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ARTICLES

- PAKISTAN'S FAILED COMMITMENT:
HOW PAKISTAN'S INSTITUTIONALIZED
PERSECUTION OF THE AHMADIYYA
MUSLIM COMMUNITY VIOLATES THE
INTERNATIONAL COVENANT ON CIVIL
AND POLITICAL RIGHTS *Qasim Rashid* 1
- DOING BUSINESS IN EGYPT AFTER THE
JANUARY REVOLUTION: CAPITAL
MARKET AND INVESTMENT LAWS *Radwa S. Elsaman* 43
& Ahmed A. Alshorbagy
- ARAB SPRING BRINGS WINDS OF
CHANGE TO THE MAGHREB AND
MENA REGION: DOES THAT SPELL
OPPORTUNITY FOR INFRASTRUCTURE
DEVELOPMENT AND PROJECT
FINANCE? *Silvano Domenico Orsi* 77

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**PAKISTAN’S FAILED COMMITMENT: HOW
PAKISTAN’S INSTITUTIONALIZED PERSECUTION
OF THE AHMADIYYA MUSLIM COMMUNITY
VIOLATES THE INTERNATIONAL COVENANT ON
CIVIL AND POLITICAL RIGHTS**

*By Qasim Rashid*¹

“My guiding principle will be justice and complete impartiality, and I am sure that with your support and cooperation, I can look forward to Pakistan becoming one of the greatest Nations of the world.”

– Muhammad Ali Jinnah,^{2*} Pakistan’s Founder and First Governor
General at the Presidential Address to the Constituent
Assembly of Pakistan on 11th August, 1947.

ABSTRACT:

The United Nations (“UN”) adopted the International Covenant on Civil and Political Rights (“ICCPR”) in 1966 and officially implemented it in 1976 to ensure, among other guarantees, that no

¹ The author is an American-Muslim human rights activist, writer, and lecturer on American-Islamic issues. He received his Bachelors of Science in Marketing from the University of Illinois at Chicago (2006) and is completing his Juris Doctorate from the University of Richmond School of Law (2012), where he serves as Executive Editor of the *Richmond Journal of Global Law and Business* and Founder and President of the Muslim Law Student Association. He can be reached at q.rashid@richmond.edu. The author also expresses his sincere gratitude to his father, Rashid Yahya, wife, Ayesha Noor, colleague, Amjad Mahmood Khan, the Richmond Law Faculty, and the Richmond Journal of Global Law and Business. Each provided generous help, support, and insight on the various issues addressed in this paper. Without each of their involvement, this paper would not have been possible.

² Akbar S. Ahmed, *Jefferson and Jinnah: Humanist Ideals and the Mythology of Nation-Building*, in *THE FUTURE OF LIBERAL DEMOCRACY: THOMAS JEFFERSON AND THE CONTEMPORARY WORLD* 85, 91 (Rouhollah K. Ramazini & Robert Fatton eds., 2004).

* This paper is dedicated to Pakistan’s visionary Founder and first Governor-General, Muhammad Ali Jinnah (1876-1948), who fought valiantly for a nation founded on the tenets of freedom, equality, and pluralism. Under his revolutionary leadership, millions of individuals of all backgrounds were granted the opportunity to live in a liberated nation, free from the shackles of oppression. Let this paper serve as a reminder that Muhammad Ali Jinnah’s vision of a free nation, though obscured behind the veil of extremism, is still possible, should Pakistanis and the world at large wish it to be.

human is denied his or her right to equal voting, freedom of political association, due process of law, freedom of life, freedom of religion, freedom of speech, and freedom of assembly. The Islamic Republic of Pakistan is among 166 nations that have signed and ratified the ICCPR. Since signing the ICCPR in 2008 and ratifying it in 2010, however, Pakistan has perpetuated state-sanctioned and violent persecution of religious minority groups such as Ahmadi Muslims, Christians, and Hindus, through anti-blasphemy legislation and voting disenfranchisement. This article examines the plight of Pakistan's religious minorities, focusing primarily on the Ahmadiyya Muslim Community, in the context of the ICCPR. It demonstrates that Pakistan's Ahmadi Muslims are robbed of basic human rights in violation of the ICCPR and the imminent threats such violations pose to the international community. It concludes with an analysis of the practical steps the international community should take to remedy these threats, methods to revive religious freedom in Pakistan, and better ensure national and international security.

PART I: INTRODUCTION

Pakistan's ICCPR violations and state-sanctioned persecution of religious minorities have created a breeding ground for extremism. It should be no surprise, therefore, that Bruce Riedel of the Brookings Institution described Pakistan as "probably the most dangerous country in the world" today.³ This phenomenon directly impacts the United States and the international community at large because it creates an environment to develop and export extremism. The United States and United Nations must work together to recognize the plight of millions of Pakistani citizens who belong to a religious minority, and work to afford them the basic ICCPR-guaranteed freedoms they deserve. Silence in the face of Pakistan's clear violations of international law will only strengthen extremist ideologies within the country and abroad. Pakistan's current state of affairs pertaining to human rights is dismal. With a proper understanding of the gravity of the situation and a unified international effort, however, Pakistan can be held accountable to full ICCPR compliance.

Part II of this paper provides context into Pakistan's origin as a paragon of religious freedom founded in the Universal Declaration of Human Rights ("UDHR"), as well as a thorough analysis of the ICCPR. Part III describes Pakistan's gradual transition to the quasi-theocracy it has become today. Part IV details Pakistan's current discriminatory laws, the resulting human rights violations, and the consequential na-

³ Interview by Scott Simon with Bruce Riedel, Brookings Institute, *Assassination Leaves Pakistan Security Shaken* (Jan. 15, 2011), <http://www.npr.org/2011/01/15/132956628/Assassination-Leaves-Pakistan-Security-Shaken>.

tional and international harms. In particular, this part discusses the systematic state-sanctioned persecution of the Ahmadiyya Muslim Community, a revivalist movement within Islam. Part IV also examines the persecution of Pakistan's Christian and Hindu citizens. Part V analyzes the practical steps necessary to ensure Pakistan's ICCPR compliance. Part VI concludes this paper.

PART II: PAKISTAN'S ORIGINAL HUMAN RIGHTS PLATFORM AND THE ICCPR

a. Background on Pakistan's Religious Freedom and Freedom of Expression Platforms

Pakistan was created in 1947 upon a partition from India.⁴ Indian Muslims, anguished from living in Hindu dominated India, demanded the creation of their own nation.⁵ The two-nation State solution, originally conceived in 1933, emerged with increasing popularity.⁶ Muhammad Ali Jinnah (1876-1948), a politician and lawyer who commanded wide respect nationally and internationally, was the leader of the Muslim League.⁷ Once he began championing the two-state solution, the international community took notice. Often quoted in the American press regarding his goal of establishing a separate nation for Indian Muslims, Jinnah offered:

We are a nation with our own distinctive culture and civilization, language and literature, art and architecture, names and nomenclature, sense of values and proportion, legal laws and moral codes, customs and calendar, history and traditions, aptitudes and ambitions, in short, we have our own distinctive outlook on life and of life. By all canons of international Law we are a nation.⁸

Pakistan was founded in large part because India's minority Muslim community felt oppressed, unable to truly express their own distinctive culture and values.⁹ Much like America's Founding Fathers, Pakistan's Founding Fathers envisioned a nation free from tyrannical

⁴ GOVERNMENT OF PAKISTAN, ABOUT PAKISTAN, <http://www.pakistan.gov.pk/> (last visited Oct. 3, 2011).

⁵ See *India-Pakistan: Troubled Relations*, BBC NEWS, http://news.bbc.co.uk/hi/english/static/in_depth/south_asia/2002/india_pakistan/timeline/1947.stm (last visited on Oct. 3, 2011).

⁶ *Id.*

⁷ *Muhammad Ali Jinnah*, BBC NEWS, http://www.bbc.co.uk/history/historic_figures/jinnah_mohammad_ali.shtml (last visited Oct. 6, 2011).

⁸ HECTOR BOLITHO, *JINNAH: CREATOR OF PAKISTAN 149* (Oxford Univ. Press 2006) (1954).

⁹ See *India-Pakistan: Troubled Relations*, *supra* note 5.

rule, free from restrictions of conscience, and equality for all citizens.¹⁰ Pakistan's original Constitution reflected these principles as well.¹¹ In a policy speech, Jinnah addressed Pakistan's constituent assembly days before the nation was officially born describing his vision and commitment to ensure Pakistan became a nation that championed religious freedom. He declared,

You are free; you are free to go to your temples, you are free to go to your mosques or to any other place of worship in this State of Pakistan. You may belong to any religion or caste or creed that has nothing to do with the business of the State. As you know, history shows that in England, conditions, some time ago, were much worse than those prevailing in India today. The Roman Catholics and the Protestants persecuted each other. Even now there are some States in existence where there are discriminations made and bars imposed against a particular class. Thank God, we are not starting in those days. We are starting in the days where there is no discrimination, no distinction between one community and another, no discrimination between one caste or creed and another. We are starting with this fundamental principle that we are all citizens and equal citizens of one State.¹²

After years of deliberation and a near collapse of negotiations, Pakistan was born on August 14th, 1947, and Jinnah was elected as its first Governor-General.¹³ Jinnah particularly juxtaposed the dire conditions between Protestants and Catholics in England to the dire situation in India regarding religious discrimination, and made clear that Pakistan would rise above such discrimination.¹⁴ Instead, Pakistan (which literally means land of the pure)¹⁵ was to offer equality to all its citizens.¹⁶ In an address to the United States less than a year after Pakistan's creation, Jinnah re-affirmed Pakistan's commitment of freedom and pluralism to its new ally:

¹⁰ See, e.g., Muhammad Ali Jinnah, President of Pak., Presidential Address to the Constituent Assembly of Pakistan (Aug. 11, 1947), *transcript available at* http://www.pakistani.org/pakistan/legislation/constituent_address_11aug1947.html [hereinafter Jinnah's Constituent Assembly Address].

¹¹ See generally PAK. CONST. (1956).

¹² Jinnah's Constituent Assembly Address, *supra* note 10.

¹³ *Muhammed Ali Jinnah*, *supra* note 7.

¹⁴ *Id.*

¹⁵ *India-Pakistan: Troubled Relations*, *supra* note 5.

¹⁶ Jinnah's Constituent Assembly Address, *supra* note 10.

In any case Pakistan is not going to be a theocratic State to be ruled by priests with a divine mission. We have many non-Muslims — Hindus, Christians, and Parsis — but they are all Pakistanis. They will enjoy the same rights and privileges as any other citizens and will play their rightful part in the affairs of Pakistan.¹⁷

Pakistan's first Constitution, formed in 1956 eight years after Jinnah's death, reflected the aforementioned ideals. For example, the Preamble to Pakistan's Constitution makes the following declarations:

Wherein adequate provision should be made for the minorities freely to profess and practise [sic] their religions and develop their culture. . .Wherein should be guaranteed fundamental rights including equality of status and of opportunity, equality before law, and freedom of thought, expression, belief, faith, worship and association, and social, economic, and political justice, subject to law and public morality; Wherein adequate provision shall be made to safeguard the legitimate interests of minorities and backward and depressed classes;¹⁸

The Framers of Pakistan's Constitution went on to ensure such freedoms were explicit in the actual Constitution as well. For example, Article 8 of Pakistan's Constitution states, "[e]very citizen shall have the right to freedom of speech and expression."¹⁹ Likewise, Article 13 adds, "no religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any educational institution maintained wholly by that community and denomination."²⁰ Later on, Chapter 2, Article 36 added, "[t]he state shall safeguard the legitimate rights and interests of minorities, including their due representation in the Federal and Provincial services."²¹ Accordingly, Pakistan's inaugural cabinet reflected the true nature of this declaration and gave representation to ministers from all faiths.

¹⁷ Muhammad Ali Jinnah, President of Pak., Broadcast Talk to the United States of America on Pakistan (Feb. 1948), *transcript available at* <http://www.jinnah.pk/2009/09/pakistan-and-her-people-ii/>.

¹⁸ PAK. CONST. pmb. (1956).

¹⁹ *Id.* art. 8.

²⁰ *Id.* art. 13.

²¹ PAK. CONST. art. 36.

b. Background to the International Covenant on Civil and Political Rights

The United Nations adopted the ICCPR on December 16, 1966, officially implementing it a decade later on March 23, 1976.²² The ICCPR's Preamble declares that, "the inherent dignity and . . . equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."²³ Likewise, the Preamble also recognizes that:

. . . in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights. . .²⁴

In total, the ICCPR records fifty-three articles guaranteeing a wide array of social, religious, and political rights.²⁵ After signing and ratifying the ICCPR in 2010, Pakistan's President Asif Ali Zardari assured that his administration would, "undertake practical steps for the implementation of the [ICCPR]," and that his party, "would continue upholding basic human rights of all individuals regardless of caste, creed or any other consideration."²⁶ Pakistan's Prime Minister Syed Yousaf Raza Gilani echoed these sentiments,

The government [of Pakistan] is conscious of its international commitments. We have ratified CAT [Covenant Against Torture] and ICCPR. . . We are united in our resolve to uproot terrorism from our midst as it represents negation of human rights and values. We have faced this challenge with courage, bravery and honour [sic] and we are committed to continue to safeguard the rights of our people *at all cost*.²⁷

In claiming to "continue" to uphold human rights, both Zardari and Gilani incorrectly and disingenuously present Pakistan as a nation that upheld human rights prior to their respective administrations. Such misleading statements notwithstanding, under Zardari and Gi-

²² See International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, U.N. Doc A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

²³ *Id.*

²⁴ *Id.*

²⁵ See generally *id.*

²⁶ *International Human Rights Day*, DAILY TIMES (Dec. 10, 2010), http://www.dailytimes.com.pk/default.asp?page=2010\12\10\story_10-12-2010_pg7_13 (emphasis added).

²⁷ *Id.*

lani's rule, Pakistan is currently in violation of at least seven Articles of the ICCPR.

For example, Pakistan is in violation of ICCPR Article 18(1), which states,

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.²⁸

Likewise, Article 18(2) adds, "[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."²⁹ Article 19(1) continues, "[e]veryone shall have the right to hold opinions without interference."³⁰ Article 19(2) concludes, "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."³¹ Together, Articles 18 and 19 reject religious compulsion and forbid restrictions on imparting religious information. Pakistan's anti-blasphemy legislation, however, directly contravenes the spirit and letter of these ICCPR articles.

While Article 18 and 19 ensure that every person has certain inalienable religious freedoms, Article 20 adds a new dimension, ensuring no person shall be subject to hate campaigns. Article 20(1) of the ICCPR states, "[a]ny propaganda for war shall be prohibited by law."³² Article 20(2) further adds, "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."³³ Ignoring this article, the Government of Pakistan regularly permits hate campaigns against religious minorities.

Similarly, Article 27 of the ICCPR ensures, "[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise [sic] their own religion, or to use their own language."³⁴

²⁸ ICCPR, *supra* note 22, at art. 18(1).

²⁹ *Id.* art. 18(2).

³⁰ *Id.* art. 19(1).

³¹ *Id.* art. 19(2).

³² *Id.* art. 20(1).

³³ *Id.* art. 20(2).

³⁴ *Id.* art. 27.

Like Pakistan's anti-blasphemy laws, Pakistan's Second Amendment also undermines the protection these ICCPR Articles guarantee.

Next, Article 25 of the ICCPR guarantees equal representation in the electorate for every citizen, regardless of distinctions, stating,

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.³⁵

This article is significant because, as explained in more detail below, the Pakistani election process is such that religious minorities have either no representation through systematic disenfranchisement, or are outright forbidden from running for political office.

Next, Pakistan is in violation of Article 26 of the ICCPR, which guarantees equal protection under the law:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³⁶

Contrary to Article 26, the Government of Pakistan repeatedly and deliberately ignores its responsibility to protect religious minorities from attack.

Finally, Article 21 of the ICCPR guarantees the right to peacefully assemble:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (or

³⁵ *Id.* art. 25.

³⁶ *Id.* art. 26.

dre public), the protection of public health or morals or the protection of the rights and freedoms of others.³⁷

Section IV describes that certain religious minority groups in Pakistan have been forbidden from peaceful assembly for decades. Some historical context of the development of extremism within Pakistan is helpful to better understand the source of Pakistan's various ICCPR violations.

