sustainable development, competition, trade facilitation and transparency. The FTA has also set independent disciplines on non-tariff measures with regard to automobiles, consumer electronics, pharmaceuticals, and chemicals. This is the first FTA Korea has concluded that introduced disciplines on non-tariff measures which are currently major trade issues among countries. This FTA also introduced a mediation mechanism in addition to the traditional dispute settlement mechanism in order to solve trade disputes in the area of non-tariff measures in a timely manner.

Secondly, in terms of level of trade liberalization in major areas, this FTA is more ambitious than the current WTO agreement. In the area of trade in industrial goods, the level of liberalization is really impressive compared with Korea's commitments at the WTO where it still maintains on average 8% tariffs for industrial goods. Under the Korea-EU FTA, Korea eliminated duties on 90.7% of its industrial products immediately upon the entry into force of the FTA, 95.8% of duties will be eliminated within three years of entry into force, and eventually, all industrial tariffs of Korea will be eliminated within seven years. The EU's tariff elimination scheme is even faster than the Korean one; it eliminated duties on 97.3% of industrial products effective immediately on 1 July. All EU industrial tariffs will be eliminated within five years.

In the area of trade in services, the level of Korea's commitment under this FTA is also considered to be the highest when compared with those set out in the WTO agreement and other FTAs Korea has concluded. The Korea-EU FTA has significantly upgraded Korea's GATS commitments. More specifically Korea made commitments in 115 sectors among all WTO 155 sectors of services while it made commitments in 85 sectors under the WTO GATS. The EU made commitments in 139 sectors in the Korea-EU FTA while its

[9] Korea International Trade Association (KITA), *Facts About the EU-Korea FTA*, at 16-28 (2011).

commitment under the GATS is in 105 sectors.

There are significant WTO plus elements also in the area of IPR. The Korea-EU FTA extends the terms of copyright protection from 50 years to 70 years, provides the same level of protection of geographical indications for agricultural products and food stuff as those for wine and spirits under the WTO, and offers protection for registered designs and unregistered appearance as well. With respect to border measures, the FTA expands the scope of goods subject to a suspense procedure, from those infringing "trademark, copyright and neighboring copyright" to include those violating "patent, plant variety right, registered design, and geographical indication."

It is also noteworthy that this is an FTA with the world's largest economy with a GDP of 16 billion US dollars, and its second largest trading partner only after China. When Korea established its FTA roadmap in 2003, the EU was a candidate FTA partner from a mid to long term perspective. The reason why the EU was nota "short term" but "mid to long term" target appears to be that the economic and social impact of the FTA with the largest economy and one of its main trading partners, whether positive or negative, would be huge and thus very sensitive in domestic politics. The conclusion of the Korea-EU FTA shows that Korea is confident that it can compete with the world's largest economy and that it can now continue to proceed to the next stage of FTAs with countries which have a significant economic impact.

It is interesting to see the negotiation history of the Korea-EU FTA alongside the Korea-US FTA. In fact, the negotiations for the Korea-US FTA started and were concluded earlier than the Korea-EU FTA and worked as a basis for the negotiations for the Korea-EU FTA. However, ironically enough, the Korea-US FTA was late in terms of actual coming into effect due to the slow process in the domestic procedures on both sides. Since both FTAs are similar in terms of coverage and level of ambition, it could be said that the implications of those FTAs are also similar in the context of Korea's FTA policy.

III. KOREA'S LEGAL FRAMEWORK FOR FTA AND THE KOREA-EU FTA

A. OVERVIEW OF THE LEGAL FRAMEWORK FOR FTAS

Under the Korean Constitution, treaty-making power is vested in the President as the head of the government. Article 73 of the Constitution provides that the President concludes and ratifies treaties.

Within the government, the Minister of Foreign Affairs and Trade is responsible for trade negotiations and the conclusion of trade-related agreements with foreign countriesunder the Government Organization Act.[10] However, considering the comprehensive nature of FTAs, many government ministries and agencies are involved in the FTA process, and thus, in practice, the Office of the Minister for Trade within the Ministry of Foreign Affairs and

[10] Article 30(1)of the Government Organization Act stipulates that "[t]he Minister of Foreign Affairs and Trade shall exercise general supervision over diplomacy, trade negotiations with foreign countries, and general management and coordination of trade negotiations, treaties and other international agreements, protection of and support for Korean nationals abroad, and research on international situations and immigration."

Trade leads and coordinates Korea's negotiations on FTAs in cooperation with various relevant ministries and agencies.

Detailed procedures which must be followed by government officials participating in FTA negotiations and their implementation areprovided for in the "Presidential Directive on Procedures for the Conclusion and Implementation of Free Trade Agreements (hereinafter the "Directive")"[11]Originally the title of the Directive was "Presidential Directive on Procedures for the Conclusion of Free Trade Agreements." On the occasion of the entry into force of the Korea-EU FTA, the Directive was revised in order to introduce more detailed procedures for the implementation stage under the new title. For instance, procedures to appoint Korean chair persons for the FTA implementing bodies such as specialized committees and working groups have been newly introduced.

Under the Directive, the Ministers' Meeting for External Economic Affairs (hereinafter "MMEEA") has authority to make decisions on major policy issues with regard to negotiations on FTAs Korea pursues with its partner countries and their implementations. Such issues include the selection of countries with which Korea will negotiates FTAs; the timing and method of such negotiations; the mandates that will be given to the negotiating team; and other important directions for the negotiations. The MMEEA is chaired by the Minister for Strategy and Finance with the participation of relevant economic ministers including the Minister for Trade.

The Directive has established three committees: the FTA Committee; the Working-level Sub-committee; and the FTA Advisory Committee. These three committees all together draw up roadmaps for FTAs, make decisions on Korea's important negotiating positions for each FTA negotiation and undertake follow-up measures after the conclusion of an FTA. The FTA Committee, which is chaired by the Minister for Trade and consists of Deputy Ministers of relevant ministries, is primarily responsible for formulating Korea's FTA policy, overseeing FTA negotiations, and undertaking any follow-up measures. The Sub-committee chaired by the Chief FTA Negotiator (Deputy Minister Level) provides working-level support to the work of the FTA Committee. The FTA Advisory Committee, which is chaired by the Minister for Trade, and consists of experts from academia and businesses, gives advice to the government in the pursuit of FTAs.[12]

It is noteworthy that the Directive provides the procedural rules only on FTA negotiations and for the time being there is no official legislation with regard to the procedures for overall trade negotiations other than FTAs. In this regard, there has been some criticism that this lack of rules leads to a lack of transparency in the trade negotiation process and finally failure to accommodate various interests of domestic producers especially in sectors which are negatively affected by the trade agreements.[13] In light of this criticism, some proposals to establish a new Act on procedures for trade negotiations are currently under discussion in the National Assembly. If the Act governing the procedures for trade negotiations as a whole is established, the Directive is expected to be incorporated into the

[11] The Directive has been established to facilitate consultations and coordination among relevant ministries and to increase the understanding and participation of the general public in the FTA process. The Directive entered into effect on June 8, 2004 and was amended on August 8, 2008 and July 6, 2011.
[12]Presidential Directive on Procedures for the Conclusion and Implementation of Free Trade Agreements, Art. 9.
[13]Seung-hwan Choi, *Necessity and Issues of the Act on Procedures for Trade Negotiations* (Dec. 5, 2008).

new legislation since the Act is much higher in the legal hierarchy and covers trade negotiations as a whole including FTAs.

Under the Korean Constitution, the National Assembly, the legislative body, does not have authority to engage in trade negotiations and, therefore, is not directly involved in FTA negotiations. However, the approval by the National Assembly must be obtained for those treaties which fall into the category of Article 60 of the Constitution[14]before their ratification by the President. FTAs normally fall under such category. Although a request for the National Assembly's consent for the ratification of a treaty is placed after that treaty is signed, the Article 21 of the Directive provides that the Minister for Trade should report important progress in the negotiations to the National Assembly. If an Act on the procedures for trade negotiations is enacted, this report requirement is expected to be strengthened.

In current practice, the National Assembly isbriefed intermittently on any important progress in the trade negotiations and the results of the negotiations at their conclusion by the government. This information-sharing process is considered to be very important by the government as it promotes understanding of the negotiations amongst the public and thus helps to facilitate the procedures for the National Assembly's consent to the ratification at a later stage.

B. PROCEDURES FOR EACH STAGE

1. PRE-NEGOTIATIONS STAGE

Korea's FTA roadmap and basic strategy for its execution is drafted by the FTA Committee and endorsed by the MMEEA[15]. The FTA Committee recommends candidate countries to the MMEEA as potential FTA partners on the basis of economic feasibility studies undertaken by domestic research institutes. On the FTA roadmapendorsed by the MMEEA in September 2003, the EU was indicated as an FTA candidate froma mid to long term perspective along with the US and China.

It is the Korean Government's usual practice to carry out a joint study with a candidate FTA partner to examine the feasibility of an FTA before it commences negotiations. During the period of the joint study, such issues as the economic effect of the FTA, the scope and coverage of the FTA and modalities for negotiations are normally discussed. When a joint study or any other form of preliminary consultation is finalized with the conclusion that the proposed FTA is expected to bring benefits to both sides, the FTA Committee recommends the launch of FTA negotiations to the MMEEA. However, a joint study is not mandatory under the Directive. In the case of the Korea-EU FTA, both Parties agreed not to conduct a joint study prior to embarking on official negotiations. Instead, they held two rounds of preliminary consultations in 2006.

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[14] Article 60 of the Constitution stipulates that "[t]he National Assembly shall have the right to consent to the conclusion and ratification of treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters."

[15]Presidential Directive on Procedures for the Conclusion and Implementation of Free Trade Agreements,Art. 13.

A public hearing must be held prior to the MMEEA's decision and the result of the public hearing should be presented to the MMEEA.[16] The MMEEA has thefinal say on whether or not to launch the negotiations. This procedural requirement is to ensure that various interested parties and sectors will have a chance to be fully heard by the government before the government makes any formal decision on the launch of negotiations. For the Korea-EU FTA, a public hearing was held in November 2006 and an FTA Advisory Committee consisting of experts from academia and businesses was held in December 2006. The MMEEA finally decided to start negotiations with the EU in May 2007.

2. NEGOTIATION STAGE

In general, the negotiating team is led by a senior official of the Ministry of Foreign Affairs and Trade and consists of officials from relevant ministries and agencies.The important negotiating proposals and specific negotiating strategies are considered by the FTA Committee or the MMEEA as needed during the period of negotiations. The final negotiation package that is formulated as a result of negotiations should be submitted to the MMEEA for its approval. As stipulated in the Directive, the National Assembly is briefed intermittently on any important progress in the negotiations and the results of the negotiations at their conclusion.

In the case of the Korea-EU FTA, a total of eight rounds of negotiations were held from May 2007 to May 2009. The Korean negotiation team was led by the Chief FTA negotiator (Deputy Minister level) of the Ministry of Foreign Affairs and Trade. The negotiations were finally concluded in July 2009 after high level consultations in addition to the official eight rounds of negotiations. The Agreement was initialed by the Trade Ministers of both sides in October 2009.

3. POST-NEGOTIATION STAGE: RATIFICATION

Once Korea and a partner country conclude a free trade agreement and initial the agreement text, the text of the agreement is reviewed by the International Legal Affairs Bureau of the Ministry of Foreign Affairs and Trade and then by the Ministry of Government Legislation. The text of the agreement including all annexes and appendices is submitted to the Cabinet Meeting for deliberation and finally presented to the President for him to sanction the text. Then, the Minister of Foreign Affairs and Trade or any other competent high-level official is authorized to sign the text of the agreement.

The Korea-EU FTA was signed by the Trade Ministers of both sides in October 2010. It took longer than one year after initialing the Agreement because it took longer than expected to translate and review the text in the European side.[17] Since the Korean and 22 EU language versions of the text are all authentic, the negotiated text which was written in English had to be translated into 21 other European languages and the consistency of all language versions should be reviewed by experts before the Agreement was signed.

As mentioned above, the National Assembly's consent is required for the ratification

[16]Presidential Directive on Procedures for the Conclusion and Implementation of Free Trade Agreements,Art. 12.
[17]Seok-young Choi, Briefing by the FTA Chief Negotiator (July 8, 2010) <http://www.fta.go.kr>.

by the President of an FTA. Once presented by the government to the National Assembly, the agreement is reviewed first by the Committee on Foreign Affairs, Trade and Unification of the National Assembly. After the agreement is passed in the Standing Committee, it is sent to the Plenary Session of the National Assembly for its final consent. With the consent of the National Assembly and the ensuing ratification by the President, the domestic procedures are completed. When it is promulgated by the publication in the official gazette, the FTA becomes effective.

During the process of review of the Korea-EU FTA by the Standing Committee, there has been a suggestion from certain opposition party members that a special Ad Hoc Committee needed to be established in order to review the FTA.[18] It was argued that since the Foreign Affairs Committee has no special knowledge with regard to the technical aspects of FTAs, a special Ad Hoc Committee composed of specialists on the relevant issues should be established to review the FTA. However, it was not accepted by the majority of the National Assembly and no special committee was established for the Korea-EU FTA.[19] The National Assembly gave its finalconsent to the Korea-EU FTA on May 4, 2011.

4. POST-NEGOTIATION STAGE: IMPLEMENTATION LEGISLATION

Any treaty duly concluded and promulgated in accordance with the provisions of the Constitution is automatically incorporated into the Korean domestic legal system and has the same effect as domestic law.[20] However, this does not mean that a treaty's self-execution effects are always recognized and that an individual may file a case directly resorting to the treaty. The Constitution does not provide clear direction and the position of Supreme Courts vary on this issue.[21]There are even cases in which the Agreement explicitly denies self-execution effects of certain provisions.[22] In cases which are not clearly stated, it appears that whether a provision of a treaty has self-executing effects or not is judged by the court on a case by case basis.

Therefore, there might be a case in which individuals cannot claimtheir rights under the treaty in domestic courts. In order to prevent such situations, the Korean government revises domestic laws in accordance with its obligations under the treaty prior to the treaty's entry into force. If necessary, it enacts new laws. However, in any case, the parties to the treaty are under obligation to implement the treaty. If any party fails to implement the obligation under the international agreement, then such action shall be deemed as breaching the agreement.

Domestic regulations that are required to be enacted or revised for implementation may include laws, enforcement decrees, and enforcement rules. Any revision or enactment of lawsmust be approved by the National Assembly while enforcement decrees and enforcement rules can be revised or enacted by the government, the administrative body without the

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[18] *SeeMember of National Assembly Park Joo-sun Proposes the Establishment of AdHoc Committees for Korea-U.S. and Korea-EU FTAs* (Jan. 14, 2011) <http://www.parkjoosun.pe.kr/bbs/board.php?bo_table=bodo&wr_id=380&page=6>.

[19] A special Ad Hoc Committee was established during the negotiations for the Korea-U.S. FTA.

[20] DAEHANMINGUKHEONBEOB[Constitution] Art. 6.

[21] For case acknowledging the effects, see Supreme Court Decision 2004Chu10 (Sept. 3, 2005) (S. Korea).For case denying the effects, see Supreme Court Decision 2004Do2965 (July 15, 2004) (S. Korea).

[22] South Korea-EU Free Trade Agreement para.6,annex 7(A)(1).

approval of the National Assembly.