PART III: PAKISTAN'S EMERGENCE AS A WORLD LEADER IN HUMAN RIGHTS VIOLATIONS

a. The Birth of Religious Extremism in Pakistan by Abul A'la Maududi

In addition to understanding the source of Pakistan's ICCPR violations, this historical context of Pakistan's human rights devolution is essential to properly frame the basis, justification, and need for international intervention. Soon after Pakistan won its independence in 1947, several religious leaders voiced their opposition to Pakistan's commitments to freedom of religion and freedom of expression.³⁸ One of the leading opponents was Abul A'la Maududi, an influential cleric in 20th century India/Pakistan and founder of the Jamaat-e-Islami party, a pseudo-religious political organization.³⁹ Maududi harbored a particular hatred for the Ahmadiyya Muslim Community⁴⁰ and wanted the government to legally "expel" its members from Islam.⁴¹ While there are complex dogmatic reasons for Maududi's hatred beyond the scope of this discussion, two particular factors motivated his aggressive behavior. First, the Ahmadiyya Muslim Community firmly rejects violence as a means to spread Islam.⁴² Maududi rejected this practice and instead defined Islam's purpose as to destroy all non-Is-

³⁷ *Id.* art. 21.

³⁸ *Pakistan Islamic Assembly: Jamaat-e-Islami-e-Pakistan (JIP)*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/world/pakistan/ji.htm> (last visited July 11, 2011).

³⁹ *Id.*

⁴⁰ "The Ahmadiyya Muslim Community is a dynamic, fast growing international revival movement within Islam. Founded in 1889, it spans over 195 countries with membership exceeding tens of millions." The Ahmadiyya Muslim Community are Muslims who "believe that the long-awaited Messiah has come in the person of Mirza Ghulam Ahmad (1835-1908) of Qadian." *Ahmadiyya Muslim Community: An Overview*, AL ISLAM, <http://www.alislam.org/introduction/index.html> (last visited Oct. 4, 2011); see FRÉDÉRIC GRARE, *POLITICAL ISLAM IN THE INDIAN SUBCONTINENT: THE JAMAAT-I-ISLAMI* 9 (2001).

⁴¹ Kate Zebiri, Book Review, 61 *BULL. SCH. ORIENTAL & AFR. STUD.* 167, 167-68 (1998) (reviewing SEYYED VALI REZA NASR, *MAUDUDI AND THE MAKING OF ISLAMIC FUNDAMENTALISM* (1996)).

⁴² *Ahmadiyya Muslim Community*, *supra* note 40.

lamic regimes.⁴³ Second, Mirza Ghulam Ahmad of Qadian, in 1889, founded the Ahmadiyya Muslim Community.⁴⁴ Ahmad proclaimed he was the long-awaited Messiah and Mahdi for all religions.⁴⁵ Maududi again opposed the belief that any Messiah or Prophet could appear after Prophet Muhammad, declared anyone who accepted such a belief to be an apostate, and, therefore, demanded Ahmadi Muslims be declared a non-Muslim apostate minority.⁴⁶

Prior to Pakistan's formation, and even in the early years after Pakistan's formation, anti-Ahmadi Muslim sentiments were scattered and random. A transformation took place, however, in 1953 when Maududi's Jamaat-i-Islami party launched nationwide riots against the Ahmadiyya Muslim Community.⁴⁷ In these riots, dozens of members of the Ahmadiyya Muslim Community were killed, hundreds more were injured, while countless shops, houses, and mosques belonging to Ahmadi Muslims were set ablaze.⁴⁸ Likewise, Ahmadi Muslims faced large-scale boycotts of their businesses while extremists continued to issue threats of violence to the Pakistani Government, unless the Government complied and declared Ahmadi Muslims to be an apostate minority.⁴⁹

In response, A. T. Naqvi, Pakistan's Chief Commissioner, publicly reemphasized his administration's policy that every Pakistani citizen had perfect freedom of religion, and that future attempts to interfere with such freedoms would not be tolerated.⁵⁰ Justice Munir, Chief Justice of the Punjab Court of Inquiry, thoroughly investigated the cause of the riots, and ultimately rejected Maududi's desires to de-

⁴³ Maududi wrote, "*Islam wishes to destroy all states and governments anywhere on the face of the earth which are opposed to the ideology and programme of Islam regardless of the country or the Nation which rules it. . . Islam requires the earth—not just a portion, but the whole planet . . . because the entire mankind should benefit from the ideology and welfare programme [of Islam]. . . Towards this end, Islam wishes to press into service all forces which can bring about a revolution and a composite term for the use of all these forces is 'Jihad.' . . the objective of the Islamic 'Jihād' is to eliminate the rule of an un-Islamic system and establish in its stead an Islamic system of state rule.*" S. ABUL A'LA MAUDUDI, *JIHAD IN ISLAM* 6-7, 22 (The Holy Koran Publ'g House 2006) (1939) (emphasis added).

⁴⁴ *Ahmadiyya Muslim Community*, *supra* note 40.

⁴⁵ *The Promised Messiah: A Prophet to Unite Mankind in the Latter Days*, AL ISLAM, <http://www.alislam.org/topics/messiah/index.php> (last visited Oct. 4, 2011).

⁴⁶ *Pakistan Islamic Assembly*, *supra* note 38.

⁴⁷ *Id.*

⁴⁸ *History of Persecution 1951 to 1960*, THEPERSECUTION.ORG, <http://www.thepersecution.org/facts/h51-60.html> (last visited Oct. 4, 2011).

⁴⁹ *Id.*

⁵⁰ REPORT OF THE COURT OF INQUIRY CONSTITUTED UNDER PUNJAB ACT II OF 1954 TO ENQUIRE INTO PUNJAB DISTURBANCES OF 1953 76 (Punjab 1954), *available at* http://www.thepersecution.org/dl/report_1953.pdf.

clare Ahmadi Muslims as apostates.⁵¹ He concluded that it would not only be unconstitutional, but also impossible to legally “expel” someone from Islam.⁵²

Likewise, then Governor-General of Pakistan, Khwaja Nazim-ud-Din, added that, “[i]t was no part of the duties of the Government to declare a section of the population as a minority . . . [and] that he was not prepared to have the Ahmadi [Muslims] declared a minority.”⁵³ Governor-General Nazim-ud-Din unfortunately also added, however, that he was, “not prepared to tell the [clerics] [directly that he would not declare Ahmadis as non-Muslims], as that would have resulted in a “head-on clash” with them, which he wished to avoid.”⁵⁴ He continued,

. . . it was not in the interest of the country to press the Demands and very difficult to accept them, that even in the Constitutional document it would not be easy to evolve a definition of the term “Muslim” which would debar the Ahmadis and at the same time not debar any other section.⁵⁵

This statement was dangerous because of the precedent it established. That is, it was not a matter of *if* an appropriate definition of a “Muslim” could be found, but *when* such a definition would be found, at which point, members of the Ahmadiyya Muslim Community could be legally discriminated against through expulsion from the larger Muslim community.

Though dozens of members of the Ahmadiyya Muslim Community were murdered in the 1953 riots and throughout the 1960s, these attacks were not state-sanctioned, nor considered legal in any capacity. In fact, Maududi faced material consequences for his violent preaching; in 1948 and again in 1964, Maududi was sent to prison as a direct result of his violent teachings against members of the Ahmadiyya Muslim Community.⁵⁶ In 1953, owing to the loss of life his preaching caused, the Government of Pakistan sentenced Maududi to death—only to have his sentence commuted to life in prison, and eventually absolved completely for unknown reasons.⁵⁷

Through this first test of Pakistan’s Constitution, cracks already appeared in the Pakistani Government’s promise of free speech

⁵¹ See generally *id.*

⁵² *Id.*

⁵³ *Id.* at 291.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 10 *Abu-I A’la Mawdudi*, in *ENCYCLOPEDIA OF WORLD BIOGRAPHY* 353, 354 (2d ed. 2004).

⁵⁷ *Id.*

for all its citizens. For example, on February 27, 1953, the Government banned the Ahmadiyya Muslim Community from publishing their daily newspaper, *Al Fazl*, for one year.⁵⁸ This act violated the Article 1, Chapter 19 freedom of press guarantee of Pakistan's Constitution. When a surrogate publication was published, entitled, *Farooq*, the Government acted to ban it as well.⁵⁹ Regardless, this ban lasted only a year, and no state sanctioned restrictions were placed upon religious minorities in Pakistan. Though extremists like Maududi attempted to promote discriminatory legislation through the legal process, Pakistan's promise to protect minorities and their freedoms largely remained true.

b. Religious Extremism Begins Infiltrating Pakistan's Secular Government

The first substantive blow to religious freedom in Pakistan emerged in 1962. In that year, the Pakistan Advisory Council for Islamic Ideology added a repugnancy clause to the Constitution. The clause required that, "[a]ll existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah,⁶⁰ in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions."⁶¹ This clause effectively gave clerics vast power to repeal any secular law repugnant to their extremist understanding of Islam. Pakistan also eventually created a Federal Shariah Court in 1986,⁶² and passed the Enforcement of Shari'ah Act of 1991, to ensure no laws were implemented that could be considered offensive to Islam or Pakistan's Constitution.⁶³ Democracy Reporting International ("DRI") reports that these provisions have severely diminished human rights in Pakistan. DRI is an international, non-partisan and independent, not-for-profit organization specifically funded to report on Pakistan's level of ICCPR compliance.⁶⁴ DRI's report concludes that Pakistan used these repugnancy clauses as legal justification to make several ICCPR reserva-

⁵⁸ *History of Persecution 1951 to 1960*, *supra* note 48.

⁵⁹ *Id.*

⁶⁰ Sunnah are the actions of the Prophet Muhammad. See M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E.L. 135, 150 (2002).

⁶¹ PAK. CONST. art. 227.

⁶² See David F. Forte, *Apostasy and Blasphemy in Pakistan*, 10 CONN. J. INT'L L. 27, 35-37 (1994).

⁶³ Pakistan Enforcement of Shari'ah Act, No. 10 of 1991, available at <http://www.pakistani.org/pakistan/legislation/1991/actXof1991.html>.

⁶⁴ See *Pakistan*, DEMOCRACY REPORTING INT'L, <http://www.democracy-reporting.org/programmes/pakistan.html> (last visited Oct. 11, 2011) [hereinafter DEMOCRACY REPORTING INT'L].

tions.⁶⁵ Relevant to this discussion, Pakistan specifically declared that the provisions of the ICCPR Article 12 (liberty of movement), Article 18 (freedom of thought, conscience, and religion), Article 19 (freedom of opinion), and Article 25 (participation in public affairs, right to vote) shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the Shariah Laws.⁶⁶ The authority this repugnancy clause gives clerics has been devastating to efforts to strengthen democracy in Pakistan because the final decision-making authority rests not with the people of Pakistan, nor Pakistan's legislature, but with the extremist clerics managing the Islamic Council (i.e. Shariah Court).⁶⁷

Pakistan further regressed when it nationalized all educational institutions in 1972.⁶⁸ This act violated Chapter 1, Article 22(3)(a) of Pakistan's Constitution.⁶⁹ On July 28, 1996, the Government of the Punjab Province issued a gazette notification to enable owners of nationalized educational institutions to regain ownership over their institutions, provided the original owners fulfill certain terms and

⁶⁵ See generally *Pakistan's Reservations to the International Covenant on Civil and Political Rights* (Democracy Reporting Int'l, Briefing Paper No. 4), http://www.democracyreporting.org/files/dri_briefing_paper_4_gop_reservations_on_icpr.pdf.

⁶⁶ UNITED NATIONS, STATUS PAGE FOR ICCPR, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec (last visited Oct. 24, 2011).

⁶⁷ PAK. CONST. art. 230(1) ("Functions of Islamic Council.

(1) The functions of the Islamic Council shall be,

(a) to make recommendations to [Majlis-e-Shoora (Parliament)] and the Provincial Assemblies as to the ways and means of enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concepts of Islam as enunciated in the Holy Quran and Sunnah;

(b) to advise a House, a Provincial Assembly, the President or a Governor on any question referred to the Council as to whether a proposed law is or is not repugnant to the Injunctions of Islam;

(c) to make recommendations as to the measures for bringing existing laws into conformity with the Injunctions of Islam and the stages by which such measures should be brought into effect; and

(d) to compile in a suitable form, for the guidance of [Majlis-e-Shoora (Parliament)] and the Provincial Assemblies, such Injunctions of Islam as can be given legislative effect.").

⁶⁸ *Education in Pakistan*, PAKISTANEDUCATION.INFO, <http://www.pakistaneducation.info/edusystem/> (last visited Oct. 7, 2011).

⁶⁹ PAK. CONST. art. 22(3)(a) ("no religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any educational institution maintained wholly by that community and denomination.").

conditions.⁷⁰ The Ahmadiyya Muslim Community fulfilled the required obligations, including a Rs. 11,012,483 deposit into the government treasury.⁷¹ Similar steps were taken under a revised July 2002 notification plan to denationalize educational institutions.⁷² To date, however, and despite numerous reminders to the Government of Pakistan from the Ahmadiyya Muslim Community, the Government has refused to return the illegally nationalized institutions.⁷³ This nationalization exists even though the Ahmadiyya Muslim Community has fulfilled all obligations to retrieve their property, it exists despite the seizures' unconstitutionality, and it exists though other organizations have regained ownership over their respective institutions.⁷⁴ In fact, other organizations received their institutions back as early as the mid-1980's.⁷⁵ By maintaining control over schools belonging to the Ahmadiyya Muslim Community, Pakistan is restricting their freedom to "seek, receive, and impart information," in violation of Article 19(2) of the ICCPR.⁷⁶ Once the Government of Pakistan nationalized all education systems in 1972, it subsequently introduced the Second Amendment to Pakistan's Constitution in 1974.⁷⁷ This Amendment signaled a new era of state-sponsored human rights abuses. Going forward, the Government of Pakistan defined what a Pakistani citizen was, and was not, *allowed* to believe.

c. The Second Amendment and the End of Religious Freedom in Pakistan

By passing the Second Amendment to Pakistan's Constitution in 1974, officially declaring members of the Ahmadiyya Muslim Community to be a non-Muslim minority, President and Prime Minister Zulfikar Ali Bhutto opened the doors of extremism unabated to infiltrate Pakistan's once secular leadership.⁷⁸ The Constitution's Second Amendment declares:

⁷⁰ THEPERSECUTION.ORG, PERSECUTION OF AHMADIS IN PAKISTAN DURING THE YEAR 2007: A SUMMARY 9-10 (2008), *available at* <http://www.scribd.com/doc/27105450/Persecution-of-Ahmadis-in-Pakistan-during-the-Year-2007>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Education in Pakistan*, *supra* note 68.

⁷⁶ "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." ICCPR, *supra* note 22, at art. 19(2).

⁷⁷ PAK. CONST. amend. II.

⁷⁸ *See, e.g., GRARE, supra* note 40, at 37.

A person who does not believe in the absolute and unqualified finality of The Prophethood of MUHAMMAD (Peace be upon him), the last of the Prophets or claims to be a Prophet, in any sense of the word or of any description whatsoever, after MUHAMMAD (Peace be upon him), or recognizes such a claimant as a Prophet or religious reformer, is not a Muslim for the purposes of the Constitution or law.⁷⁹

Maududi and Jamaat-e-Islami achieved what they could not two decades prior, and their impact was more influential than many realize. For example, these extremists ultimately hastened the creation of modern day terrorist groups such as Hizbul Mujahideen.⁸⁰ A 1993 United States Congressional report states that, "Islamist indoctrination and other assistance is provided [to Hizbul Mujahideen] [by] the Jamaat-i-Islami of Pakistan."⁸¹ Likewise, historian Philip Jenkins reports that Maududian teachings directly and heavily influenced Qutb, the founder of the terrorist organization known as the Muslim Brotherhood.⁸² Expectedly, once Maududian ideologies helped change Pakistan's Constitution, human rights rapidly degenerated.

Pakistan's 1974 constitutional amendment is in complete contradiction to Jinnah, who said, "You may belong to any religion or caste or creed that has nothing to do with the business of the State."⁸³ More significantly, it contradicts Pakistan's Preamble and Chapter 1, Article 19 of Pakistan's Constitution, which guarantees freedom of speech and freedom of expression.⁸⁴ Likewise, Pakistan's Second Amendment violates Articles 18 and 19 of the UDHR, which also guarantee freedom of conscience and freedom of religion.⁸⁵ Relevant to this discussion, Pakistan has not repealed the Second Amendment to its Constitution despite signing and ratifying the ICCPR. Article 18(1) requires ICCPR member nations to ensure its citizens have the right to "freedom of thought, conscience and religion."⁸⁶ Therefore, Pakistan's

⁷⁹ PAK. CONST. amend. II(3).

⁸⁰ HOUSE REPUBLICAN RESEARCH COMMITTEE, 103RD CONG., TASK FORCE ON TERRORISM AND UNCONVENTIONAL WARFARE, THE NEW ISLAMIST INTERNATIONAL 37-51 (1993), available at http://www.fas.org/irp/congress/1993_rpt/house_repub_report.html.