Generally, domestic legislation must go through the following process within the government: i)notice of draft legislation; ii) review by the Ministry of Government Legislation; and iii) approval by the Cabinet Meeting. Once this process is completed, enforcement decrees and enforcement rules may be promulgated.However, laws must go through relevant procedures within the National Assembly before they can be promulgated. These procedures include: i) the government's submission of the bill to the National Assembly; ii) review by the Standing Committee; iii) review by the LegalAffairs Committee; iv) approval by the Plenary Session; and v) the National Assembly's notification of its approval to the government.

Although enforcement decrees and enforcement rules can be amended by the government, if the laws which give mandate to those enforcement decrees and rules need to be revised for implementation, the enforcement decrees and rules cannot be revised until the laws have first been revised.

Following the ratification of the Korea-EU FTA, 15 laws have been identified to be in need of revision for implementation. With the exception of three laws for which a grace period has been granted and which are therefore not required to be revised before the entry into force of the Agreement on 1 July 2011, 12 laws have been revised before July 1, 2011.

5. POST-NEGOTIATION STAGE: THE IMPLEMENTATION MECHANISM

The FTAs which Korea has concluded so far contain provisions on implementation mechanisms. For instance, the Korea-Chile FTA provides for the establishment of the Free Trade Commission in order to monitor its implementation. In appearance, the Korea-EU FTA does not look much different. However, in practice, both administrations have accorded special attention to the mechanisms for its implementation due to the comprehensive coverage, high level of trade liberalization, and huge commercial stakes of this FTA.

Under the Agreement, the Trade Committee - which is the Minister-level consultation body - and seven Specialized Committees and seven Working Groups are established in order to monitor and consult on implementation of the FTA. After only 103 days from its entry into force, the first Trade Committee Meeting was held in Seoul on October 12, 2011. In addition to the fact that the Ministers' Meeting was held so early, it is also noteworthy that the first decision of the Trade Committee Meeting was to adopt its rules of procedures. This was the first time that Korea, which has concluded many FTAs, had agreed on this kind of detailed rules of procedure for the consultation body. This demonstrates the great importance that both Parties place on this implementing mechanism.

Another important factor in the implementation mechanism is its dispute settlement procedures. The Korea-EU FTA already provides very detailed procedures for the implementation of panel decisions. The Agreement provides that no later than six months after the entry into force of the Agreement the Trade Committee shall establish a list of 15 individuals to serve as arbitrators in the panel. Another decision by the first Trade Committee Meeting was to adopt the panel list. The fact that the Trade Committee prepared the list far in advance of the timeline provided for in the Agreement also shows that implementation really matters for both Parties.

In the Trade Committee, both Trade Ministers agreed on the importance of the Trade Committee and other implementation institutions as mechanisms for addressing bilateral trade issues and enhancing bilateral cooperation. This shows that in the case of the Korea-EU FTA the process of an FTA does not end with the conclusion of the negotiations nor with the entry into force of the Agreement, but continues with monitoring bilateral trade relations and enhancing overall cooperation. This new development in the FTA process is expected to apply to future FTAs, in particular, those with important trading partners.

V. CONCLUSION

As a late runner in the FTA competition, Korea is pursuing a very active FTA policy in order to establish a global FTA network. For the purpose of both ensuring its export market for domestic businesses and reforming its domestic business environment into a more investor friendly one, Korea's FTA policy is aiming at very comprehensive and high level trade liberalization. The comprehensive and high level commitment set out in the Korea-EU FTA as we have reviewed so far implies that Korea's current FTA policy is fully reflected in the Agreement and it will be a very important precedent for the negotiations for future FTAs.

In terms of procedural aspects, the process of negotiating and ratifying this FTA has taken every step undercurrent domestic regulations to accommodate the various interests of the domestic constituency. In reflection of the comprehensive and high level nature as well as huge economic stakes of this FTA, its implementation stage has attracted significant attention in comparison to previous FTAs. 12 laws and other enforcement regulations have been amended to implement this FTA. The Trade Committee, which is the Ministerial-level consultation body, and specialized committees and working groups as well as detailed dispute settlement mechanisms have been established. This shall serve as a valuable precedent when Korea has to implement other FTAs with large economies in the future.

In conclusion, the Korea-EU FTA heralds a new era of FTA policy in Korea. With the completion of the Korea-EU FTA, it can be said that Korea has entered the next stage of its FTA policy by accomplishing its first objective on the mid and long term list of the 2003 FTA road map. The fact that it has finalized FTA negotiations with the largest economy in the world and achieved its entry into effectsshall serve as a valuable foundation for Korea's future FTA policy.

KEYWORDS
Free Trade Agreement, Korea-EU FTA, Trade Policy, Legal Framework, Implementation

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CONFERENCE PAPER

A FORMAL LEGISLATIVE FRAMEWORK IS NEEDED TO ESTABLISH A CARBON INVESTIGATION SERVICE IN TAIWAN

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ABSTRACT

The issue of the MRV (measurable, reportable, and verifiable) principle was first raised in the Bali Action Plan, decision 1 on the 13th Conference of the Parties

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(COP) in 2007. This decision requires all mitigation and adaptation actions taken by the Parties of UNFCCC could be evaluated by measurable, reportable, and verifiable ("MRV") measures. The carbon investigation servicesareintegral part on both implementations of the MRV measures and compliance of the decisions. They could not only provide domestic reduction records and also increase the transparency of the global emission reduction activities. Therefore, the Parties of the Convention shall establish relevant MRV regulations within their jurisdictions. The establishing of the carbon investigation services could also create new opportunities for employments and evaluation of service structures.

The U.S. and the EU have both passedformal legislation to develop the market of a carbon investigation service, and both have successfully created it. However, in Taiwan, there is no such legislationbut only administrative orders and principles waiting to be authorized once a formal law is passed. It is reasonable that The Legislative Yuan should now pass such a law now that the relevant regulations are well-defined; in the absence of such a law issuing, relevant administrative orders and principles provides an insufficient legal basis for development.

It is true that legislation takes a long time and that administrative rules are often the first movement on certain issues, it is also true that potential industries can follow those orders and principles if they are willing to. However, once their acts are disputed, there is no law for them to appeal in the absence of formal legislation, and this turns to be a must-take risk for both carbon investigation service and industries that voluntarily report their GHGs emission if they decide to follow the national policy and join the voluntary Greenhouse Gases Registry Platform. In addition to the risk of being a victim, there is also a possibility that relevant companies and industries make the advantage of the lack of legislation. If there is no legal-binding law, there is also no chance that companies will be punished. At the present time, this turns out to be a risk the government has to bear.

I. INTRODUCTION

The carbon investigation services are important elements of building domestic carbon emission records. They are also the foundation for the establishment of a carbon emissions trading market. This article discusses the Taiwanese governments' efforts to set up third party services on carbon emission reduction activities without international limitations and supports. In order to establish a voluntary system on carbon investigations, knowing what MRV requires and learning from the experiences of other countries are necessary. Therefore, the first part of this article will introduce the MRV requirements from the climate treaties and their decisions. The second section reviews legislation and administrative orders in United States and European Union. The third section introduces the regulations and bills prepared by Taiwan Environment Protection Agency for the establishment of future service industries within the island. Finally, we suggest Taiwanese government should not use administrative orders to regulate all related actions only because it lacks experiences and its

convenience.They should follow the rule by law principle in order to prepare those related bills.

II. INTRODUCTION TO UNFCCC, KP AND MRV PRINCIPLE

The MRV principle can be seen as the very first step when it comes to achieve the purpose of the United Nations Framework Convention on Climate Change (UNFCCC). Generally speaking, carbon investigation in this article is an action conducted by regulated facilities and companies in order to know about carbon dioxide (CO_2), one of the greenhouse gases (GHGs). Since the objective of the UNFCCC is to stabilize the concentration of GHGs in the atmosphere, finding a way to ensure that GHGs emission reduction does exist is the priority, and this is also the reason why MRV principle has been raised.