⁸¹ *Id.*

⁸² PHILIP JENKINS, GOD'S CONTINENT: CHRISTIANITY, ISLAM, AND EUROPE'S RELIGIOUS CRISIS 129 (2007).

⁸³ Jinnah's Constituent Assembly Address, *supra* note 10.

⁸⁴ PAK. CONST. art. 19.

⁸⁵ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, at art. 18, U.N. Doc. A/RES/217(III) A (Dec. 10, 1948) [hereinafter UDHR].

⁸⁶ ICCPR, *supra* note 22, at art. 18(1) ("Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to

decision to uphold President Bhutto's Second Amendment directly undermines Article 18(1) of the ICCPR.

Though Pakistan had violated its own Constitution and the UDHR, one basic hope was that despite the Second Amendment, members of the Ahmadiyya Muslim Community would be afforded protection as a religious minority. This was the purpose of Chapter 2, Article 36 of Pakistan's Constitution.⁸⁷ Unfortunately, the exact opposite occurred. The Government of Pakistan took no active measures to protect members of the Ahmadiyya Muslim Community from attack, nor pursued instigators to prevent future attacks.⁸⁸ Instead, the Government tacitly approved the persecution through its silence. In fact, violence against Ahmadi Muslims in the 1970s surpassed the brutality suffered in the previous two decades combined. During the 1950s and 1960s, prior to the passage of Pakistan's Second Amendment, twenty-four total members of the Ahmadiyya Muslim Community were killed at the hands of extremists for their faith.⁸⁹ But, in the 1970s alone, extremists murdered thirty-nine Ahmadi Muslims.⁹⁰ In addition, Ahmadi Muslims suffered a dramatic increase in boycotts, arsons, desecrated graves, and vandalism to their homes and mosques.⁹¹ Rather than placate the violent desires of extremists like Maududi, the Second Amendment further motivated extremists to infuse a dictatorial form of Islam into Pakistan in place of secular laws. The dictatorial form of Islam that extremists desired literally manifested itself only a few years later. Once General Zia ul Haq assumed control of Pakistan via a 1977 military coup,⁹² he actively targeted religious minorities, and Ahmadi Muslims in particular, with anti-blasphemy legislation. Ali Dayan Hasan, a senior researcher for Human Rights Watch Asia reports, "[a]s a consequence [of anti-blasphemy laws], Ahmadi

adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.").

⁸⁷ PAK. CONST. art. 36 ("The state shall safeguard the legitimate rights and interests of minorities, including their due representation in the Federal and Provincial services.").

⁸⁸ Amnesty Int'l, *Pakistan: Killing of Ahmadis Continues Amid Impunity*, AI Index ASA 33/028/2005 (Oct. 11, 2005), available at <http://www.amnesty.org/en/library/asset/ASA33/028/2005/en/89ea605d-d49f-11dd-8a23-d58a49c0d652/asa330282005en.html>.

⁸⁹ *History of Persecution 1961 to 1970*, THEPERSECUTION.ORG (Mar. 10, 2004), <http://www.thepersecution.org/facts/h61-70.html>.

⁹⁰ *History of Persecution 1971 to 1980*, THEPERSECUTION.ORG (Mar. 10, 2004), <http://www.thepersecution.org/facts/h71-80.html>.

⁹¹ *Id.*

⁹² *Timeline: Pakistan*, BBC NEWS, http://news.bbc.co.uk/2/hi/south_asia/country_profiles/1156716.stm (last updated Oct. 5, 2011).

mosques have been burned, their graves desecrated and their very existence criminalized.”⁹³ These anti-blasphemy laws have exerted such a powerful influence over Pakistan that despite Pakistan’s signing and ratifying the ICCPR in 2008 and 2010, respectively,⁹⁴ the laws yet remain in full force, unrestricted.

PART IV: PAKISTAN’S ICCPR VIOLATIONS AND THE DELETERIOUS CONSEQUENCES

a. Pakistan Signs and Ratifies the ICCPR with Reservations

Pakistan initially signed and ratified the ICCPR with several reservations.⁹⁵ On June 23, 2010 Pakistan made reservations to Articles 3, 6, 7, 18, and 19, stating, “[the] Islamic Republic of Pakistan declares that the provisions of Articles 3, 6, 7, 18 and 19 shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the Shariah laws.”⁹⁶ These reservations subjected the ICCPR to the Pakistani Constitution’s approval, rather than the other way around, in effect voiding the purpose of the ICCPR as an internationally binding treaty. Likewise, Pakistan made a reservation to Article 25 of the ICCPR, stating, “[the] Islamic Republic of Pakistan declares that the provisions of Article 25 shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan.”⁹⁷ Thus, Pakistan ratified the ICCPR while creating a loophole for itself to avoid responsibility for the relevant human rights requirements set forth in these Articles.

On the question of whether the ICCPR may exercise valid jurisdiction over Pakistan, ICCPR Article 2(1) *requires* each State Party under the ICCPR to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁹⁸ Likewise, ICCPR Article 2(3) ensures those whose rights have been violated shall have an effective and enforceable remedy, as provided by a competent authority.⁹⁹ Therefore,

⁹³ *Ali Dayan Hasan*, HUM. RTS. WATCH, <http://www.hrw.org/bios/ali-dayan-hasan> (last visited Oct. 23, 2011); *Ali Dayan Hasan, Indonesia Risks Taking Pakistan’s Path to Intolerance*, JAKARTA GLOBE (Apr. 18, 2011), <http://www.thejakartaglobe.com/opinion/indonesia-risks-taking-pakistans-path-to-intolerance/435924>.

⁹⁴ See ICCPR, *supra* note 22; STATUS PAGE FOR ICCPR, *supra* note 66.

⁹⁵ STATUS PAGE FOR ICCPR, *supra* note 66.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ ICCPR, *supra* note 22, at art. 2(1).

⁹⁹ *Id.* art. 2(3) (“Each State Party to the present Covenant undertakes:

despite her reservations, Pakistan is fundamentally required to protect the rights of all its citizens “without distinction of any kind.”¹⁰⁰

In addition to making numerous reservations, Pakistan abstained from signing the First Optional Protocol to the ICCPR.¹⁰¹ The First Optional Protocol to the ICCPR “allows individuals, whose countries are party to the ICCPR and the protocol, who claim their rights under the ICCPR have been violated, and who have exhausted all domestic remedies, to submit written communications to the UN Human Rights Committee.”¹⁰² Because Pakistan has not signed the First Optional Protocol, Pakistani citizens who face human rights violations and have exhausted the domestic legal process without relief, are left without any recourse to alleviate their suffering under Pakistan’s illegal apparatus of state-sanctioned persecution.

b. Pakistan Retracts Several of Its ICCPR Reservations

Under pressure from the European Union (“EU”), however, Pakistan announced in late June 2011 that it is retracting several of its ICCPR reservations.¹⁰³ Pakistan recanted these reservations after the EU objected that the reservations were illegal according to Article 19 of the Vienna Convention.¹⁰⁴ Article 19(c) of the Vienna Convention holds that a State may not make a reservation if it is incompatible

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.”).

¹⁰⁰ UDHR, *supra* note 85, at art. 2.

¹⁰¹ UNITED NATIONS, STATUS PAGE FOR OPTIONAL PROTOCOL OF THE ICCPR (Oct. 24, 2011), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en.

¹⁰² UNITED NATIONS, WHY AN OPTIONAL PROTOCOL?, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, <http://www.un.org/womenwatch/daw/cedaw/protocol/why.htm> (last visited Oct. 2, 2011).

¹⁰³ *Pakistan Decides to Withdraw Most of Reservations on ICCPR, UNCAT*, THE NATION (June 23, 2010), <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/Regional/Islamabad/23-Jun-2011/Pakistan-decides-to-withdraw-most-of-reservations-on-ICCPR-UNCAT> [hereinafter *Pakistan Withdraws Reservations*].

¹⁰⁴ Vienna Convention on the Law of Treaties art. 19, May 23, 1969, 1155 U.N.T.S. 331 (“A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

with the international treaty's purpose.¹⁰⁵ In their report on Pakistan's ICCPR reservations, DRI concluded:

[b]y indicating that the mentioned ICCPR articles only apply as far as they are in line with Pakistan's Constitution, the reservation introduces a *de facto* hierarchy of norms by which national law supersedes international obligations. *No real international rights or obligations have thus been accepted.*¹⁰⁶

Considering UN Human Rights Committee General Comment 24, DRI further concluded that Pakistan's reservations are illegal because they are unspecific, not transparent, and apply an unlawful hierarchy of norms (i.e. domestic laws supersede the ICCPR).¹⁰⁷

In sum, Pakistan withdrew its reservations on Articles 6, 7, 12, 13, 18, 19 and 40 of the ICCPR, while the Article 3 reservation was narrowed to Personal Law and Law of Evidence, and the Article 25 reservation was restricted to the election of Pakistan's President.¹⁰⁸ These retractions, though a step in the right direction, have not changed Pakistan's discriminatory public policy towards its religious minorities, nor decreased the violence to which religious minorities in Pakistan are subject. A litany of tragic instances of popular persecution of religious minorities in Pakistan persists. For example, in July 2011, religious extremists murdered an Ahmadi Muslim in Pakistan on account of his faith.¹⁰⁹ More recently, in September 2011, an Ahmadi Muslim mosque under construction was razed without due process.¹¹⁰ Also in September 2011, an Ahmadi Muslim was murdered as he slept, after police repeatedly ignored his requests for protection, despite the constant death threats he received on account of his faith.¹¹¹ Another Ahmadi Muslim was shot three times on September

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.”).

¹⁰⁵ *Id.*

¹⁰⁶ DEMOCRACY REPORTING INT'L, *supra* note 64, at 3 (emphasis added).

¹⁰⁷ *Id.* at 2-3.

¹⁰⁸ *See id.*

¹⁰⁹ *List of Martyres*, THEPERSECUTION.ORG, <http://www.thepersecution.org/facts/martyred.html> (last visited Oct. 9, 2011).

¹¹⁰ Owais Raza, *Caving in to Pressure: Ahmadi Place of Worship Demolished*, THE EXPRESS TRIBUNE (Sept. 4, 2011), <http://tribune.com.pk/story/244500/caving-in-to-pressure-ahmadi-place-of-worship-demolished/>.

¹¹¹ Shamsul Islam, *Suspected Hate Crime: Ahmadi Man Shot Dead in Faisalabad*, THE EXPRESS TRIBUNE (Sept. 5, 2011), <http://tribune.com.pk/story/245094/suspected-hate-crime-ahmadi-man-shot-dead-in-faisalabad/>.

8th, 2011 after a *Khatam-e-Nabuwat* rally.¹¹² This rally, significant for several reasons, is held annually to celebrate the anniversary of Pakistan's 1974 declaration that Ahmadi Muslims are apostates,¹¹³ consistently calling for violence against them.¹¹⁴

Critics may argue that Pakistan only recently retracted its ICCPR reservations, and therefore needs time to substantively begin protecting religious minorities per ICCPR requirements. But if Pakistan's retractions held any clout, why permit a conference in celebration of a constitutional amendment in direct opposition to ICCPR obligations?¹¹⁵ Moreover, that the attacker attempted to murder an Ahmadi Muslim after the rally demonstrates the influence of these hate-mongering rallies. Likewise, neither Asia Bibi, a Pakistani Christian woman accused of blasphemy, nor any other of the countless Pakistanis currently imprisoned for blasphemy should still be behind bars.¹¹⁶ Instead, Asia Bibi is still imprisoned and on death row for her alleged blasphemy, as are numerous other Christians and Ahmadi Muslims.¹¹⁷ While repealing discriminatory legislation may reasonably take longer than just a few months, taking simple actions to release prisoners of conscience should not. In maintaining the illegal detention of people like Asia Bibi, despite retracting its ICCPR reservations, Pakistan demonstrates that it has not changed its discriminatory public policy against religious minorities.

c. Pakistan's ICCPR Violations Through Anti-Blasphemy Legislation

Prime Minister Zulfiqar Ali Bhutto reasoned that passage of the Second Amendment would appease clerics enough to stop the violence perpetrated against members of the Ahmadiyya Muslim Community.¹¹⁸ Unfortunately for all parties involved, Bhutto's decision only acted as an accelerant for extremism to strengthen its grip on

¹¹² Rana Tanveer, *Ahmadi Shot, Injured on 'Khatam-e-Nabuwat Day*, THE EXPRESS TRIBUNE (Sept. 8, 2011), <http://tribune.com.pk/story/247482/ahmedi-shot-injured-on-khatam-e-nabuwat-day/>.

¹¹³ *Id.*

¹¹⁴ See U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT OF THE UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM 114 (2011) [hereinafter U.S. COMM'N ON INT'L RELIGIOUS FREEDOM].

¹¹⁵ ICCPR, *supra* note 22, at art. 20(2) ("Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.")

¹¹⁶ *Asia Bibi: A Call for Mercy Campaign*, PERSECUTION.COM, http://www.persecution.com/public/newsroom.aspx?story_ID=NDA2 (last visited Aug. 16, 2011).

¹¹⁷ *Id.*

¹¹⁸ *Interview with Pakistani Colonel Rafiuddin*, YOUTUBE (Aug. 24, 2010), <http://www.youtube.com/watch?v=i5qk-65MDC4>.

Pakistani politics and legislature. Once the Second Amendment became law, clerics pressed Bhutto to do more to restrict the Ahmadiyya Muslim Community and other religious minorities from propagating their faith, though Bhutto resisted.¹¹⁹ General Zia gained dramatic popularity due to his mutual support of, and by, top clerics of Pakistan. Bhutto's diminishing influence combined with Zia's increasing popularity, enabled Zia to seize control of Pakistan via a 1977 military coup.¹²⁰ Zia claimed the coup was necessary, accusing Bhutto of widespread voter fraud and questionable murder allegations.¹²¹

In 1980, President Zia furthered the extremist cause when he created a special Federal Shariat Court designed to evaluate Pakistan's current legislation to ensure they were not repugnant to Islamic teachings.¹²² By 1986, the Federal Shariat Court had invalidated 55 federal laws and 212 provincial laws as being contrary to the extremist clerics understanding of Islam, essentially exercising the repugnancy clause Pakistan had introduced in 1962.¹²³ The stage now set, anti-blasphemy legislation was officially passed in Pakistan on April 26th, 1984 under the now infamous Ordinance XX¹²⁴ (currently known as the Pakistan Penal Code ("PPC")). Subsections 298-B and 298-C of then Ordinance XX made it a criminal offense for members of the Ahmadiyya Muslim Community to call themselves Muslim, pose as a Muslim, refer to their places of worship as Masjids [mosques], state the customary Islamic greeting of *Asalaamo Alaikum*, practice or propagate their faith in any public or private capacity, use Islamic terminology in general, or engage in any behavior so as to injure the feelings of the Constitutionally approved Muslims.¹²⁵ Any member of the Ahmadiyya Muslim Community caught engaging in any of these now

¹¹⁹ *Ouster of Zulfiqar Ali Bhutto*, STORY OF PAKISTAN (JUNE 1, 2003), <http://www.storyofpakistan.com/articletext.asp?artid=A143>.

¹²⁰ *Timeline: Pakistan*, *supra* note 93.

¹²¹ Craig Baxter, *Historical Settings*, in PAKISTAN: A COUNTRY STUDY 3, 64 (Peter Blood ed., 6th ed. 1995).

¹²² See Forte, *supra* note 62, at 37 ("Shariat benches within the superior courts were displaced, and a separate and stronger Federal Shariat Court was created . . . If the Shariat Court found a law to be in conflict with the injunctions of Islam, the invalid portion of the law was voided, and the President directed to take steps to assure that the law was brought into conformity with the injunctions of Islam.")

¹²³ *Id.*

¹²⁴ PAK. PENAL CODE §§ 298B, 298C (made part of Penal Code by Presidential Ordinance No. 20 (1984), THE GAZETTE OF PAKISTAN EXTRAORDINARY, Apr. 26, 1984).

¹²⁵ *Id.* ("298B. Misuse of epithets, descriptions and titles, etc., reserved for certain holy personages or places.

(1) Any person of the Qadiani group or the Lahori group (who call themselves 'Ahmadis' or by any other name) who by words, either spoken or written, or by visible representation;

illegal activities was punishable with “imprisonment of either description for a term which may extend up to three years and shall also be liable to a fine.”¹²⁶ Though Pakistan has signed and ratified the ICCPR, these laws are still in effect today in violation of Article’s 18, 19, and 27.¹²⁷ Article 27 ensures all minorities “shall not be denied the right. . .to enjoy their own culture, to profess and practice their

(a) refers to, or addresses, any person, other than a Caliph or companion of the Holy Prophet Muhammad (peace be upon him), as ‘*Ameerul Mumineen*’, ‘*Khalifa-tui-Mumineen*’, ‘*Khalifa-tul-Muslimeen*’, ‘*Sahaabi*’ or ‘*Razi Allah Anho*’

(b) refers to, or addresses any person other than a wife of the Holy Prophet Muhammad (peace on him) as ‘*Ummul-Mumineen*’

(c) refers to, or addresses, any person, other than a member of the family (Ahle-bait) of the Holy Prophet Muhammad (peace be upon him), as ‘*Ahle-bait*’; or

(d) refers to, or names, or calls, his place of worship as ‘*Masjid*’;

shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

(2) Any person of the Qadiani group or Lahori group (who call themselves Ahmadis or by any other name) who by words, either spoken or written, or by visible representation, refers to the mode or form of call to prayers followed by his faith as ‘*Azan*’ or recites *Azan* as used by the Muslims, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

(3) 298-C. Person of Qadiani group etc., calling himself a Muslim or preaching or propagating his faith.

Any person of the Qadiani group or the Lahori group (who call themselves ‘*Ahmadis*’ or by any other name), who, directly or indirectly, poses himself as Muslim, or calls, or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations, or in any manner whatsoever outrages the religious feelings of Muslims, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.”).

¹²⁶ *Id.* § 298C.

¹²⁷ ICCPR, *supra* note 22, at art. 18(1) (“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”); *id.* art. 18(2) (“No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”); *id.* art. 19(1) (“Everyone shall have the right to hold opinions without interference.”); *id.* art. 19(2) (“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”); *id.* art. 27 (“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”).

own religion.”¹²⁸ Under Ordinance XX Section 298-B and 298-C, however, a member of the Ahmadiyya Muslim Community caught “behaving as a Muslim” is liable to arrest and fine.¹²⁹

General Zia then added Section 295-C to Ordinance XX in 1986.¹³⁰ While punishments to prior offenses were limited to fine and imprisonment, Zia now introduced the death penalty for anyone convicted of insulting the Prophet Muhammad.¹³¹ Under Subsection 295-C, General Zia extended the application of anti-blasphemy legislation from the Ahmadiyya Muslim Community to all religious minorities.¹³² Ordinance XX Section 295-C also violates the ICCPR Articles 18, 19, and 27.¹³³ A recent demonstration of this intolerant law that has swept worldwide headlines is the case of Asia Bibi, a Pakistani Christian woman accused and convicted of violating 295-C.¹³⁴ Bibi is currently on death row in Pakistan only for allegedly insulting Prophet Muhammad.¹³⁵ In December 2010, Yousef Qureshi, an influential cleric, offered a \$6,000 reward for killing Asia Bibi; the Government of Pakistan remained silent and took no action against Qureshi for his incitement to violence.¹³⁶ Likewise, Amir Liaquat Hussain, Pakistan’s former federal minister for religious affairs, declared on his popular television show that it was both necessary and Islamic to kill Ahmadi Muslims.¹³⁷ As a result, within two days, two Ahmadi Muslims were murdered—police made no arrests.¹³⁸ Both the Qureshi and Hussain

¹²⁸ *Id.* art. 27.

¹²⁹ PAK. PENAL CODE §§ 295B, 295C (made part of Penal Code by Presidential Ordinance No. 20 (1984), THE GAZETTE OF PAKISTAN EXTRAORDINARY, Apr. 26, 1984).

¹³⁰ See § 295C (“Use of derogatory remarks, etc. in respect of the Holy Prophet: Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.”); *Religious Freedom in India and Pakistan*, U.S. COMM’N ON INT’L RELIGIOUS FREEDOM (2000), <http://www.uscirf.gov/countries/1023.html?task=view> (offering a chronology of anti-Ahmaddiya legislation in Pakistan).

¹³¹ § 295C.

¹³² *Id.*

¹³³ Compare *id.*, with ICCPR, *supra* note 22, at arts. 18, 19, 27.

¹³⁴ Carol Grisanti & Fakhar ur Rehman, *Christian Woman Faces Death for Blasphemy*, MSNBC WORLD BLOG (Nov. 29, 2010, 2:35 PM), http://worldblog.msnbc.msn.com/_news/2010/11/29/5543912-christian-woman-faces-death-for-blasphemy.

¹³⁵ *Id.*

¹³⁶ U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, ANN. REPORT 115 (2011), available at <http://www.uscirf.gov/images/book%20with%20cover%20for%20web.pdf>.

¹³⁷ *Pakistan: Two Persons Murdered After an Anchor Person Proposed the Widespread Lynching of Ahmadi Sect Followers*, ASIAN HUM. RTS. COMM’N (Sept. 10, 2008), <http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-203-2008>.

¹³⁸ *Id.*

incitements to violence are clear ICCPR Article 20(2) violations that the Government of Pakistan has wholly ignored.¹³⁹

Ordinance XX directly undermines Pakistan's Constitution and the ICCPR, and gives extremists in Pakistan even more power to influence legal and civil matters.¹⁴⁰ Since 1984, the level of persecution of religious minorities in Pakistan has steadily increased. Not surprisingly, Ahmadi Muslims residing in Pakistan have been called "the most persecuted Muslim religious group today."¹⁴¹ For example, since anti-blasphemy legislation was enacted in 1984, seven hundred and sixty-four members of the Ahmadiyya Muslim Community have been charged with blasphemy simply for displaying the Kalima.¹⁴² In addition, thirty-eight Ahmadi Muslims have faced blasphemy charges for calling the Adhaan,¹⁴³ four hundred and thirty-four Ahmadi Muslims have been charged for posing as Muslims, one hundred and sixty-one Ahmadi Muslims have been charged for using Islamic terminology in public, ninety-three Ahmadi Muslims have been charged with offering prayers, seven hundred and nineteen Ahmadi Muslims have been charged for preaching, and the list yet continues.¹⁴⁴ In one instance, roughly sixty thousand members of the Ahmadiyya Muslim Community residing in Rabwah, Pakistan were charged for blasphemy under the 1984 Ordinance XX penal provisions.¹⁴⁵ Since 1974 alone, when Pakistan declared the Ahmadiyya Muslim Community to be a non-Muslim minority, extremists have murdered nearly three hundred Ahmadi Muslims on account of their faith.¹⁴⁶ Amnesty International reports that assailants have rarely, if ever, been brought to justice and that the persecution has only intensified.¹⁴⁷ In fact, 2010 proved to be the bloodiest year in the history of the Ahmadiyya Muslim Community in Pakistan as ninety-nine Ahmadi Muslims were murdered that

¹³⁹ ICCPR, *supra* note 22, at art. 20(2) ("Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.")

¹⁴⁰ See sources cited *supra* notes 9-21.

¹⁴¹ Donna E. Arzt, *Heroes or Heretics: Religious Dissidents Under Islamic Law*, 14 WIS. INT'L L.J. 349, 408 (1996).

¹⁴² *Summary of the Cases Instituted Against Ahmadis in Pakistan*, THEPERSECUTION.ORG, <http://www.thepersecution.org/facts/summary.html> (last visited Feb. 14, 2011) [hereinafter *Summary of Cases*].

¹⁴³ *Id.*; see Paul V. M. Flesher, *Official Islam Glossary for Introduction to Religion*, UNIV. OF WYO. (1996), <http://uwacadweb.uwyo.edu/religionet/er/islam/iglossry.htm> (describing how the Adhaan is the Muslim call to prayer, announced publicly five times daily).

¹⁴⁴ *Summary of Cases*, *supra* note 142.

¹⁴⁵ *Id.*

¹⁴⁶ *List of Martyres*, *supra* note 109.

¹⁴⁷ Amnesty Int'l, *supra* note 88.

year.¹⁴⁸ On May 28, 2010, during Friday prayer, Tehreek-e-Taliban¹⁴⁹ terrorists attacked two Ahmadi Muslim mosques in Lahore, Pakistan, with semi-automatic weapons, suicide vests, and ball bearings, leaving 86 dead and over 125 injured.¹⁵⁰ Though police were warned of the attacks weeks in advance, they failed to provide any protection to the attacked members of the Ahmadiyya Muslim Community.¹⁵¹ Instead, police only arrived several hours after the attack began when the majority of lives were already lost.¹⁵² This incident is also a glaring example of Pakistan's complete disregard for Article 26 of the ICCPR, which requires governments to offer equal protection under the law to all of its citizens.¹⁵³

d. Pakistan's ICCPR Violations Through the Disenfranchisement of Religious Minorities

In addition to the aforementioned human rights violations in Pakistan, the Government of Pakistan has also disenfranchised millions of its citizens who belong to religious minorities from equal voting rights. Pakistan insists it follows a democratic process and allows free voting for all its citizens, but this claim is simply not true. While Pakistan's Constitution and the ICCPR guarantee equal representation in public affairs and equal voting rights,¹⁵⁴ religious minorities in

¹⁴⁸ *List of Martyres*, *supra* note 109.

¹⁴⁹ See generally Liam Stack, *Pakistani Taliban Helped Faisal Shadad, It's Not on US List of Terrorists?*, THE CHRISTIAN SCI. MONITOR (June 23, 2010), <http://www.csmonitor.com/World/terrorism-security/2010/0623/Pakistani-Taliban-helped-Faisal-Shahzad-it-s-not-on-US-list-of-terrorists> (describing how the Tehreek-e-Taliban (TTP) trained Faisal Shahzad, the convicted attempted Times Square Bomber, to carry out his attacks and demonstrating how anti-blasphemy legislation in Pakistan has led to a direct threat to American safety).

¹⁵⁰ Press Release, ThePersecution.org, *Death Toll Rises to 94 Following Lahore Terrorist Attacks* (May 30, 2010), <http://www.thepersecution.org/press/10/pk100530.html>.

¹⁵¹ *Pakistan: Massacre of Minority Ahmadis*, HUM. RTS. WATCH (June 1, 2010), <http://www.hrw.org/news/2010/06/01/pakistan-massacre-minority-ahmadis>.

¹⁵² *Id.*

¹⁵³ ICCPR, *supra* note 22, at art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

¹⁵⁴ See PAK. CONST. art. 36; ICCPR, *supra* note 22, at art. 25; UDHR, *supra* note 85, at art. 21(3).

Pakistan have neither equal representation nor equal voting rights.¹⁵⁵ For example, non-Muslims have no representation in the Pakistani senate and federal cabinet.¹⁵⁶ This provision violates Article 25 of the ICCPR.¹⁵⁷ Similarly, no member of a religious minority in Pakistan can ever rise to the office of President or Prime Minister, as the President and Prime Minister of Pakistan must be a “Muslim” as defined by the Constitution.¹⁵⁸ This discriminatory restriction on minorities from becoming President or Prime Minister violates Article 25(c) of the ICCPR, which guarantees equal access to public office.¹⁵⁹ Pakistan has maintained this policy even after its June 2011 ICCPR reservation retractions.¹⁶⁰

Moreover, members of the Ahmadiyya Muslim Community are further isolated when trying to vote. Ahmadi Muslims are forced to make a decision if they choose to vote—either register as a non-Muslim or sign a document declaring the founder of their community, Mirza Ghulam Ahmad, to be an apostate and a liar.¹⁶¹ In other words, members of the Ahmadiyya Muslim Community must either denounce their faith, denounce their Community’s Founder, or be forbidden from voting. The July-December 2010 UN International Religious Freedom Report on Pakistan explains:

The government [of Pakistan] designated religious affiliation on passports and requested religious information in national identity card applications. A citizen must have a national identity card to vote. Those wishing to be listed as Muslims must swear their belief that the Prophet Muhammad is the final prophet and denounce the Ahmadiyya movement’s founder [Mirza Ghulam Ahmad] as a false prophet and his followers as non-Muslims, a provision designed to discriminate against

¹⁵⁵ Amjad Mahmood Khan, *Persecution of the Ahmadiyya Community in Pakistan: An Analysis Under International Law and International Relations*, 16 HARV. HUM. RTS. J. 217, 226 n.33 (2003).

¹⁵⁶ *Id.*

¹⁵⁷ ICCPR, *supra* note 22, at art. 25 (guaranteeing equal participation in public affairs and the right to vote).

¹⁵⁸ PAK. CONST. art. 41(2) (“A person shall not be qualified for election as President unless he is a Muslim of not less than forty-five years of age and is qualified to be elected as member of the National Assembly.”).

¹⁵⁹ ICCPR, *supra* note 22, art. 25(c) (“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(c) To have access, on general terms of equality, to public service in his country.”).

¹⁶⁰ See *Pakistan Withdraws Reservations*, *supra* note 103.

¹⁶¹ Khan, *supra* note 155, at 226 n.33.

Ahmadis. As a result Ahmadis continued to boycott elections.¹⁶²

This unconstitutional requirement has disenfranchised Pakistan's roughly 4 million Ahmadi Muslims from the voting process.¹⁶³ For religious minorities in general, a separate voting electorate functioned from 1978 until President Pervez Musharraf issued an executive order calling for its elimination in 2002.¹⁶⁴ Under pressure from clerics, however, President Musharraf issued Executive Order 15 just a few months later, partially undoing his previous order.¹⁶⁵ Executive Order 15 exclusively targeted Ahmadi Muslims on account of their faith and placed them into the same discriminatory predicament as during the separate electorate.¹⁶⁶ Thus, since 2002, members of the Ahmadiyya Muslim Community in Pakistan are the only demographic disenfranchised from voting in Pakistan. Once again, this policy directly violates the ICCPR Article 25(a), which guarantees every citizen the right to take part in public affairs.¹⁶⁷ This policy also violates the ICCPR Article 25(b), which guarantees equal suffrage and secret balloting.¹⁶⁸ If Ahmadi Muslims must reveal their affiliation when voting, then they can vote neither equally nor in secret—and thus, have no representation on matters of public importance. Until Pakistan is held accountable under the ICCPR, this human rights violation will continue to become more destructive.

e. Pakistan's ICCPR Violations Perpetuate National Extremism

Pakistan's current President Asif Ali Zardari has made international promises to champion peace and human rights.¹⁶⁹ Pakistan

¹⁶² U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RTS., AND LABOR, INT'L RELIGIOUS FREEDOM REP.: PAKISTAN 6 (Sep. 13, 2011), *available at* <http://www.state.gov/documents/organization/171759.pdf> [hereinafter RELIGIOUS FREEDOM REPORT: PAKISTAN].

¹⁶³ See Khan, *supra* note 155, at 218.

¹⁶⁴ N. Mahmood Ahmad & Amjad Mahmood Khan, 'Apartheid' in Pakistan, WASH. POST (Jan. 19, 2011), http://newsweek.washingtonpost.com/onfaith/guestvoices/2011/01/apartheid_in_pakistan.html.

¹⁶⁵ PAK. PENAL CODE §§ 7B, 7C (made part of Penal Code by Chief Executive's Order No. 15 (1984), THE GAZETTE OF PAKISTAN EXTRAORDINARY, June 17, 2002).

¹⁶⁶ Ahmad & Khan, *supra* note 164.

¹⁶⁷ ICCPR, *supra* note 22, at art. 25(a).

¹⁶⁸ *Id.* art. 25(b).

¹⁶⁹ "High ideals of the United Nations have inspired our vision of the global society. A global society that is based on: Peace and justice; Freedom and human rights; Equality and equal opportunity; Freedom from want and hunger; Tolerance and harmony; A global society; that celebrates its unity in diversity; That believes in sovereign equality of nations, large or small; That promotes, truth and reconciliation. . . On behalf of the people of Pakistan I assure you of our cooperation to

in the Zardari era, however, has only upheld the discriminatory 1974 amendment and 1984 anti-blasphemy legislation. Under Zardari's regime in 2009, Pakistan charged at least 74 members of the Ahmadiyya Muslim Community under section 295 of the penal code, and to this day has still detained many of these individuals behind bars.¹⁷⁰ Moreover, according to the watchdog organization South Asia Terrorism Portal ("SATP"), sectarian violence continues to increase in Pakistan. SATP reports that terrorists in Pakistan killed over 1500 civilians in 2007.¹⁷¹ In 2008, 2155 civilians were murdered.¹⁷² The year 2009 recorded another increase as over 2300 civilians were killed in sectarian violence.¹⁷³ In 2010, civilian deaths decreased to 1796.¹⁷⁴ This decrease seems to be an anomaly, unfortunately, because SATP reports that as of December 25, 2011, 2545 civilians have been killed in Pakistan because of terrorist violence.¹⁷⁵ These numbers do not account the thousands killed as youths recruited to militancy, terrorists in suicide bombings, and military personnel in terrorist attacks.¹⁷⁶

As a direct result of Pakistan's anti-blasphemy laws, Pakistan's minority Christian population continues to suffer intense persecution as well. The US State Department reports, "[d]uring the 2009 violence in the village of Gojra, eight Christians were killed and 18 injured, and two churches and about 75 houses burned, following an accusation that Christians had desecrated the Koran."¹⁷⁷ Likewise, in response to a Florida pastor's March 2011 Qur'an burning, several churches in Pakistan were attacked.¹⁷⁸ Numerous Christians accused of blasphemy have been murdered, even under police protection. For example, Qamar David, a Christian who was sentenced to 25 years in 2006 for allegedly blasphemous text messages, was found dead in his Karachi jail in March 2011.¹⁷⁹ In July 2010, two Christian brothers

fashion a safer and better world; A world in which all children, - yours and mine-live in peace and harmony." Asif Ali Zardari, President, Pak., Speech to United Nation General Assembly (Sep. 25, 2009), *available at* http://www.ihro.org.pk/zardari_speech_un.html.