A. THE BALI ACTION PLAN AND MRV PRINCIPLE

The so-called "MRV" principle refers to "measurable, reportable, and verifiable." These words were first seen in the Bali Action Plan (BAP)[1], decision 1.1(b)(i) and (ii) in 13th Conference of the Parties (COP) which stated that " (b) Enhanced national/international action on mitigation of climate change, including, inter alia, consideration of: (i) Measurable, reportable and verifiable nationally appropriate mitigation commitments or actions, including quantified emission limitation and reduction objectives, by all developed-country Parties, while ensuring the comparability of efforts among them, taking into account differences in their national circumstances; (ii) Nationally appropriate mitigation actions by developing country Parties in the context of sustainable development, supported and enabled by technology, financing and capacity-building, in a measurable, reportable and verifiable manner."

The aim of the MRV principle is to implement the Convention more completely, effectively, and continuously, but the concepts are not new.[2]

Under the MRV principle, on one hand, Annex I parties shall build up a system which complies with the MRV principle to enhance their mitigating commitments (QELRCs) and national appropriate mitigation acts (NAMAs). On the other hand, non-Annex I parties shall follow the principle to do NAMAs. This aside, the MRV principle also applies tothe provision of technology, financing and capacity-building, too.[3]

To sum up, in achieving QELRCs, conducting NAMAs, and providing relevant assistances, countries are asked toestablish a system that every act, process, and outcome can

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[1] UNFCCC, Conference of the Parties, 13th Sess., Bali, 3-15 Dec. 2007, Report of the Conference of the Parties, addendum, Part Two: Action taken by the conference of the Parties, Decision 1/CP. 13, Bali Action Plan, 3-7, FCCC/CP/2007/6/Add.1* (14 March 2008)

[2] SvitlanaKravchenko, *Procedural Rights as a Crucial Tool to Combat Climate Change*, 38 GA. J. INT'L & COMP. L. 613, 631 (2010).

[3] Harald Winkler, Measurable, Reportable and verifiable: the keys tomitigation in the Copenhagen deal, climate policy 537-547 (2008), *available at* http://www.globalcitizen.net/Data/Pages/2037/papers/2009103014912579.pdf (*last visited* on Nov. 10, 2011)

be measured, reported, and verified. By using the word "enhanced" in the BAP decision 1, these measuring, reporting and verifying concepts can be reasonably considered to have already existed before. That is, these concepts can be found in the United Nations Framework on Convention of Climate Change (UNFCCC)[4] roughly, and also in the Kyoto Protocol (KP). This connection will be discussed in the following sections.

Table 1 MRV scope in BAP

MRV scope in BAP		
Subject	Object	
Developed countries	Mitigation commitments complying with MRV principle.	NAMAs complying with MRV principle.
Developing countries	NAMAs and relevant technological assistance, financial aid, and capacity building complying with MRV principle.	

B. The Interrelationship between the MRV Principle and the UNFCCC

Until now, there is no accurate data showing whether the global greenhouse effect causes the climate change, or whether human activities cause global warming. However, the increasing concentration of GHGs causes the global warming effect, and the idea that global warming does change some natural patterns in a bad way, like drought and flood, has already gained a high-level consensus. Also, the increasing concentration of the GHGs in the atmosphere is over 90 percent likely produced by humans.[5] Despite that scientists cannot be 100 percent confirmed that the increasing concentration of the GHGs in the atmosphere is produced by humans, neither the global warming is the cause of recent climate change, there is already an international consensus on dealing with the rising temperature earlier before anything unrecoverable happens.

In order to protect the global climate systems and also control the emission reduction activities among the Parties, the UNFCCC Art 3.1 asks Annex I Parties to adopt acts against climate change and related negative impacts prior to other contracting parties. The Art 4.1(b) then further states that every contracting party shall adopt corresponding mitigation acts and adaptation acts to deal with climate change and its effects. Therefore, every contracting party should establish and implement relevant acts regards to the aim of the Convention or its

[4]United Nations Framework Convention on Climate Change (UNFCCC), Mar. 21, 1994, 1771 U.N.T.S. 107, 31 I.L.M. 848 (1992).

[5]Intergovernmental Panel on Climate Change, Climate Change 2007: The Physical Science Basis, 119 (2007).

practical need.[6] These two articles also reveal the burden sharing and the common but differentiated responsibility principles that are common in any environmental convention.

UNFCCC Art 4.2(a) states that every Annex I country shall mitigate the emission of anthropogenic GHGs as a way to achieve the purpose of keeping the concentration of GHGs in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system, as article 2 states[7]. Decision 1.1(b)(i) and (ii) on the 13th COP aims to carry out a more complete, more effective and more continuous outcome through a long-term cooperation, including strengthening both international and national mitigation and adaptation acts correspond with the MRV principle.[8] However, though the MRV principle was first referred in 2007 and has been repetitively emphasized since, what it means is still yet clearly defined.

Despite its imprecise definition, some articles in UNFCCC do unveil the meaning of the MRV principle because the decisions made by COP are to complement original text of UNFCCC. In Art 4.1(a) and Art 7.2(d) shows every Party should use comparable methodologies that are announced by COPs to check national emissions by sources and removals by sinks. Combining Art 4.1(j) and Art 12, it undoubtedly states every Party shall compile national communication, and shall submit to the COP periodically. In Art 4.2(b) and Art 7, the COP shall verify those national communications.

Above all, these are the overall concepts of MRV principle: (1) to check the emission by sources and removals by sinks; (2) to compile a relevant report; and (3) to make the report verified.

C. THE INTERRELATIONSHIP BETWEEN MRV PRINCIPLE AND KP

For further explanations of the MRV on UNFCCC,[9]the Kyoto Protocol (KP)[10] was promulgated in 1998 as the supplementary document to the UNFCCC (1992). Art.13.1 declares that the decision-making mechanism on KP is a meeting of the Parties (COP/CMP). And UNFCCC, as a framework convention,[11] allows complementary amendments, annexes, and protocols[12] to be up-to-dated. As a supplementary document to the UNFCCC, the scope of KP shall not trespass the scope of the UNFCCC. However, the decisions made by CMPs

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[6]Yiyuan Su, *The Legal Analysis on Taiwan's Greenhouse Gas Emission Reduction Drafting Act 2009 from Climate Change Regime Perspective*, 6 CHUNG-HSING U. L. REV. 113, 141 (2010).

[7]UNFCCC, *supra* note 4,art. 2. "The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner."

[8]UNFCCC, *supra* note 1, subpara. (b) and (C).

[9]Allyn L. Taylor, *Governing the Globalization of Public Health*, 32 J. L. Med. & Ethics 500, 506 (2004).

[10] Kyoto Protocol to the Framework Convention on Climate Change, Feb. 16, 2005, U.N.T.S. 30822, 37 I.L.M. 22 (1998)

[11] Although there is yet a definition to what a framework convention is, it is mostly found in environmental conventions. JostDelbrueck, *Transnational Federalism: Problems and prospects of Allocating Public Authority Beyond the State*, 11 Ind. J. Global Legal Stud. 31, 45 (2004); ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 97 (2000).

[12]UNFCCC, *supra* note 4, art. 17 and art. 18.

only bind KP contracting parties[13]; for UNFCCC member countries, it's not necessary to sign its protocols yet they can still attend CMPs as observers.

There are so far 38 industrialized countries along with the European Union (EU) that have made their commitments to KP Annex B. And KP allows those countries above to implement relevant reduction actions to achieve their quantified emission limitation and reduction commitment (QELRC). For example, they can develop project-based flexible mechanisms in other countries like the Clean Development Mechanism (CDM).

The CDM is a mechanism that allows industrialized countries to invest sustainable development projects in developing countries.[14] Through these investments, developing countries may have lower GHG emissions. These reduced amounts can be applied to QELRC after undergoing the strict verification process.[15] The concept of CDM is "cost-effective," which means the country will pursue a wanted outcome no matter how much it costs. Comparing to developing a more advanced technology than nowadays, investing and transferring existing technologies and facilities to developing countries costs industrialized countries less money yet they still earn the same amount of carbon credits. In addition to this benefit for industrialized countries, the developing countries gain new technology too. This creates a win-win situation for every country that pursues this policy.