¹⁷⁰ PERSECUTION OF AHMADIS IN PAKISTAN DURING THE YEAR 2009: A SUMMARY, THEPERSECUTION.ORG 98, http://www.thepersecution.org/dl/2009/annual_report_2009.pdf (last visited Oct. 4, 2011) [hereinafter PERSECUTION OF AHMADIS].

¹⁷¹ *Fatalities in Terrorist Violence in Pakistan 2003-2011*, <http://www.satp.org/satporgtp/countries/pakistan/database/casualties.htm> (last visited Dec. 30, 2011).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, *supra* note 114, at 114.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 116.

were shot dead on the footsteps of a Faisalabad courthouse; each originally summoned on the charge of alleged blasphemy.¹⁸⁰ Even those acquitted of blasphemy are subject to vigilante justice. Muhammad Imran was released from an April 2009 blasphemy charge—for a lack of evidence no less—but was still gunned down in March 2011.¹⁸¹ Note that, with the exception of the 2009 Gojra violence, which took place after Pakistan only signed the ICCPR, each of the aforementioned murders occurred after Pakistan signed *and ratified* the ICCPR.

Pakistan's Hindu population has not faced much better than Pakistan's Christian population. The US State Department reports that 23 Hindu children were kidnapped between January 2008 and December 2010.¹⁸² Hindu and Christian women, including minors, are particularly vulnerable to rape and forced conversion to Islam.¹⁸³ Some estimates record that up to 25 Hindu women in Pakistan are forcibly converted to Islam every month.¹⁸⁴ Such behavior violates any number of ICCPR Articles.

Still, in February 2010, Pakistan's Minister of Minority Affairs, the late Shahbaz Bhatti, claimed he expected changes to the current anti-blasphemy legislation by the end of 2010.¹⁸⁵ The potential changes would obligate judges to investigate blasphemy cases before they are registered, and mete out similar punishments to those who concoct false accusations.¹⁸⁶ While such an amendment may theoretically work to help decrease abuse of anti-blasphemy legislation, it fails to recognize the principle that anti-blasphemy legislation itself is in violation of Pakistan's own Constitution and the ICCPR. That fact notwithstanding, however, such a change is nowhere to be found in Pakistan's legislative process even two years later. On the contrary, Babar Awan, Pakistan's then Law Minister and close aide of President Zardari, categorically rejected any efforts to repeal anti-blasphemy legislation, declaring, "in my presence as the Law Minister, no one should think of finishing this [anti-blasphemy] law."¹⁸⁷ To properly contextualize, Awan's comment was in response to appeals to grant

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 114.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 114-15.

¹⁸⁵ Shaun Tandon, *Pakistan Minister Sees Blasphemy Law Revision This Year*, AGENCE FRANCE-PRESSE (Feb. 7, 2010), http://www.google.com/hostednews/afp/article/ALeqM5gN_fU6rinxd4J-egRTpxlQrY5sdA.

¹⁸⁶ *Id.*

¹⁸⁷ "No One Should Think of Finishing Blasphemy Law in My Presence": *Pak Law Minister*, ONEINDIA NEWS (Nov. 26, 2010), <http://news.oneindia.in/2010/11/26/no-one-should-think-of-finishing-blasphemy-law-in-mypresen.html>.

Christian Pakistani Asia Bibi amnesty for her conviction of alleged blasphemy.¹⁸⁸ Likewise, Pakistan's Prime Minister Gilani, stated on January 8, 2011, "I have already clarified and our religious affairs minister has also said that we have no intentions to amend this law."¹⁸⁹ Most depressing, however, is that Shabazz Bhatti, Pakistan's only Christian federal minister, was murdered at the hands of extremists on March 2, 2011, specifically because he sought to repeal Pakistan's anti-blasphemy laws.¹⁹⁰

Furthermore, Bhatti was not the first politician to be assassinated due to attempts to repeal Pakistan's anti-blasphemy laws. On January 3, 2011, Punjab Province Governor Salman Taseer was also assassinated at the hands of one of his bodyguards, Mumtaz Qadri, who did so because Governor Taseer wanted to repeal Pakistan's anti-blasphemy laws.¹⁹¹ In a tweet hours before his murder, Taseer stated, "I was under huge pressure sure 2 cow down b4 rightest [sic] pressure on blasphemy. Refused. Even if I'm the last man standing."¹⁹² In celebration of Taseer's assassination, 500 clerics in Pakistan declared his death a victory for the country, lawyers threw rose petals on the assassin, and countless refused to offer Taseer's funeral prayers.¹⁹³ On January 9th, 2011, over 50,000 people rallied in support of anti-blasphemy legislation—demonstrating how these discriminatory laws have gained dramatic strength since their implementation.¹⁹⁴ In fact, Judge Pervez Ali Shah, who presided over Mumtaz Qadri's criminal case and delivered a death penalty verdict, has gone into hiding after receiving multiple death threats.¹⁹⁵

Furthermore, the Government of Pakistan is often in complete denial that any discrimination, much less persecution, exists. For ex-

¹⁸⁸ *Id.*

¹⁸⁹ *Massive Karachi Rally in Support of Blasphemy Law*, BBC NEWS (Jan. 10, 2011), <http://www.bbc.co.uk/news/world-south-asia-12149011> [hereinafter *Massive Karachi Rally*].

¹⁹⁰ Karin Brulliard & Shaiq Hussain, *Shahbaz Bhatti, Pakistan's Sole Christian Minister, Is Assassinated in Islamabad*, WASH. POST (Mar. 2, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/01/AR2011030101394.html>.

¹⁹¹ *Punjab Governor Salman Taseer Assassinated in Islamabad*, BBC NEWS (Jan. 4, 2011), <http://www.bbc.co.uk/news/world-south-asia-12111831>.

¹⁹² Saba Imtiaz, *Salmaan Taseer, Last Man Standing*, FOREIGN POL. (Jan. 5, 2011), http://afpak.foreignpolicy.com/posts/2011/01/05/salmaan_taseer_last_man_standing.

¹⁹³ U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, *supra* note 114, at 112.

¹⁹⁴ *Massive Karachi Rally*, *supra* note 189.

¹⁹⁵ Farooq Naem, *Sympathy for an Assassin: The Worrisome Protests in Pakistan*, TIME (Oct. 9, 2011), <http://www.time.com/time/world/article/0,8599,2096500,00.html>.

ample, Nadeem Kiani, spokesman for the Embassy of Pakistan in Washington D.C. stated to the *Los Angeles Times* on October 12, 2009,

[t]he Ahmadi beliefs are in absolute contravention to Muslim beliefs, but everyone has equal rights of worship in Pakistan. . . There are some people who try to incite sectarian violence from time to time to carry out their own agendas but as far as the government and 99% of the general public are concerned, there are no problems with Ahmadis.¹⁹⁶

On the contrary, a November 23, 2010 Human Rights Watch report categorically rejects Kiani's statement, and particularly mentions the denial tactic in which Kiani engages:

The Punjab [Pakistan] provincial government is either in denial about threats to minorities or is following a policy of willful discrimination. . . Provincial law enforcement authorities need to put aside their prejudices and protect religious minorities who are clearly in serious danger from both the Taliban and sectarian militant groups *historically supported by the state*.¹⁹⁷

Likewise, an October 11, 2005 Amnesty International report demonstrates that persecution of religious minorities in Pakistan is not a rogue phenomenon, but is in fact a state sanctioned norm.

Police investigations of previous targeted killings of Ahmadi [Muslims] in Pakistan have been slow or have not taken place at all. In many cases the perpetrators have not been brought to justice. Amnesty International believes that the government's consistent failure to investigate attacks and killings of members of religious minorities fails to discourage further human rights abuses against such groups.¹⁹⁸

The 2010 UN International Religious Freedom Report on Pakistan adds that, "[s]acred books for religious minorities, except Ahmadis, were freely imported,"¹⁹⁹ further demonstrating the Government's targeted discrimination against Ahmadi Muslims. The report also adds,

¹⁹⁶ David Kelly, *In a Chino Mosque, Ahmadis Can Worship Freely*, L.A. TIMES (Oct. 12, 2009), <http://articles.latimes.com/2009/oct/12/local/me-beliefs12/2>.

¹⁹⁷ *Pakistan: Repeal Blasphemy Law*, HUM. RTS. WATCH (Nov. 23, 2010), <http://www.hrw.org/en/news/2010/11/22/pakistan-repeal-blasphemy-law> (emphasis added).

¹⁹⁸ Amnesty Int'l, *supra* note 88.

¹⁹⁹ *Religious Freedom Report: Pakistan*, *supra* note 162, at 13.

[t]he constitution provides for the right to establish places of worship and train clergy, but in practice these rights were restricted for Ahmadis. Authorities continued to conduct surveillance on Ahmadis, and several Ahmadiyya mosques reportedly were closed or confiscated; others reportedly were desecrated or their construction stopped.²⁰⁰

While the ICCPR Article 27 ensures minorities are protected from such discrimination,²⁰¹ Pakistan has only promoted state sanctioned persecution, empowering extremists to treat minorities in Pakistan as less than equal citizens.

The ICCPR Article 21 specifically reserves the right to peaceably assemble.²⁰² Members of the Ahmadiyya Muslim Community in Pakistan, however, are forbidden from the right to peaceful assembly, as assembly would mean propagation, and thus in violation of Ordinance XX.²⁰³ Pakistan has denied Ahmadi Muslims this right since 1983.²⁰⁴ Article 21 only restricts the right to assembly for reasons of national security,²⁰⁵ but that restriction cannot fairly apply to Ahmadi Muslims.²⁰⁶ The Ahmadiyya Muslim Community in Pakistan held national conferences annually from 1948²⁰⁷ to 1984 when General Zia forbade them,²⁰⁸ all without a single act of violence or disturbance of the peace. In fact, since the Ahmadiyya Muslim Community began holding conferences in 1891 in India, it has held literally thousands of conferences worldwide, with attendance exceeding 200,000 members at times, all without a single act of violence on record.²⁰⁹ The Ahmadiyya Muslim Community uses these public conferences to champion peace, enhance spirituality, and engage in humanitarian

²⁰⁰ *Id.* at 12.

²⁰¹ See ICCPR, *supra* note 22, at art. 27.

²⁰² See *id.* art. 21.

²⁰³ PAK. PENAL CODE § 298C (made part of Penal Code by Presidential Ordinance No. 20 (1984), THE GAZETTE OF PAKISTAN EXTRAORDINARY, Apr. 26, 1984).

²⁰⁴ See U.S. DEP'T STATE, INT'L RELIGIOUS FREEDOM REP. 2010 (Nov. 17, 2010), <http://www.state.gov/g/drl/rls/irf/2010/148800.htm>.

²⁰⁵ See ICCPR, *supra* note 22, at art. 21.

²⁰⁶ Khan, *supra* note 155, at 234.

²⁰⁷ See *Human Right Violations Suffered by Ahmadis in Pakistan: A Brief*, THEPERSECUTION.ORG, <http://www.thepersecution.org/brief.html> (last visited Sept. 30, 2011).

²⁰⁸ See *Newsreport November, 2006: Vicious Application of the Blasphemy Law*, THEPERSECUTION.ORG, <http://www.thepersecution.org/nr/2006/november.html> (last visited Sept. 30, 2011).

²⁰⁹ See *Annual Conference*, AL ISLAM, <http://www.alislam.org/library/history/ahmadiyya/69.html> (last visited Sept. 30, 2011).

services.²¹⁰ Pakistan's state policy to restrict Ahmadi Muslims from the right to freedom of assembly is in clear violation of ICCPR Article 21.

On the other hand, Pakistan unrestrictedly allows groups like the *Khatame Nabuwat* Party to hold regular conferences, with the specific aim to disparage and incite hatred against the Ahmadiyya Muslim Community.²¹¹ These conferences promote the extremist ideology that Ahmadi Muslims are *wajibul qatl*, i.e. liable to death, and that "the streets need to be cleansed of Ahmadi Muslims [sic]."²¹² Chaudri Muhammad Iqbal, former President of the *Khatme Nabuwat* movement declared in 2009, "[t]o dispatch [i.e. kill and send] a Qadiani to hell is the religious duty of every Muslim."²¹³ While the ICCPR Article 20(2) expressly forbids advocacy for the aforementioned violent purposes,²¹⁴ the Government of Pakistan has done nothing to prevent these conferences from taking place, or to hold those who incite violence accountable. The results have been devastating. For example, surrounding the May 28th, 2010 Lahore attack that killed 86 members of the Ahmadiyya Muslim Community, Human Rights Watch reported that "[t]he anti-Ahmadiyya campaign has intensified in the past year, exemplified by the government allowing groups to place banners seeking the death of "Qadianis" (a derogatory term for Ahmadi [Muslims]) on the main thoroughfares of Lahore."²¹⁵ Likewise, the Human Rights Commission of Pakistan, an independent NGO, reported that it "repeatedly brought [the Taliban's] threats [of attack] to the notice of Punjab Chief Minister Shahbaz Sharif, the provincial government, and the police controlled by the provincial authorities, asking for enhanced security for Ahmadiyya mosques."²¹⁶ Not only did the Government completely fail to provide any protection, Zaeem Qadri, an advisor to Punjab Chief Minister Shahbaz Sharif, admitted, "the provincial Government had failed to remove threatening banners from the city's thoroughfares in order to prevent 'adverse reaction against the government' by the groups responsible."²¹⁷ In short,

²¹⁰ See generally *Objectives, Purposes & Blessings of Jalsa Salana in the Words of the Promised Messiah (Peace Be On Him!)*, AL ISLAM, <http://www.jalsasalana.org/objectives.html> (last visited Oct. 22, 2011).

²¹¹ See generally Press Release, Al Islam, Anti-Ahmadiyya Conferences on the Increase in Pakistan: Hate Filled Conferences Being Held Throughout Pakistan (Apr. 30, 2010), <https://www.alislam.org/egazette/press-release/anti-ahmadiyya-conferences-on-the-increase-in-pakistan/>.

²¹² *Id.*

²¹³ PERSECUTION OF AHMADIS, *supra* note 170, at 1.

²¹⁴ See ICCPR, *supra* note 22, at art. 20.

²¹⁵ See *Pakistan: Massacre of Minority Ahmadis*, *supra* note 151.

²¹⁶ See *id.*

²¹⁷ See *id.*

the Government of Pakistan and the Pakistani Court system permitted public banners in Lahore, calling for the murder of all Ahmadi Muslims, specifically to avoid a Taliban attack on the government. That the Government of Pakistan allowed such banners to be raised in the first place is a direct contravention of ICCPR Article 20(2), which forbids religious hatred and incitement to violence and discrimination.²¹⁸

f. Pakistan's ICCPR Violations Perpetuate International Extremism

In addition to causing increasingly violent internal problems, Pakistan's anti-blasphemy laws have helped extremists amplify their influence on an international scale. For example, the Christian Science Monitor reports that the May 2010 failed Times Square bomber, Faisal Shahzad, received his training from the Pakistani Tehreek-e-Taliban.²¹⁹ This is the same Taliban group that killed 86 members of the Ahmadiyya Muslim Community on May 28th, 2010.²²⁰ Likewise, in November 2010, Mohamed Osman Mohamud was arrested in Portland, Oregon, for an attempted bombing.²²¹ He admits his training came from Internet websites teaching destruction of the west and all 'un-Islamic' regimes, exactly reflecting the teachings Maududi promoted to help pass anti-blasphemy legislation in Pakistan.²²² Moreover, the five Virginian youth arrested in Pakistan in 2009 traveled to Pakistan from America to receive terrorism training from the Taliban.²²³ The BBC reports on December 8, 2010 that in the United Kingdom, the *Khatam un Nabuwat* Movement handed out leaflets calling for the murder of all members of the Ahmadiyya Muslim Community on account of their blasphemous faith.²²⁴ This is the same political movement calling for the death of the Christian Pakistani

²¹⁸ See ICCPR, *supra* note 22, at art. 20(2) ("Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.").

²¹⁹ See Stack, *supra* note 149.

²²⁰ *Pakistan: Massacre of Minority Ahmadis*, *supra* note 151.

²²¹ See Brad Knickerbocker, *Mohamed Osman Mohamud: The Somali Teen Who Wanted to Bomb Portland*, THE CHRISTIAN SCI. MONITOR (Nov. 28, 2010), <http://www.csmonitor.com/USA/2010/1128/Mohamed-Osman-Mohamud-The-Somali-teen-who-wanted-to-bomb-Portland>; see also GRARE, *supra* note 40.

²²² See ABC Interview Regarding Extremist Websites, YOUTUBE (Dec. 1, 2010), <http://www.youtube.com/watch?v=hYMEs6GSUIM>.

²²³ See Frank Liao, *Five US Students Arrested in Pakistan on Terrorism Charges*, NOWPUBLIC (Dec. 11, 2009), <http://www.nowpublic.com/world/five-us-students-arrested-pakistan-terrorism-charges>.

²²⁴ See Ahmadiyya 'Targeted by Hate Campaign', BBC NEWS (Dec. 8, 2010), <http://www.bbc.co.uk/news/uk-11947734>.

woman, Asia Bibi, for her alleged blasphemy.²²⁵ Pakistan's support of anti-blasphemy legislation has created a society that is increasingly influencing people around the world with extremist ideologies.

This influence of extremist ideologies does not extend merely to fringe groups, but also to numerous governments. In 1999 Pakistan and the Organization of the Islamic Conference ("OIC") introduced an anti-blasphemy measure ("the resolution") to the United Nations that "stresses the need to effectively combat defamation of all religions and incitement to religious hatred, against Islam and Muslims in particular."²²⁶ This resolution passed every year for over a decade before it was finally defeated in 2011.²²⁷ Before the resolution was ultimately rejected, Pakistan touted it as a means to champion diversity and promote harmony.²²⁸ This is, however, the exact type of law used to persecute Pakistan's religious minorities. For example, Section 295-C of Pakistan's Ordinance XX issues the death penalty for anyone who, "by words, either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad."²²⁹ The resolution's proposed purpose is "combat defamation. . . against Islam and Muslims in particular."²³⁰ More than just a similarity, Pakistani Christian Asia Bibi is on death row, and countless more are incarcerated, for the precise allegation that they defamed Islam and Muslims.²³¹

Indonesia, a nation President Obama complimented as one that has the "spirit of religious tolerance. . . enshrined in [its] Constitution, and that [spirit] remains one of [Indonesia's] defining and inspiring characteristics,"²³² has recently enforced anti-blasphemy laws to

²²⁵ Grisanti & ur Rehman, *supra* note 134.

²²⁶ Betsy Pisik, *U.S. Fights Islamic Anti-Defamation Push*, THE WASH. TIMES (Sept. 2, 2008), <http://www.washingtontimes.com/news/2008/sep/02/us-fights-islamic-anti-defamation-push/>.

²²⁷ See News Release, Assyrian Int'l News Agency, *An Anti-Blasphemy Measure Laid to Rest – AINA* (Apr. 1, 2011), <http://www.uscirf.gov/news-room/uscirf-in-the-news/3585.html>.

²²⁸ See *id.* ("Speaking for the OIC, Pakistan typically introduced these resolutions, arguing in words calculated to appeal to Western liberals: "Unrestricted and disrespectful freedom of opinion creates hatred and is contrary to the spirit of peaceful dialogue and promotion of multiculturalism.").

²²⁹ PAK. PENAL CODE § 295C (made part of Penal Code by Presidential Ordinance No. 20 (1984), THE GAZETTE OF PAKISTAN EXTRAORDINARY, Apr. 26, 1984).

²³⁰ See Pisik, *supra* note 226.

²³¹ See Grisanti & ur Rehman, *supra* note 134.

²³² Barack Obama, President, U.S., Remarks in Indon. (Nov. 9, 2010), <http://blogs.wsj.com/washwire/2010/11/09/full-text-obamas-prepared-remarks-in-indonesia/>.

restrict religious freedom for Indonesian Ahmadi Muslims.²³³ As a result, restrictions on religious freedom have increasingly allowed violence against Ahmadi Muslims, because of their faith.²³⁴ In addition, the US State Department reports that Indonesian government officials are calling to ban Ahmadi Muslims from Indonesia, and turning a blind eye to dozens of Ahmadi Muslims mosques that have been illegally closed and destroyed.²³⁵ Like Pakistan, Indonesia has signed and ratified the ICCPR, demonstrating the powerfully destructive abilities of anti-blasphemy legislation.²³⁶

Likewise, the international community cannot ignore the dangerous precedent that will be set if Pakistan is allowed to uphold its current discriminatory legislation yet remain an ICCPR ratified member. Nations may then point to a discriminatory Pakistan as an ICCPR member nation, and justify committing similar atrocities without fear of reprisal. Even now, what is to prevent Indonesia from proposing this argument to justify its discriminatory laws? The domino

²³³ U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RTS., AND LABOR, INT'L RELIGIOUS FREEDOM REP.: INDONESIA, <http://www.state.gov/g/drl/rls/irf/2008/108407.htm> (last visited Sept. 28, 2011) [hereinafter RELIGIOUS FREEDOM REP.: INDONESIA] ("On June 9, 2008, the Government announced a joint ministerial decree freezing the activities of the Ahmadiyya Qadiyani (Ahmadiyya) and prohibiting vigilantism against the group. The decree was short of an outright ban for which hardline groups and a government-appointed body, the Coordinating Board for Monitoring Mystical Beliefs in Society (Bakor Pakem), were strongly advocating. The decree was signed by the Attorney General's Office, the Ministry of Religion, and the Ministry of Home Affairs. The Minister of Religious Affairs stated that violations of the ban on proselytizing would result in a maximum 5-year jail sentence under charges of blasphemy. . . . Prior to the government decree, Bakor Pakem issued a recommendation to the Government to dissolve the Ahmadiyya. The April 16, 2008, recommendation declared the group heretical and deviant, citing a 1965 presidential instruction on the 'prevention of misuse and disgrace of religion.'").

²³⁴ Phillip Shishkin, *Intolerant Indonesia: In Java, Muslim Hardliners Target 'Apostates'*, WORLD NEWS (Feb. 13, 2011), <http://www.thedailybeast.com/newsweek/2011/02/13/intolerant-indonesia.html>.

²³⁵ RELIGIOUS FREEDOM REP.: INDONESIA, *supra* note 233 ("There were a number of reports of societal abuses or discrimination based on religious affiliation, belief, or practice. Some groups used violence and intimidation to force at least 12 churches and 21 Ahmadiyya mosques to close. Several churches and Ahmadiyya mosques remained closed after mobs forcibly shut them down in previous years. Some Muslim organizations and government officials called for the dissolution of the Ahmadiyya, resulting in some violence and discrimination against its followers. Some perpetrators of violence were undergoing trials during the reporting period. However, many perpetrators of past abuse against religious minorities were not brought to justice.").

²³⁶ STATUS PAGE FOR ICCPR, *supra* note 66. Indonesia ratified the ICCPR on 23 February 2006.

effect has the potential to compromise the very purpose of the ICCPR, and expose minorities worldwide to discriminatory legislation. Therefore, these human rights violations and apathetic ICCPR compliance must be dealt with immediately.

PART IV: SOLUTIONS TO ENCOURAGE PAKISTAN TO COMPLY WITH THE ICCPR

a. A Strong Platform Exists to Ignite Reformation

Since Pakistan's anti-Ahmadi and anti-blasphemy legislation was enacted in 1984 and 1986, respectively,²³⁷ an entire generation of Pakistanis have been raised with the belief that the 'might is right' approach to public policy is constitutional. Obviously, no simple solution exists to return Pakistan to its noble founding principles of equality and freedom. Pakistan has signed and ratified the ICCPR, however, and this is a significant platform upon which Pakistan can advance towards restoring human rights. Likewise, that Pakistan has recently recanted the majority of its reservations also indicates at least a peripheral willingness to comply with its international obligations. This process must continue.

The first step to ensure this process continues is through international accountability. Herein, however, lies the problem. That Pakistan is in blatant violation of the ICCPR should be an international outrage—but no such mass outrage exists. Unfortunately, this international apathetic approach is nothing new. The world has largely remained historically silent, even though Pakistan has violated minority rights for at least the past 36 years (since it passed the Second Amendment to its Constitution).²³⁸ To date, the US House of Representatives has passed only two resolutions, one in 1986 and the other 2002, condemning Pakistan's anti-blasphemy legislation.²³⁹ In similar fashion, the United Nations passed Resolution 1985/21 in 1986, also to specifically condemn Ordinance XX.²⁴⁰ Three resolutions in the span of nearly four decades, the most recent of which was a decade ago, cannot be expected to effectuate substantive change. For Pakistan to be held accountable under the ICCPR, the international community must take active measures to address Pakistan's systematic human rights violations and ICCPR noncompliance. These appropriate measures include enforcement of Article 41 of the ICCPR.

²³⁷ Khan, *supra* note 155, at 226-27.

²³⁸ PAK. CONST. amend. II.

²³⁹ H.R. Res. 348, 107th Cong. (2002); H.R. Res. 379, 96th Cong. (1986).

²⁴⁰ See Khan, *supra* note 155, at 235.

b. Prime Time for ICCPR Article 41 Action Against Pakistan

Article 41 of the ICCPR permits ICCPR member nations to file complaints against other member nations for human rights violations.²⁴¹ The nation against whom the complaint is filed then has three months to provide an “explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter.”²⁴² Failure to comply with this procedural requirement results in the matter being referred to a UN Commission, which conducts an even more thorough investigation.²⁴³ ICCPR Article 41 provisions are only applicable, however, when the offending nation recognizes Article 40—i.e. accepts the competency of the United Nations Human Rights Committee to receive complaints²⁴⁴—and ten ICCPR ratified member states who also recognize Article 40 file declarations under Article 41, paragraph 1.²⁴⁵ To date, no nation has filed Article 41 complaints against Pakistan, even though 166²⁴⁶ nations have signed and ratified the ICCPR, and recognize Article 40. It stands to reason, therefore, that at least ten nations can join together to address Pakistan’s ICCPR violations. Through international EU pressure, Pakistan retracted its ICCPR reservations.²⁴⁷ Likewise, through joint international pressure via Article 41 activation, Pakistan can be made to retract both anti-blasphemy legislation and voting restrictions on its religious minorities.

c. The United States and Pakistan Must Unite Against Extremism

When Former President George W. Bush was in office, he made clear that Pakistan is a close American ally in the war on extremism.²⁴⁸ In fact, this alliance first developed under President Reagan’s administration during the proxy war in Afghanistan, even before Pakistan’s anti-blasphemy laws were enacted.²⁴⁹ While the war against ex-

²⁴¹ ICCPR, *supra* note 22, at art. 41.

²⁴² *Id.* art. 41(a).

²⁴³ *Id.* art. 41(b).

²⁴⁴ *Pakistan Withdraws Reservations*, *supra* note 103.

²⁴⁵ *Id.* art. 41(2).

²⁴⁶ *The Right to Information*, FONDATION HIRONDELLE, <http://www.hirondelle.org/the-right-to-information/?lang=en> (last visited Sept. 30, 2011).

²⁴⁷ *Pakistan Withdraws Reservations*, *supra* note 103.

²⁴⁸ *Bush Names Pakistan ‘Major Ally’*, BBC NEWS (June 17, 2004), <http://news.bbc.co.uk/2/hi/3814013.stm>.

²⁴⁹ Adrian Levy & Cathy Scott-Clark, *The Man Who Knew Too Much*, THE GUARDIAN (Oct. 13, 2007), <http://www.guardian.co.uk/world/2007/oct/13/usa.pakistan> (quoting Richard Barlow, a CIA expert on Pakistan’s nuclear secrets, who served under the Reagan administration. He observes, “. . .Pakistan had, within days of Reagan’s inauguration in 1981, gone from being an outcast nation that had out-

tremism is admittedly a different phenomenon, the success of the proxy war demonstrates the power of a unified front against a common enemy. The common enemy in this case is extremism, supported and promoted by anti-blasphemy legislation. As Pakistan's strongest ally in the west and a fellow ICCPR ratified member, the United States must invest in Pakistan's public policy by assertively encouraging Pakistan to repeal its anti-blasphemy legislation in favor of the ICCPR. This process can appropriate itself through numerous forms, including diplomacy, conditional aid, educational grants, and federal resolutions. In November 2010, Secretary of State Hillary Clinton mentioned Pakistan's numerous human rights violations during a lecture on religious persecution.²⁵⁰ Likewise, the State Department's 2011 annual report on Pakistan mentions Ahmadi Muslims by name at least 101 times.²⁵¹ Both examples demonstrate our government's keen awareness of these issues, and the need to act quickly to rectify them.

On July 29, 2011, the U.S. House of Representatives passed the South Central Asia Religious Freedom Act, H.R. 440, to promote religious freedom in South Asia, including Pakistan.²⁵² In addition to promoting religious freedom and combating religious violence, H.R. 440 authorizes the U.S. Government to work with foreign governments to address inherently discriminatory laws.²⁵³ This awareness and proactive legislation must be consistent to protect the rights of Pakistan's religious minorities, and is a positive step forward in doing so.

d. Encourage Pakistan to Sign The First Optional Protocol of the ICCPR

Pakistan has, to date, abstained from signing the First Optional Protocol of the ICCPR.²⁵⁴ As a result, individuals in Pakistan who have exhausted all domestic legal relief mechanisms but still face human rights violations are left without recourse to combat Pakistan's illegal apparatus of state sanctioned persecution. In fact, Ahmadi Muslims appealed Pakistan's anti-blasphemy laws up to Pakistan's Supreme Court in 1993, without success.²⁵⁵ Likewise, President

raged the west by hanging Bhutto to a major US ally in the proxy war in Afghanistan.)" (emphasis added).

²⁵⁰ Hillary Clinton, *Hillary Clinton About Anti Ahmadiyya Laws Persecution in Pakistan Islam Ahmadiyya*, YOUTUBE (Nov. 21, 2010), http://www.youtube.com/watch?v=_knTT6BTYqA&p=4C3F11DC3301061C.

²⁵¹ Ahmad & Khan, *supra* note 164.

²⁵² South Central Asia Religious Freedom Act, H.R. 440, 112th Cong. (2011).

²⁵³ *See id.* § 3.

²⁵⁴ STATUS PAGE FOR OPTIONAL PROTOCOL, *supra* note 101.

²⁵⁵ *Zaheeruddin v. State*, 26 S.C.M.R. (S.Ct.) 1718 (1993) (Pak.) (holding that Ahmadi Muslims do not qualify for religious freedom protection because they are outside the fold of Islam, and as apostates, do not have the right to engage in

Musharraf's Executive Order 15 in 2002 further cemented Pakistan's targeted persecution of the Ahmadiyya Muslim Community.²⁵⁶ Since 1974, Ahmadi Muslims have been completely disenfranchised from voting, and since 2002, are Pakistan's only disenfranchised community. Pakistan recanted its reservations under pressure from the European Union.²⁵⁷ A similar strategy may be applied to oblige Pakistan to sign the First Optional Protocol of the ICCPR. By obliging Pakistan to sign the First Optional Protocol of the ICCPR, the international community will afford persecuted religious minorities in Pakistan (for the first time in nearly two decades) an affirmative venue to challenge Pakistan's illegal apparatus of state sanctioned persecution. As of now, no such option exists to mitigate this persecution.

e. International Proactive Support of Moderation

Finally, moderation is the ultimate antidote to extremism. A moderate voice within the worldwide Muslim community that can lead by example will offer those prone to extremist ideology a clear alternative to extremism. In this battle of ideologies, international public support of anti-extremist platforms, along with active protection of such platforms and its adherents is crucial to promote moderation. This process has already begun in several nations. For example, Canada's Prime Minister Stephen Harper stated in a July 2008 address,

Ahmadi [Muslims] are renowned for their devotion to peace, universal brotherhood and submission to the will of God—the core principles of true Islam. . . They are also renowned for working together to serve the greater good through social, health and education initiatives, as well as mosque projects like this one. And wherever they live in the world, Ahmadi [Muslims] are renowned for participating in the larger community and peacefully co-ex-

Islamic behavior. Just as Coca Cola has the right to protect their product trademark, Pakistan has the right to protect the usage of Islamic terms and behaviors, and reserve them exclusively for Muslims. Therefore, Ordinance XX anti-blasphemy laws were not only Constitutional, but necessary to protect Islam and preserve the peace by not offending Pakistan's Sunni Muslim majority population; see also Amjad Mahmood Khan, *Misuse and Abuse of Legal Argument by Analogy in Transjudicial Communication: The Case of Zaheeruddin v. State*, 10 RICH. J. GLOBAL L. & BUS. 497 (2011). See generally Tayyab Mahmud, *Freedom of Religion and Religious Minorities in Pakistan: a Study of Judicial Practice*, 19 FORDHAM INT'L L.J. 40 (1995) (providing a detailed scholarly analysis of *Zaheeruddin*).