To sum up, to calculate definite cost of investment and accurate GHG emission reduction are vital in conducting mitigation acts, so the principle that ensures every penny has its value becomes very important.There is a saying which goes: "Whatever you can measure, you can verify." In KP, we can also figure out the concept of the MRV principle too.

Table 2 MRV concepts in UNFCCC and KP[16]

		Articles	Brief

[13]There are 194 parties in UNFCCC, yet there are only 192 parties in KP. See Fact sheet: An introduction to the United Nations Framework Convention on Climate Change and its Kyoto Protocol (Oct. 2010), *available at*: http://www.cinu.mx/minisitio/cop16/unfccc_and_kyoto_protocol.pdf(*last visited* on June 22, 2011).

[14] UNFCCC, Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, 1st Sess., 28 Nov.-10 Dec. 2005, Montreal, Report of the COP/MOP on its first session, Decision 3/CMP.1, Modalities and procedures for a clean development mechanism as defined in art. 12 of the Kyoto Protocol, 6-29, and Decision 4/CMP.1, Guidance relating to the CDM, FCCC/KP/CMP/2005/8/Add.1 (30 Mar. 2006).

[15]*Id.*

[16] Global Governance Programme for Development, South Centre, Geneva, May 2008, "Measurable, Reportable, and Verifiable": Using the UNFCCC's Existing MRV Mechanisms in the Context of the Ad Hoc Working Group on Long Term Cooperative Action under the Convention, Analytical Note, 9-14, SC/GGDP/AN/ENV/2; Also see Fransen, T., *Enhancing Today's MRV Framework to Meet Tomorrow's Needs: The Role of national Communications and Inventories* (WRI Working Paper (2009), *available at* http://pdf.wri.org/working_papers/national_communications_mrv.pdf (*last visited* on Nov. 1, 2011)

Measurable	UNFCCC	4.1.a 7.2.d	COPs shall develop and delicate relevant comparable methodologies to measure national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol.
	KP	5.2	Contracting parties shall abide by methodologies IPCC has accepted and decided in COP 3 to estimate anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol. Where such methodologies are not used, appropriate adjustments shall be applied according to methodologies agreed upon by the Conference of the Parties serving as the meeting of the Parties to this Protocol at its first session.
Reportable	UNFCCC	4.1.j and 12 12.2 12.5	DCs shall submit national communications including QELRC's detailed mitigation policies and acts they plan to implement periodically after signing the UNFCCC.
	KP	7	Annex I parties shall submit national communication incorporated with its annual inventory of anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol.
Verifiable	UNFCCC	4.2.b 7	COPs shall verify information about national adaption policies and acts, and detailed mitigated anthropogenic emission and

			removals by sinks in the national communications that Annex I parties submitted.
	KP	8.1-3 3, 6 and 12.7	National communications shall be reviewed in a way pursuant to relevant COP and CMP guidelines and decisions by expert review teams.

III. THE MRV PRINCIPLE AND CARBON INVESTIGATION SERVICE

Though there is no clear definition in international environmental law or international law until now for the precise meaning of MRV principlesas used by the UNFCCC and KP, it is quite obvious that these concepts should not be too far from ordinary use.

Measurable refers to something that can be measured qualified or quantified. Measuring a situation is to describe it with precise, objective terms for establishing "standard" or "unit of measurement" in order to make a phenomenon can be verified by any third-party and to gain public-trust.

Reportable refers to something can be reported. Compiling reports to a specified unit is quite common in multilateral agreements, especially environmental agreements. Reporting is mainly to gain information from every member country so that they can know their current situation and conduct further plans or actions in the future. Besides, the specified units in multilateral agreements can have a more complete look at the issue they concern and see how the issue affects each member country.

Verifiable refers to something can be verified independently/by a third-party. Verification is a technical, non-judgmental deed distinct from "review" or "compliance" that contains political elements. Generally, to verify something is to check its accuracy and reliability technically. So there is a saying that:" Whatever you can measure, you can verify."[17]

To measure and to report should be conducted by those regulated industries or companies; however, to verify in a totally objective manner, it should be conducted by an independent third-party. The MRV principle aims to ensure those emission reduction achievements are real. On the international convention level, industrialized countries and developing countries shall follow MRV in order to ensure their achievements, and on national or industrial level, the MRV principle is to be followed by governments and companies conducting emission reduction acts for just the same purpose. Once these relevant data collected by industries are trusted, they can serve as the basis of editing the national communication which every country should submit.

Carbon investigation service, literally, is one kind of service provided by specific companies in a systematic manner to discover and examine the fact of carbon-related

[17]CLARE BREIDENICH& DANIEL BODANSKY, MEASUREMENT, REPORTING, AND VERIFICATION IN A POST-2012 CLIMATE AGREEMENT 4 (2009).

information.It plays the verification role in the MRV principle, and aims at making sure that all those GHGs emission and reduction related information a company provides is trustworthy.

Carbon investigation service exists because there are needs, and these needs are created by legislation, not only those mandatory or voluntary national reporting schemes that are required by UNFCCC and KP,[18] but also emission trading scheme like EU - ETS. Therefore, regulating the rising market on carbon investigation service in order to ensure the market would function well should be emphasized.

A. CARBON INVESTIGATION SERVICE IN THE U.S.– FEDERAL LAW

The US Congress ratified the UNFCCC in 1992[19] but reject the ratification of Kyoto Protocol. In the case Massachusetts v. EPA[20], the USEPA was obliged to establish GHG relevant regulations in Clean Air Act 1990 (CAA).[21]There are still other disputes on whether these GHG emissions should be regulated in CAA or in a whole new act.

In addition to CAA, the Consolidated Appropriation Act was passed in the first session of the 110th Congress of the United States of America. The Congress noticed the stimulation of GHG in the atmosphere is the cause of the arising temporary average temperature. This phenomenon increases the frequency of natural flood, drought and fire. And scientists gradually have shown that human activities are one of the reasons that results to the raising GHG concentration. Therefore, the Congress passed a law to implement an effective and mandatory national program under the condition that this does no serious harm to American economy.[22]

According to the Consolidated Appropriation Act, USEPA issued Mandatory Reporting of Greenhouse Gases Rule[23], and the implementation of the Rule is called Greenhouse Gas Reporting Program (GHGRP). Under this Rule, large GHG emission sources and suppliers shall collect and submit accurate and up-to-date GHG relevant information to USEPA in order to develop future policies.

In GHGRP, those regulated GHGs are CO_2, CH_4, N_2O, SF_6, HFCs, PFCs, and HFEs. Therefore, facilities that emit those regulated GHGs, suppliers that emit industrial GHGs and fossil fuel, manufacturers that produce transportation vehicles and engines, and other industries are all asked to compile reports by other regulations and have to submit periodical

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[18] *Id.*

[19] USEPA, Climate Change- U.S. Climate Policy, UN Framework Convention on Climate Change. *available at* http://www.epa.gov/climatechange/policy/international_unfccc.html (*last visited* on Oct. 3, 2011)

[20] Massachusetts v. EPA, 549 U.S. 497, 37 ELR 20075 (2007).

[21] Nathan Richardson, Art Fraas& Dallas Burtraw, *Greenhouse Gas Regulation under the Clean Air Act: Structure, effects, and implications of a Knowable Pathway*, 41 ENVTL. L. REP. NEWS & ANALYSIS 10098, 10101 (2011).

[22] Consolidated Appropriations Act, 2008, H.R. 2764 Sess. 430 (2008).