²⁵⁶ PAK. PENAL CODE §§ 7B, 7C (made part of Penal Code by Presidential Ordinance No. 15 (1984), THE GAZETTE OF PAKISTAN EXTRAORDINARY, June 17, 2002).

²⁵⁷ *Pakistan Withdraws Reservations*, *supra* note 103.

isting with people of all faiths, languages and cultures.²⁵⁸

Similarly, Jack Straw, UK Member of Parliament stated while speaking on behalf of UK Prime Minister Gordon Brown, “[a]ll of us hugely admire the work of the Ahmadiyya [Muslim] Community here in the United Kingdom as we do across the world.”²⁵⁹ US Congresswoman Jackie Speier (D-CA), Congressman Keith Ellison (D-MN), Congresswoman Sheila Jackson (D-TX), and Congressman Tom Petri (R-WI) have each expressed similar sentiments about the Ahmadiyya Muslim Community’s moderate and pluralistic platform.²⁶⁰

The next step, beyond simple public endorsement however, is that nations must proactively protect moderate religious minorities from violence and harm. This should not be difficult as the ICCPR member nations are already committed to promoting equality and moderation in a unified manner. In the current Pakistan model, moderate positions are marginalized and disenfranchised while extremist ideologies continue to flourish unchecked. For change to occur, the international ICCPR member community must jointly protect Pakistan’s moderate minorities from harm, thereby promoting exactly the opposite scenario. Such efforts, performed consistently, will send a clear message to Pakistan, the extremists within Pakistan, and extremists around the world, that the world is united against extremism.

PART V: CONCLUSION

Amnesty International describes Pakistan’s anti-blasphemy laws best as “a handy tool to silence debate and dissent.”²⁶¹ How ironic when the Nations founder, Muhammad Ali Jinnah, envisioned “a State in which we could live and breathe as free men.”²⁶² Pakistan has signed and ratified the ICCPR and even retracted its reservations. Yet, violence against innocent civilians and religious minorities in Pakistan continues to increase exponentially. Members of the

²⁵⁸ *Prime Minister Harper Attends Opening of Baitun Nur Ahmadiyya Mosque*, PRIME MINISTER OF CANADA (July 5, 2008), <http://pm.gc.ca/eng/media.asp?id=2191>.

²⁵⁹ *Khilafat Centenary Reception at the Queen Elizabeth II Center – Part 3*, YOUTUBE (Jan. 7, 2009), http://www.youtube.com/watch?v=ZGRkKdK037Q&feature=player_embedded.

²⁶⁰ Press Release, Cision Wire, Ahmadiyya Muslim Community USA (Sept. 13, 2011), <http://www.cisionwire.com/ahmadiyya-muslim-community-usa/r/members-of-congress-and-muslims-unite,c9161465>.

²⁶¹ Amnesty Int’l, *Pakistan: Blasphemy Laws Should be Abolished*, AI Index ASA 33/023/2001 (Aug. 21, 2001), available at <http://www.amnesty.org/en/library/asset/ASA33/023/2001/en/6bd5700e-d8f5-11dd-ad8c-f3d4445c118e/asa330232001en.html>.

²⁶² Muhammad Ali Jinnah, President, Pak., Address to Civil, Naval, Military and Air Force Officers of Pakistan Government, Karachi (Oct. 11, 1947).

Ahmadiyya Muslim Community are completely disenfranchised from voting. Anti-blasphemy legislation has only strengthened extremists and paralyzed moderation, leading to ongoing persecution of Pakistan's minority Christian, Hindu, and Ahmadi Muslim populations. The longer Pakistan is allowed to dysfunction through violation of international human rights regulations, the more detrimental the consequences, and the more difficult it will be to reform Pakistan in the future.

Therefore, the international ICCPR community must reassert its focus to recognize Pakistan's blatant ICCPR violations and hold Pakistan accountable through Article 41 enforcement. Likewise, the United States must now again invest in Pakistan to defeat extremism, just as it invested in Pakistan before to defeat Communism. In addition, Pakistan should be assertively encouraged to sign the First Optional Protocol of the ICCPR to afford persecuted minorities their first opportunity in nearly two decades to be heard, and Ahmadi Muslims their first opportunity in nearly four decades to exercise their right to vote. Finally, the United States and the United Nations must publicly support and actively protect the adherents of Pakistan's moderate religious organizations, thereby promoting national and international security. Only with a multi-faceted push to oblige Pakistan's full and transparent ICCPR compliance can Jinnah's Pakistan that, "start[ed] with this fundamental principle that we are all citizens and equal citizens of one State," finally become a reality once again.²⁶³

²⁶³ Jinnah's Constituent Assembly Address, *supra* note 10.

DOING BUSINESS IN EGYPT AFTER THE JANUARY REVOLUTION: CAPITAL MARKET AND INVESTMENT LAWS

By Radwa S. Elsaman¹ & Ahmed A. Alshorbagy²

ABSTRACT:

Despite the Egyptian economy's remarkable growth during the last decade, unequal treatment at law and unfair distribution of wealth led to the Revolution on January 25, 2011. The Revolution affected investment in Egyptian markets. Reforming business laws—specifically the Capital Market and Investment Laws—has become essential to restore confidence in Egyptian markets. These two branches of business law have undergone many developments over the years, which have improved them significantly. Legal compliance, however, remains a major concern. This Article surveys the economic activity in Egypt from a legal perspective. It evaluates Egyptian laws affecting economic activity by analyzing the effectiveness and shortcomings of relevant laws, and proposing the necessary amendments to those laws in light of the Revolution's impact.

1. INTRODUCTION

Egypt has witnessed remarkable economic growth in the last decade. Most Egyptians, however, did not feel the effect of this growth. The corruption of public officials and businessmen, who were frequently motivated by politics, led to the concentration of most investment tools³ in the hands of the elite.⁴ This elite monopoly led to an

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³ See *infra* and note 172.

⁴ CREDIT AGRICOLE BANK, EMERGING MARKET FOCUS: THE POINT OF NO RETURN, EGYPT'S UNCERTAIN POLITICAL FUTURE, THE ECONOMY AND THE ARMY (Feb. 2011), www.alfransi.com.sa/en/general/download/file/1027.

unfair distribution of wealth, which eventually caused the January 2011 Revolution. The January Revolution has given rise to much economic and political chaos. It rattled the national stock exchange and shocked investors' confidence in the Egyptian market. Reforming economic laws will help boost the Egyptian economy and shorten the transition period before the economy rises again.⁵ In the long term, curbing corruption and institutional reformation are the best means to boost the economy and to achieve social and economic prosperity. The faster these reforms take place, the sooner the Egyptian economy can restore its strength and regain both national and international investor confidence.

This article evaluates Egyptian laws affecting economic activity by analyzing the effectiveness and shortcomings of the relevant laws and proposing necessary amendments in light of the Revolution's impact. Conducting business in Egypt involves numerous different laws, and it is difficult to cover all the relevant laws in a single article. This article focuses on two specific branches of business law in Egypt: Investment Incentives No. 8 of 1997 ("ILI")⁶ and the Capital Market Law No. 95 of 1992 ("CML").⁷

The CML regulates the Capital Market Authority ("CMA"), which was replaced by the Egyptian Financial Supervisory Authority ("EFSA") as the main market supervisor. The CML's executive regulations enjoy a special importance as secondary statutes⁸ because the government has increasingly used them to regulate otherwise unregulated or under-regulated capital market areas.⁹ The amendments to the CML over the past decade have greatly enhanced Egyptian capital market regulation by overcoming many previous deficiencies like the under-regulation of insider trading and market manipulation. Although parts of the law continue to require reform, such as takeover regulation, the main problem with the CML is investor compliance.

⁵ *See id.*

⁶ Law No. 8 of 1997 (Law of Investment Guarantees and Incentives), *Al-Jarida Al-Rasmiyya*, 11 May 1997 (Egypt).

⁷ Law No. 95 of 1992 (Law of Capital Market), *Al-Jarida Al-Rasmiyya*, 22 June 1992 (Egypt).

⁸ Secondary statutes is a generic term that refers to regulations issued by the executive authority rather than the by legislature. In this sense, primary statutes promulgated by the Parliament supersede secondary statutes that may not add, change or violate the primary statutes. *See* MOHAMED KAMAL ABDUL-AZIZ, *ALTANFITH ALMADANY FI DO'OE ALFIQH WALQADA'A* [Civil Execution in the Light of Jurisprudence and Judiciary] 18-25 (1980).

⁹ Minister of Economics and Foreign Trade Decree No. 135 of 1993 (Executive Regulations of the Capital Market Law), *Al-Jarida' al-Rasmiyya*, 8 Apr. 1993, vol. 81 F. no. 8 (Egypt); *see also* Law No. 95 of 1992 (Law of Capital Market), *Al-Jarida Al-Rasmiyya*, 22 June 1992 (Egypt).

Hence the EFSA, as the main market supervisor, should be granted independence from governmental supervision to allow for greater neutrality. Moreover, educating investors about the importance of corporate governance will increase legal compliance, and improved compliance will cause a more transparent market that will attract more investors.

The ILI organizes both local and foreign direct investment in Egypt.¹⁰ It has had a strong influence on the Egyptian investment environment during the previous decade because it provides incentives and guarantees for both local and foreign investors.¹¹ The ILI also established the General Authority of Investment and Free Zones (“GAFI”), an authority that deals with investment issues.¹² Likewise, the ILI also provides for an independent dispute settlement system for disputes arising between investors subject to its provisions. This may be of great use towards reforming investment laws and regulations. Furthermore, considering enforcement mechanisms to guarantee that small investors can make use of investment laws and regulations in Egypt is also necessary.

This explanation of the CML and ILI provides the necessary overview of Egypt’s legal system, the situation with regard to Islamic law, and the economic reasons for the January Revolution. Understanding this is the initial step to do business in Egypt. Part Two explains Egyptian securities regulations and proposes some reforms. Part Three provides an overview of the investment environment in Egypt, its laws, and provides guidelines for its reform.

2. OVERVIEW

2.1. *Laws and Regulations*

The Egyptian legal system is a combination of Islamic law—known as *Shari’a*,— and the Napoleonic Code.¹³ Egypt is the first Arab Middle Eastern country that voluntarily adopted Western style codes in the late nineteenth century.¹⁴ Accordingly, Egypt is a civil law country with a legal system based on codified law.¹⁵

¹⁰ See also Law No. 8 of 1997 (Law of Investment Guarantees and Incentives), *Al-Jarida Al-Rasmiyya*, 11 May 1997 (Egypt).

¹¹ *Id.*

¹² *Id.*

¹³ Mohamed S. E. Abdel Wahab, *Update: An Overview of the Egyptian Legal System and Legal Research* GLOBALLEX (2008), § 2, available at <http://www.nyulawglobal.org/Globalex/Egypt1.htm>.

¹⁴ GHISLAINE ALLEAUME, *EGYPT AND ITS LAWS 1* (Nathalie Bernard-Maugiron & Baudouin Dupret eds., 2002).

¹⁵ Wahab, *supra* note 13, at § 9.

European legal models—particularly the French Civil Code—influenced the Egyptian Civil Code.¹⁶ The Egyptian Civil Code is the law governing private relationships between individuals in areas like property, contracts, personal guarantees, and evidence.¹⁷ The civil law also fills gaps for other branches of private law, such as commercial law.

Egypt's Commercial Code organizes trade and commerce.¹⁸ It has more than 700 provisions covering different issues like commercial contracts, banking, bankruptcy, and commercial paper.

The Companies' Law No. 159 of 1981¹⁹ and the old Egyptian Commercial Law of 1883 govern business associations. The Egyptian Companies' law recognizes different forms of business associations such as partnerships, limited partnerships, partnerships limited by shares, limited liability companies, and corporations.²⁰ Most of the rules governing these forms of business associations are based on European precedents.²¹

2.2. *Judicial system*

Egypt has two types of courts: civil and administrative, each having different levels. Civil courts have first degree courts, second degree courts, and the Egyptian Court of Cassation.²² First degree court decisions are appealed before second degree courts, and those decisions are appealed before the Court of Cassation.²³ In addition, the Law No. 120 of 2008 established specialized Economic Courts to decide economic disputes.²⁴ The State Council ("*Conseil d'Etat*") handles administrative disputes, and is composed of different levels of administrative courts—the highest of which is the Egyptian Supreme Administrative Court.²⁵ The Supreme Constitutional Court decides

¹⁶ ALLEAUME, *supra* note 14, at xxv.

¹⁷ Law No. 131 of 1948 (Civil Code), *Al-Jarida Al-Rasmiyya*, 29 July 1948, vol. 108 (Egypt).

¹⁸ Law No. 17 of 1999 (Commercial Code), *Al-Jarida Al-Rasmiyya*, 17 May 1999, vol. 19 (Egypt).

¹⁹ Law No. 159 of 1981 (Companies' Law), *Al-Jarida Al-Rasmiyya*, 1 Oct. 1981, vol. 40 (Egypt).

²⁰ Tarek F. Riad, *The Legal Environment for Investment in Egypt in the New Millennium*, 15 ARAB L.Q. 117, 122 (2000).

²¹ *Id.*

²² ALLEAUME, *supra* note 14, at xxviii-xxix.

²³ *Id.*

²⁴ Law No. 120 of 2008 (Economic Courts Law), *Al-Jarida Al-Rasmiyya*, 22 May 2008, vol. 21 (Egypt).

²⁵ ALLEAUME, *supra* note 14, at xxviii-xxix.

the constitutionality of laws and disputes among the different courts and judicial bodies.²⁶

Foreign judgment enforcement within Egypt requires the satisfaction of certain conditions.²⁷ For example, Egyptian courts must have competence to decide the dispute.²⁸ Furthermore, the parties are duly and legally notified, that the judgment to be enforced must be final, and it must not contradict any previous Egyptian court decision.²⁹

In Egypt, alternative dispute resolution is commonly used to settle disputes outside of the court system. The “Cairo Regional Center for International Commercial Arbitration” is Egypt’s specialized arbitration center that oversees both domestic and international cases.³⁰ Egypt is also a party to the New York Convention, which enforces the disbursement of foreign arbitral awards in Egypt.³¹

2.3 *The Effect of Islamic Law on the Egyptian Legal System*

Egypt is a Muslim country that requires its main laws and regulations remain consistent with *Shari’a* law.³² The Egyptian Constitu-

²⁶ *Id.*

²⁷ Wahab, *supra* note 13, at § 9; see also Jalila Sayed Ahmed, *Enforcement of Foreign Judgments in Some Arab Countries – Legal Provisions and Court Precedents: Focus on Bahrain*, 14 ARAB L. Q. 169 (1999).

²⁸ Wahab, *supra* note 13, at § 9.

²⁹ *Id.*

³⁰ See generally THE CAIRO REGIONAL CTR. FOR INT’L COMMERCIAL ARB. (CRCICA), <http://www.crcica.org.eg/factsheet.html>.

³¹ See N.Y. ARBITRATION CONVENTION, CONTRACTING STATES (Sept. 1, 2011), <http://www.newyorkconvention.org/new-york-convention-countries/contracting-states>. Some conditions, however, exist for the enforcement of foreign arbitral awards in Egypt such as the requirement that no previous arbitral award issued by an Egyptian arbitration tribunal is there, the condition that the foreign arbitral award does not contradict with the Egyptian public policy, and the condition that notifications of the issuance of the arbitral award and the requesting its enforcement takes place. See also Wahab, *supra* note 13, at § 9.

³² “Muslim States” is a general term that does not only include Arab Middle Eastern states, but also other states outside the Arab region whose populations are mostly Muslim and where the state is a member of the Organization of the Islamic Conference (OIC). NISRINE ABIAD, SHARIA, MUSLIM STATES AND INTERNATIONAL HUMAN RIGHTS TREATY OBLIGATIONS: A COMPARATIVE STUDY 32 (2008). The word Islam, formally, *Al-Islam*, refers to the religion of Muslims whose rules and principles are driven from the holy book, [The] *Qur’an*. [The] *Qur’an* is the Islamic holy book revealed to the Prophet Muhammad. See also *Glossary of Islamic Legal Terms*, 1 J. ISLAMIC L. 89, 99 (1996). The word *Shari’a* literally means “the path or the way”, and, in a legal sense, *Shari’a* refers to Islamic law or the entire system of jurisprudence associated with Islam. See Mona Rafeeq, *Rethinking Islamic Law Arbitration Tribunals: Are They Compatible With Traditional American Notions of*

tion's second provision provides: "Islam is the Religion of the State. Arabic is its official language, and the principal source of legislation is Islamic Jurisprudence (*Shari'a*)."³³ Also, the Egyptian Supreme Constitutional Court has held:

The principles of the Islamic *Shari'a* are the major source of legislation. This imposes a limitation curtailing both the legislative and executive power, through which they are obliged that whatever laws or decrees they enact, no provision contained in them may contradict the provisions of Islamic law which are definite in terms of their immutability and their meaning. . . whatever legislative enactment contravenes them must be declared null and void.³⁴

Accordingly, *Shari'a* strongly influences Egyptian laws and regulations. It also affects Egyptians' trade and investment behavior.