[23] Environment Protection, Administrative Practice and Procedure, Greenhouse gases, Incorporation by reference, Suppliers, Reporting and recordkeeping requirements, 40 C.F.R. pt. 98, 74 Fed. Reg. 56373 (Oct. 30, 2009), *available at* http://www.epa.gov/climatechange/emissions/downloads09/GHG-MRR-FinalRule.pdf(*last visited* on Oct. 3, 2011)

reports.[24]

In addition to the mandatory GHGRP, there are several voluntary report mechanisms in the U.S., for example, The Climate Registry (TCR), California Climate Action Registry (CCAR), and so on. Those facilities or corporates not regulated under GHGRP can consider their location and take part in one of those voluntary mechanisms in order to control their own GHG emission and conduct early actions. There are, however, variations from state to state in the United States in the approach to this issue in addition to national legislation passed by the U.S. Congress.

1. MASSACHUSETTS

Massachusetts follows Reporting of GHGs Rule issued by USEPA, and the governor agreed and signed on Global Warming Solution Act (GWSA)[25] in August 2008. This GWSA asks Executive Office of Energy and Environmental Affairs (EOEEA) to set state's GHGs emission reduction goal after consulting relevant state institutions and public. By 2020, there must be a reduction of 10 to 25 percent GHGs emissions comparing to 1990. By 2050, there must be a reductionof 80 percent GHG emissions compared to 1990.

GWSA also asks Department of Environmental Protection (MassDEP) to develop mandatory regulations regards to GHGs reporting. Thus, MassDEP issued an emergency regulation[26]; its purpose is to follow every rule about report and verification GWSA declared. Besides, 310 CMR 7.71 (1) sets certain conditions[27], so every facility that fits for those conditions shall compile GHGs report, and these bound facilities must register in MassDEP before April 2009. MassDEP also declared that these facilities should abide by TCR General Reporting Protocol[28] to work on their reports.

Last but not least, every GHG relevant number included in these reports shall be verified by an independent third-party recognized by MassDEP. These verification bodies[29] are also required to have American National Standards Institute (ANSI)[30] accreditation so that they can conduct verification with specific methodologies. In addition to those methodologies, these verification bodies should also follow CMR 7.70 (10) to ensure that

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[24] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GENERAL PROVISIONS PROPOSED RULE: MANDATORY REPORTING OF GREENHOUSE GASES UNITED STATES ENVIRONMENTAL PROTECTION AGENCY1 (2009), *available at* http://www.epa.gov/climatechange/emissions/downloads/GeneralProvisions.pdf (*last visited* on Oct. 3, 2011).

[25] The Global Warming Solutions Act, Section 2 & 10, Chapter 21N, Mass. Acts 2540 (2008), *available at* http://www.malegislature.gov/Laws/SessionLaws/Acts/2008/Chapter298 (*last visited* on Oct. 3, 2011)

26 Final Amendments to 310 CMR 7.71, Reporting for Greenhouse Gas Emissions, (1) Purpose, 1113, Mass. Reg. 465 (2009), *available at*http://www.mass.gov/dep/service/regulations/771fnl.pdf andhttp://archives.lib.state.ma.us/handle/2452/69828 (*last visited* on Oct. 10, 2011).

27 Conditions are set in CAA Title V, 310 CMR 7.00 Annex C, and facilities emit over 5,000 tons CO2e. See Official Website of MassDEP, *available at*http://www.mass.gov/dep/air/climate/reqdghgr.htm(*last visited* on Oct. 10, 2011)

28 General Verification Protocol and GVP Updates and Clarifications, *available at* http://www.theclimateregistry.org/resources/verification/general-verification-protocol/ (*last visited* on Oct. 10, 2011)

29 List of accredited verification bodies by MassDEP, *available at* http://www.mass.gov/dep/air/climate/verifiers.htm (*last visited* on Oct. 10, 2011).

30 ANSI Accreditation Program for Greenhouse Gas Validation/Verification Bodies, *available at* https://www.ansica.org/wwwversion2/outside/GHGgeneral.asp?menuID=200 (*last visited* on Oct.10, 2011)

those numbers and relevant information in the report prepared by regulated units are calculated and collected with accuracy.

2. CALIFORNIA

California, like Massachusetts, followed Reporting of GHGs Rule issued by USEPA, and the Governor agreed and signed the Global Warming Solution Act of 2006 (AB32), directly put reduction target in the act. The act ordered California Air Resources Board (ARB) to develop concrete early reduction actions, and in the mean time, prepare an overview plan to make sure the best way to achieve 2020 target. These actions were adopted in the beginning of 2011. According to AB32 timeline, relevant regulations, methodologies and mechanisms should be made by 2012 so that the target set in AB32 can be achieved by 2020.[31]

There are many requirements in AB32, and CAL. HSC. CODE 38530 is one of the requirements regards with mandatory GHG reporting regulations. Point (a) asked ARB to adopt mandatory regulations on GHG reporting and verification, and implement project monitoring before 2008 to ensure the regulations are complied with. ARB adopted Regulation for the Mandatory Reporting of Greenhouse Gas Emission in February 2007; objectives and standards are all listed in detail. However, in order to unify relevant information with USEPA, on 16 December 2010, the Regulation for the Mandatory Reporting of GHG Emission was amended. This amended Regulation will be effectively implemented since 2012.[32]

So far, ARB has asked to compile reports in using GHG Reporting Tool. After logging in the platform on the Internet, following directions to register GHG relevant information. But this doesn't have to be bound for those who already taken part in CCAR by 2006 because Chapter 6 of Part 4 of Division 26 allows these institutions to remain their original way to compile reports as long as these methods are not complete enough or not easy to be verified.

California conducts verification in exactly the same way Massachusetts does. The verification body accredited by ARB should verify every number and GHG relevant information.[33] These institutions should also be recognized by ANSI.

B. CARBON INVESTIGATION SERVICE IN THE EU

The European Union (EU) consists of many European countries, but they only give parts of their sovereignty to the EU, and each of EU member countries still has its own sovereignty. The EU, as a union, passed UNFCCC in 94/69/EC Article 1[34], and became one

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[31] Air Resources Board, California Environmental Protection Agency website, *available at* http://www.arb.ca.gov/cc/ab32/ab32.htm (*last visited* on Oct. 13, 2011)

[32] *Id*, *available at* http://www.arb.ca.gov/cc/reporting/ghg-rep/ghg-rep.htm (*last visited* on Oct. 13, 2011)

[33] *Id*, List of accredited verification bodies, *available at* http://www.arb.ca.gov/cc/reporting/ghg-ver/arb_vb.htm (*last visited* on Oct. 11, 2011)

[34] Commission Directive 94/69/EC, 1994 O. J. (L 33) 11, 13. The UNFCCC signed in June 1992 in Rio de Janeiro is hereby approved on behalf of the European Community. The text of the Convention appears in Annex A to this Decision.

of the Annex I parties, so EU as a community, is one of the UNFCCC contracting parties as well. Furthermore, EU council passed KP in 2002/358/EC Article 1[35]. Also in 2002/358/EC, EU council determined that European Community (EC) and its Member States shall fulfill the commitments under Article 3(1) of the KP jointly. Besides, the QELRCs agreed by the EC and its Member States are set out in Annex II and allocated to each of them for the first period, from 2008 to 2012. Later, in Commission Decision No 2006/944/EC determines the respective emission levels allocated to the Community and each of its Member States under the KP.

In decision No 280/2004/EC in 2004 Article 1(d) established a mechanism for monitoring, evaluating, national programs implementing, and reporting by the Community and its Member States. Article 3 specified what should be put into the report and the frequency of submitting the report, both for the Member States and the Community. And according to decision No 2005/166/EC Article 1(c) and Chapter II, reporting requirements for Member States are further established. For information about national inventories, Article 2 asks Member States shall determine the information reported pursuant to IPCC guidelines for national greenhouse gas inventories, IPCC good practice guidance and uncertainty management in national greenhouse gas inventories, and so on.[36]

In EU, the carbon investigation service is needed when EU established European Union Emissions Trading Scheme (EU ETS)[37] in Directive 2003/87/EC. The European Commission adopted Revised Guidelines for Monitoring and Reporting (MRG 2007) in Directive 91/692/EEC. In the above Guidelines[38], runners of companies should submit their GHGs emission reports after being verified by a qualified, independent, and accredited verification body that conducts the verification according to Annex V of MRG 2007.

1. UNITED KINGDOM

Under EU ETS, every Member States should choose the institution responsible for monitoring and reporting mechanism. By signing Memorandum of Understanding with the Government[39], the United Kingdom's (UK) government recognized United Kingdom Accreditation Service (UKAS) as the only accreditation body[40] that can conduct accreditation affairs.

So far the UKAS accredited 11 entities[41] to conduct validation and verification. These

[35]Kyoto Protocol, *supra* note 10, Annex A.

[36]Commission Decision 2005/166/EC, Article 2, 2005 J.O. (L. 55) 57.

[37]Directive 2003/87/EC, 2003 J.O. (L. 257) 32. It establishing a scheme for greenhouse gas emission allowance trading within the Community andamending Council Directive 96/61/EC, *available at*http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:275:0032:0032:EN:PDF(*last visited* on June 24, 2011)

[38] Council Directive 91/692/EEC, 1991 O.J. (L. 377) 48, The standardizing and rationalizing reports on the implementation of certain Directives relating to the environment, *available at*http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31991L0692&model=guichett (*last visited* on June 24, 2011)

[39] UKAS official website, about UKAS, *available at* http://www.ukas.com/about-accreditation/about-ukas/ (*last visited* on June 24, 2011)

[40] UKAS, Accreditation Certificate, 2011, Sl No 3155/2009 (U. K.), *available at http://vwww.stroma.com/files/group/certificates/UKAS%20MCS%20Certificate.pdf* (*last visited* on June 24, 2011).

[41]UKAS official website, Certification Body Schedules – GHG, *available at* http://www.ukas.com/about-

accredited entities are seen as accredited by the UK government so that they can verify relevant reports submitted by companies.

IV. *CARBON INVESTIGATION SERVICE IN TAIWAN*

Unlike the U.S. and the EU, Taiwan is not one of the contracting parties for either the UNFCCC or the KP, and there is as yet no valid law[42] that requires specific industries to submit their GHGs emission reports. However, as a member of the global society, Taiwan still follows the objective of the UNFCCC. There are policies and administrative ordersthat promote voluntary reporting program.

A. SUSTAINABLE ENERGY FRAMEWORK POLICY GUIDELINES[43]

Considering that every advanced party in Kyoto Protocol began to conduct carbon emission reduction actions for fulfilling their commitment, the target of emission reduction concluded in G8 Conference, and the rank for carbon emission per capita in 2006, the government of Taiwan believes that they should also take corresponsive actions toward the issue. To help reach this goal, the Executive Yuan (Taiwan) passed the Sustainable Energy Framework Policy Guidelines (hereinafter Guideline) in session 3095[44], on June 5, 2008.

The purpose of this Guideline is to set a goal for win-win among energy usage, environmental protection, and economic growth, including raising energy efficiency, developing clean energy, and ensuring steady energy supply. In addition to this, it also asks for pursuing energy with low carbon emission and lowering the need for fossil fuel in sectors like transportation, governmental departments, housing and commercial, etc. Under these Guidelines, industries not only have to save energy and reduce carbon emission, but also have to be regulated with assigned amount of carbon emission. Furthermore, the Guideline also pushed the government to establish relevant laws, regulations, and institutes, especially the Greenhouse Gases Emission Reduction Draft Act (2009), the Statute for Renewable Energy Development[45], and so on. At the same time, the Guideline also aims at establish relevant

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accreditation/accredited-bodies/certification-body-schedules-GHG.asp (*last visited* on June 24, 2011)

[42] The Greenhouse Gases Emission Reduction Draft Act (2009) is still in the Legislative Yuan and waiting to be voted. Relevant legal proposals were put into the schedule since 1996, Environmental Protection Administration Executive Yuan (Taiwan), The Drafting "Greenhouse Gas Reduction Act 2008, *available at* http://www.epa.gov.tw/ch/aioshow.aspx?busin=12379&path=12405&guid=5c2aad3c-ff22-47a2-b1e4-8df8b68167e0&lang=zh-tw (*last visited* on Oct. 5, 2011) (only available in Chinese).

[43]The translations of the guideline and the action plan used here are published on the Official Website of Executive Yuan (Taiwan), English version. See Carrying out Energy Saving and Carbon Reduction Policy, News & Releases, Executive Yuan, Oct. 4, 2011, *available at* http://www.ey.gov.tw/ct.asp?xItem=83871&ctNode=1334&mp=11 (*last visited* on Nov. 29, 2011)

[44]See http://www.ey.gov.tw/ct.asp?xItem=43112&ctNode=1226&mp=1 (*last visited* on Nov. 29, 2011)

[45]The translation of the Statute is from Global Legal Information Network, *available at* http://www.glin.gov/view.action?glinID=220044 (*last visited* on Nov. 29, 2011). The Renewable Energy Development Statute is already passed by the Legislative Yuan on Jun. 12, 2007. 98 Legislative Gazettes 112, at 112 & 113 (2009).*available at* http://lis.ly.gov.tw/lgcgi/lglaw?@98:1804289383:f:NO%3DC708101*%20OR%20NO%3DC008101%20OR%20NO%3DC108101$$4$$$NO (*last visited* on Nov. 29, 2011).

carbon trade system and promote environmental education.

Last but not least, relevant governmental departments must also set concrete and detailed action plans and set numerable goals to achieve so that the outcome of these plans can be examined periodically.

B. SUSTAINABLE ENERGY POLICY GUIDELINES ENERGY SAVING AND CARBON REDUCTION ACTION PLAN[46] *& NATIONAL ENERGY SAVING AND CARBON REDUCTION MASTER ACTION PLAN.*[47]

Not long after the establishment of the Guideline, the Executive Yuan (Taiwan) declared that it will be better to do relevant energy saving and carbon reduction actions early on or Taiwan would be forced to pay even more. Therefore, the Sustainable Energy Policy Guidelines – Energy Saving and Carbon Reduction Action Plan (hereinafter Action Plan), were not only a working project but also set quantified goals.

In addition to the above goals, the Action Plan also suggested that there should be an institute and a database for relevant emission and inventory data. The Action Plan was merged into the National Energy Saving and Carbon Reduction Master Action Plan (hereinafter National Action Plan) after the National Energy Conference [48]held in 2009 in order to re-organize various reduction actions and to integrate and coordinate inter-ministerial efforts.[49] The National Action Plan not only sets ten priority objectives[50] but also coordinates National Appropriate Mitigation Actions of Greenhouse Gases conducted by the Environmental Protection Agency, Executive Yuan (Taiwan), the National Action Plan itself, and other Plans conducted by the Ministry of Economic Affairs, R.O.C. (hereinafter MEA).

C. THE MANAGEMENT PRINCIPLES FOR GREENHOUSE GASES INVENTORY AND REGISTRATION IN TAIWAN

Regulations and principles about managing the carbon emission reduction are mostly made by Environmental Protection Agency, Executive Yuan (Taiwan) (hereinafter EPA). In order to develop more concrete and detailed regulations in correspondence with the goals of the above policies, the EPA established the Greenhouse Gas Reduction Management Office to focus on managing greenhouse gas emission reduction. Seven months later, the office expanded and re-organized its structure for a Reductions Planning Group, Inventory and

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[46]Executive Yuan, *supra* note 43. Passed in Section 3, session 3108, Executive Yuan, Sep. 4, 2008, *available at* http://www.ey.gov.tw/ct.asp?xItem=44182&ctNode=1226&mp=1 (*last visited* on Nov. 29, 2011).

[47]*Id*., The text of the National Energy Saving and Carbon Reduction Master Action Plan is *available at* http://www.ey.gov.tw/public/Attachment/122318185071.pdf (*last visited* on Nov. 29, 2011)(only available in Chinese).

[48]*Id*.

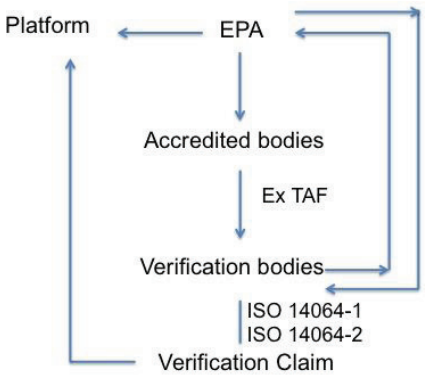
[49]See Executive Yuan, Section 1, National Energy Saving and Carbon Reduction Master Action Plan, the official website of Council for Economic Planning and Development, *available at* http://www.cepd.gov.tw/m1.aspx?sNo=0000375 (*last visited* on Nov. 29, 2011)(only available in Chinese)

[50]Executive Yuan, Picture 2, National Energy Saving and Carbon Reduction Master Action Plan Framework, National Energy Saving and Carbon Reduction Master Action Plan, 6, May, 2010, *available at* http://www.ey.gov.tw/public/Attachment/122318185071.pdf (*last visited* on Nov. 29, 2011).

Trade Group, and an Education and Adaptation Group.[51] The aforesaid Inventory and Trade Group is responsible for planning strategies that are accordingly with international regulations, and establishing relevant standards on GHGs emission inventory, registration, and verification.

EPA declared that Taiwan has followed the COP decision on UNFCCC to establish greenhouse gas reduction regulations, technology guidelines, reviewing mechanisms and a registration platform in a measurable, reportable and verifiable (MRV) way. Though the draft of the Greenhouse Gas Reduction Draft Actis still pending[52] in Legislative Yuan (Taiwan), EPA has already established a greenhouse gas inventory management system, the national Greenhouse Gas Registration Platform[53], and issued the Greenhouse Gas Inventory and Registration Guidelines, providing industries a way to submit data on greenhouse gas emissions voluntarily. To ensure consistent implementation of inventory and registration work among different industries, EPA further issued Greenhouse Gases Inventory and Registration Management Principles[54] on September 10, 2010.[55]

The EPA certifies the applications submitted by GHGs verification bodies according to the Working Principles for Managing Greenhouse Gas Inspection Organizations[56] promulgated on November 6, 2009. Once these verification bodies are admitted by the EPA, they can verify GHGs emission reports for companies that want to participate in the voluntary reporting program. After getting the verification claim issued by the accredited verification bodies, companies can log onto the Platform to register their GHGs emission. The following picture roughly shows how a verification body is accredited.



[51]The Management Office was e ɔs were divided on Aug. 18, 2008. The official website of EPA, *available at* http://www.epa.gov.tw/ch/aioshow.aspx?busin=12379&path=12402&guid=49e091dc-dc59-423d-9d5a-f65f79a60e67&lang=zh-tw (*last visited* on Nov. 29, 2011).

[52] The Greenhouse Gases Emission Reduction Draft Act (2009), *supra* note 42.

[53]Environmental Protection Administration Executive Yuan, R.O.C. (Taiwan), Taiwan GHG Emissions Registry, *available at* http://estc10.estc.tw/ghg1000test1/Information/Information_pub.aspx?r_id=18 (*last visited* on Nov. 30, 2011).

[54] Environmental Protection Administration Executive Yuan, R.O.C. (Taiwan), GHGs Inventory Investigation and Registry Management Rule, *available at* http://ivy5.epa.gov.tw/epalaw/docfile/193190.pdf (*last visited* on Nov. 30, 2011)(only available in Chinese)

[55]Environmental Protection Administration Executive Yuan, R.O.C. (Taiwan), Promoting Industry Greenhouse Gas Voluntary Reduction Strategies, Recent Issues, official website, para. 1-7, Jun. 29, 2011, *available a*t http://www.epa.gov.tw/en/NewsContent.aspx?path=426&NewsID=2602 (*last visited* on Nov. 30, 2011)

[56] Environmental Protection Administration Executive Yuan (Taiwan), Managing Principles on GHGs Verification Services, *available at* http://ivy5.epa.gov.tw/epalaw/docfile/193150.pdf (*last visited* on Nov. 30, 2011)(only available in Chinese)

Picture 1, the process of recognizing verification bodies

D. GREENHOUSE GASES EMISSION REDUCTION DRAFT ACT

The above policies and action plans also declare that the government should quicken its pace on the legislation of Greenhouse Gases Emission Reduction Act (hereinafter the Draft Act). However, from the first proposal delivered by the Executive Yuan in 2006 to the seventh (also the latest) proposal delivered by legislators in 2008, none were ever to be passed. As things stand now, the legislation of the Draft Act is still pending.[57]

Although there are some differences among these proposed documents, the objectives of establishing an inventory system and asking industries to collect, to have their data verified, and to register voluntarily remain the same.[58] And the Draft Act also authorizes[59] the EPA to establish more detailed regulations needed for achieving the goal of greenhouse gas emission reduction.

V. CONCLUSION

Carbon investigation service in the U.S., the EU and Taiwan are mostly alike, but there are still some important differences. The table following roughly shows the commons and the differences.

Table 3 the commons and differences of verification bodies among countries

Verification Bodies	Accreditation	Authorization	Standard
U.S.	By government	Acts, Congress decisions, administrative orders, and rules	ISO (ANSI), TCR Verification Protocol, PAS2050, etc.
EU	By accreditation bodies the government recognized	Council directives, Community decisions, rules, and Memorandum	ISO (UKAS)
Taiwan	By accreditation bodies the government	None, only policies	ISO (EPA)

[57] Environmental Protection Administration Executive Yuan (Taiwan), *supra* note 42, these proposals are all *available at* the Parliamentary Library, Legislative Yuan, Taiwan, R.O.C., *available at* http://lis.ly.gov.tw/ttscgi/ttsweb?@@E1F312F246F093327857 (*last visited* on Nov. 30, 2011)(only available in Chinese).

[58] *Id*., Art. 9 and Ch. 3.

[59] *Id*., Art. 2.

	recognized		

The scope of carbon investigation service in these countries can be generally separated into two parts as per the table above. One is to verify inventory report including the source of GHGs emission and removal by sink submitted by bound industries. The other is to verify emission reduction reports used in emission trading scheme. They are both for verifying GHGs emission relevant reports, and ensuring their credibility.

Basically, the carbon investigation service appears because of legislative action or government energypolicy. The legislation and policy create the need for a carbon investigation service, and where there is a need, there is a chance it will develop. However, there is also a need to develop a standardized procedure and methodologies to do the verification should also be formulated. And sometimes, a penalty is necessary too because it helps to demand industries to follow the rules or they will pay more than the cost of compliance.

Since there are still a lot of works left to do, simply, relying on administrative orders to develop relevant rules or principles is improper. Though it seems redundant to have the government's hands in the market because the market itself can function itself, a standardized procedure, methodology, and punishment to avoiding speculators taking advantage of the unregulated market are still in needed.

Taiwan is not one of the contracting parties to UNFCCC and KP; however, as a member of the global village, the Taiwanese government still decided to take theresponsibility for GHGs emission reduction. Administrative ordersalone will not be enough regulation to authorize EPA to adopt relevant actions. That is so that whatever the carbon investigation service does now might be invalidated in the future because EPA, as an administrative uni alone, has no legal right to issue regulations, and if disputes or issues arise, there is no legal basis for an appeal. This lack of formal legislation might hinder the willingness to develop a more detailed carbon investigation service market. The government in Taiwan should quicken their pace to pass the formal regulatory legislation in order to allow carbon investigation service to grow.

KEYWORDS
MRV, Bali Action Plan, GHGs, Carbon Investigation Services, Taiwan

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