Justice, 28 WIS. INT'L L.J. 108, 116 (2010). *Shari'a* is not simply a body of law but rather an ethical code organizing one's everyday life. See Charles P. Trumbull, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 626 (2006). The sources of Islamic law are divided into two main categories: primary sources, which include the *Qur'an* and *Sunnah*, and secondary sources which include, *inter alia*, *Ijma'a* and *Qiyas*. Adnan A. Zulfiqar, *Religious Sanctification of Labor Law: Islamic Legal Principles and Model Provisions*, 9 U. PA. J. LAB. & EMP. L. 421, 422 (2007). The *Qur'an* is a book of spiritual guidance with rules for everyday life. It is divided into *Surahs* (Chapters) and each *Surah* is divided into verses. *Surah* literally means "a series of things." *Glossary of Islamic Legal Terms*; see also Faisal Kutty, *The Shari'a Factor in International Commercial Arbitration*, 28 LOY. L.A. INT'L & COMP. L. REV. 565, 583 (2006). *Qur'anic* provisions are considered the highest in the hierarchy of legal norms in the Islamic legal system. MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW 33 (2003). *Sunnah* refers to the actions of Prophet *Muhammad*, his oral pronouncements, or concurrence in action by others. Kutty, *supra*, at 585. *Sunnah* literally means "method" and refers to the second source of *Shari'a* which is the sayings of Prophet *Muhammad*. *Glossary of Islamic Legal Terms, supra*. When *Qur'an* and *Sunnah* do not provide specific guidance on an issue, Muslims are directed to use reasoning to deduce rules, which is called *Ijma* and represents the convergence of opinion on a particular new rule. Irshad Abdal Haqq, *Islamic Law an Overview of its Origin and Elements*, 7 J. ISLAMIC L. & CULTURE 27, 36 (2002); see also Kutty, *supra*, at 589. Whereas *Ijma* represents a form of collective reasoning, *Qiyas* is an individual form based on analogical deduction. Haqq, *supra* at 56. *Qiyas* is based on "[T]he use of reason to conclude that an existing rule applies to a new situation because it is similar to the situation regulated by that rule or to abstain from applying the existing rule to the new situation that is proven dissimilar." Haqq, *supra*, at 56.

³³ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007.

³⁴ Case No. 5257/43/1997/Constitutional Court (Egypt).

2.4 Economic Reasons for the January 25 Revolution

Despite the remarkable economic progress Egypt witnessed throughout the last decade, middle class and lower class Egyptians did not receive much of the financial benefit.³⁵ The unfair distribution of wealth augmented by the corruption of public officials and businessmen steered economic growth in the direction of the powerful few.³⁶ Of course, profound political problems lay at the Revolution's foundation, but the igniter was the dreadful economic stance and high commodity prices.³⁷

Moreover, Egypt has witnessed significant legal reform in its economic sectors. For example, the Egyptian government adopted the Capital Market Law in 1992 to help bolster the capital market.³⁸ Egypt has also enacted an investment law to encourage both local and foreign investment.³⁹ A huge external debt and the failure to provide jobs to Egyptians characterized the Mubarak era.⁴⁰ In fact, the Egyptian per-capita income ranks 137th worldwide.⁴¹ The CIA's World Fact book reports that twenty percent of Egyptians live under the poverty line⁴² and forty percent live with a maximum of \$2 USD per day.⁴³ Financial corruption and poverty led to the January Revolution along with other political and social factors beyond this Article's scope.

³⁵ CREDIT AGRICOLE BANK, *supra* note 4.

³⁶ *See id.*

³⁷ *See id.*

³⁸ Law No. 95 of 1992 (Law of Capital Market), *Al-Jarida Al-Rasmiyya*, 22 June 1992, vol. 25 (Egypt).

³⁹ Law No. 8 of 1997 (Law of Investment Guarantees and Incentives), *Al-Jarida Al-Rasmiyya*, 11 May 1997, vol. 19 (Egypt).

⁴⁰ Lama Abu-Odeh, *On Law and The Transition To Market: The Case of Egypt*, 23 EMORY INT'L L. REV. 351, 361 (2009).

⁴¹ Zachary Karabell, *The Economic Roots of Egypt's Revolt*, WALL ST. J. (Feb. 1, 2011), <http://online.wsj.com/article/SB10001424052748703833204576114093360852546.html>.

⁴² *Id.*; see also Jonathan Berr, *Hosni Mubarak's Economic Achievements*, DAILY FIN. (Oct. 2, 2011), <http://www.dailyfinance.com/story/hosni-mubaraks-economic-achievements/19838632/>. The Egyptian economy's main sources were two billion USD coming from American subsidies, five billion USD coming from tourism, and 10 billion USD coming from Suez Canal which eliminated all other sources of income such as industry and trade.

⁴³ *World Fact Book - Egypt*, CENT. INTELLIGENCE AGENCY, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html> (last visited Nov. 18, 2011); see also Mohammad Fadel, *Labor and the Future of the Egyptian Revolution*, THE MIDDLE E. CHANNEL (Feb. 28, 2011, 3:44 PM), http://mideast.foreignpolicy.com/posts/2011/02/28/labor_and_the_future_of_the_egyptian_revolution.

3. SECURITIES REGULATIONS

Although the Egyptian stock market is one of the oldest in the world,⁴⁴ socialist policies and the public sector-based economy adopted during the mid-1950s resulted in the decline of the stock exchange.⁴⁵ It was not until the 1990s that the Egyptian government began its economic reform and restructuring program to move toward a free-market economy. In 1994, privatization began through public offerings of profitable public sector companies. This led to the reactivation and merger of the Egyptian stock markets into the Cairo and Alexandria Stock Exchange (“CASE”).⁴⁶ The Capital Market Law No. 195 of 1992 also contributed to the revival of the Egyptian Stock Exchange.⁴⁷ Today, the Egyptian securities market is a major contributor to Egypt’s economic development.⁴⁸

3.1. *Statutory Framework: Capital Market Law (CML)*

Whereas the Capital Market Law (“CML”) No. 95 of 1995 and its executive regulations No. 135 of 1993⁴⁹ are the main statutes regulating the Egyptian securities market, the Central Depository Law (“CDL”) No. 93 of 2000⁵⁰ and its executive regulations No. 906 of 2001,⁵¹ play an important role in record keeping, clearing and settlement to assure fast securities exchange, and enhanced market liquid-

⁴⁴ The Alexandria Stock Exchange was established in 1888, and a few years later in 1903 the Cairo Stock Exchange was also incepted. Both exchanges were very active until the 1940s. See Shahira Abdel Shahid, Does Ownership Structure Affect Firm Value? Evidence from the Egyptian Stock Market 8 (Jan. 2003) (unpublished manuscript) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=378580.

⁴⁵ For a thorough discussion of Egyptian economic systems before and after the 1952 revolution and the development of public sector, see MOHAMED KAMEL MALASH, MWSO’ET ALSHARIKAT [Encyclopedia of Companies], 693-98 (1980) (explaining the conversion of Egyptian economic system from Capitalism to Socialism and the accompanying establishment and development of Egyptian public sector).

⁴⁶ Jennifer Bremer & Nabil Elias, *Corporate Governance in Developing Economies: The Case of Egypt*, 3 INT’L J. BUS. GOVERNANCE & ETHICS 432 (2007). In 2008, CASE’s name was changed to the Egyptian Exchange (EGX). See also Law No. 95 of 1992, *Al-Jarida Al-Rasmiyya*, 22 June 1992 (Egypt).

⁴⁷ Shahira Abel Shahid, *Corporate Governance Is Becoming a Global Pursuit: What Can Be Done in Egypt?* 42 (Sept. 2001) (unpublished manuscript) <http://papers.ssrn.com/abstract=286875>.

⁴⁸ *Id.*

⁴⁹ Minister of Economics and Foreign Trade Decree No. 135 of 1993 (Executive Regulations of the Capital Market Law), *Al-Jarida’ al-Rasmiyya*, 8 Apr. 1993, vol. 81 F (Egypt).

⁵⁰ CDL was amended by laws 143/2004, 10/2009 and 127/2009.

⁵¹ Executive Regulations were amended by Decrees No. 227/2002, 267/2002, 554/2002 and 193/2005.

ity. Moreover, Decree No. 30 of 2002 of the former Capital Market Authority's Board of Directors defines the rules of listing and delisting in the Egyptian Stock Exchange, which sets forth, *inter alia*, many disclosure requirements.⁵² This Section focuses on CML in particular and refers to other statutes as needed.

3.1.1. Features of the Law

The Capital Market Law was intended to provide a comprehensive regulatory basis to establish and sustain the development of an efficient securities market. By putting investor protection, transparency, and fairness at the top of its priorities, the law aimed to encourage more investments.⁵³ As a result, the CML regulated the following areas of securities law:

Capital Market Commodities (securities): The First Part of the CML regulates the issuance of the different types of securities, permitting Egyptian corporations to issue bonds bearing competing interest rates that exceed seven percent per annum for the first time.⁵⁴ In 2008, wide scale amendments were introduced to encourage more investors. For example, the minimum nominal value of shares in an IPO was reduced from 5 EGP to 0.10 EGP.⁵⁵

The First Part of the CML determines the requirements and procedures of issuing securities, which starts by notifying the Egyptian Financial Supervisory Authority ("EFSA").⁵⁶ If the EFSA does not object within seven business days, the company may proceed with issuing securities.⁵⁷ This includes publishing a prospectus with specific information including the company purpose, term, and future plans after the EFSA's ratification. To guarantee continued transparency, the law requires the issuing company to submit semi-annual reports, prepared and revised by certified auditors, about its perform-

⁵² Listing Rules were amended by CMA Decision No. 94/2008 and EFSA Decisions No. 50/2009, 64/2009, 67/2009 and 132/2010.

⁵³ BAHAA ALI EL-DEAN, *PRIVATIZATION AND THE CREATION OF A MARKET-BASED LEGAL SYSTEM: THE CASE OF EGYPT* 39 (2002).

⁵⁴ Although Egyptian Companies' Law No. 159 of 1981 regulates the bonds' issuance, it did not permit corporations to issue bonds with interest rates exceeding 7% per annum, as this would violate the general rules of Egyptian law that sets the interests rate ceiling in commercial transactions at 7% per annum. This practically prevented corporations from issuing bonds. See MOHAMED TANWIR ALRAFIE, DOOR ALHYA'A AL'AMA LESOOK ALMAL FI HMAIT AKLYT ALMSHAHEMIN FI SHRKAT ALMOSAHAMA [Role of the Capital Market Authority in Protecting Minority Shareholders in Corporations] 24 (2006).

⁵⁵ Law No. 95 of 1992 (Law of Capital Market), *Al-Jarida Al-Rasmiyya*, 22 June 1992, vol. 25, art. 1/2 (Egypt).

⁵⁶ *Id.* art. 2

⁵⁷ *Id.* (the three week period was reduced to seven days in the 2008 amendments).

ance.⁵⁸ Furthermore, Article 8 of the CML requires the disclosure of any transaction that may lead to a change in company control.

Stock Exchanges: In 2008, Article 16 of the CML, which sets the framework of listing securities in Egyptian exchanges, was amended, relegating the authority to regulate this issue to the Listing Rules issued by the EFSA's Board of Directors.⁵⁹ The amendments distinguish between two types of listings. The first type includes shares of Egyptian corporations, provided they meet certain requirements as stipulated in Article 9 of the Listing Rules,⁶⁰ as well as other Egyptian securities.⁶¹ The second type comprises foreign securities, provided they are listed on other exchanges and satisfy the other listing requirements stipulated in Article 10 of the Listing Rules.⁶²

Moreover, securities issued by companies with capital of less than 50 million EGP may be listed on the Nilex exchange.⁶³ Established in accordance with Article 26 of the CML, Nilex is a special exchange that gives small and medium cap companies an opportunity to raise capital with a regulatory environment designed specifically to meet their needs.⁶⁴

Transactions in listed securities are conducted exclusively in the exchange where the traded securities are listed, and only through licensed intermediary companies for a determined fee. EGX also announces transactions that occur on unlisted securities.⁶⁵ Added in the 2008 amendments, Article 20 of the CML regulates insider trading, as explained in the next section. Moreover, the CML gives the EGX Chairman the power to suspend transactions involving price manipu-

⁵⁸ *Id.* arts. 4, 5.

⁵⁹ Chairman of the Capital Market Authority Decree No. 30 of 2002 (defining the rules of listing and delisting), *Al-Jarida Al-Rasmiyya*, 18 June 2002 (Egypt).

⁶⁰ *Id.* art. 9 (requiring the following, inter alia, for the shares of each Egyptian corporation to be listed: at least 10% of the shares must be offered, the number of shareholders must not be less than 100 shareholders, holding at least 5% of the total shares of the corporation, the number of issued shares required to be listed must not be less than 2 million shares, and the company's issued capital must be equal to at least 20 million EGP and must be fully paid).

⁶¹ This includes securities issued by the government, bonds and other financing instruments, and other forms of securities provided that they meet the listing requirements.

⁶² See Decree No. 30 of 2002 art. 10.

⁶³ This cap was increased from 25 million EGP to 50 million EGP by the EFSA's Decision No. 74 of 2010 (regarding the amendment of rules of listing and delisting), on 7 June 2010.

⁶⁴ See NILEX, http://nilex.egyptse.com/en/Listing_Requirements.aspx (last visited Sept. 30, 2011).

⁶⁵ Law No. 95 of 1992 (Law of Capital Market), *Al-Jarida Al-Rasmiyya*, 22 June 1992, vol. 25, arts. 17, 18/2, 24 (Egypt).

lation.⁶⁶ The EGX Chairman may also take substantial procedures to protect investors and the market if dangerous circumstances occur.⁶⁷

Companies Operating in Securities: Part Three of the CML provides a list of activities that are considered *operations in securities*. Examples include companies marketing and executing initial public offerings and venture capital initiatives.⁶⁸ Only EFSA licensed companies may engage in such activities.⁶⁹ A company must meet several conditions related to the company structure, capital and management to get the license.⁷⁰ The EFSA may suspend the operations of a company if it violates the law or imposes a threat to investors or to the market.⁷¹ The EFSA must then further approve and monitor the withdrawal of a company from the market to assure that the company meets its outstanding liabilities. Additionally, this Part provides in detail for the establishment and operation of investment funds and securitization companies.⁷²

The Capital Market Authority / EFSA:⁷³ Until the EFSA's establishment in 2009, the CMA, established by the CML, was the authority responsible for regulating and supervising the Egyptian capital market. The CMA merged with other entities, ultimately forming the EFSA.

Dispute Resolution: The CML created a "complaint" committee to hear complaints filed by parties affected by administrative decisions of the Authority or the Minister of Investment.⁷⁴ Filing a complaint with this committee is a prerequisite for bringing a case before the court.⁷⁵ Moreover, the law stipulated that disputes arising from CML application could only be settled by arbitration. In 2002, however, these mandatory arbitration provisions were declared unconstitutional.⁷⁶

Sanctions: Until 2008, penalties prescribed in Part Six of the CML for violating its provisions were non-deterrent and disproportionate to the gravity of the violations.⁷⁷ In 2008, the CML increased

⁶⁶ *Id.* art. 21.

⁶⁷ *Id.* arts. 22, 23.

⁶⁸ *Id.* art. 27 (the Minister of Investment may add, and has actually added, other activities over the years).

⁶⁹ *Id.* art. 28.

⁷⁰ *Id.* art. 29.

⁷¹ *Id.* arts. 30, 31.

⁷² *Id.* arts. 35-41.

⁷³ *Id.* arts. 42-49.

⁷⁴ *Id.* art. 50.

⁷⁵ *Id.* art. 51.

⁷⁶ Case no. 55/2002/Constitutional Court (Egypt).

⁷⁷ *See, e.g.,* ALI EL-DEAN, *supra* note 53, at 46 (criticizing the sanctions for several reasons. In determining the sanctions, the legislator prescribed a uniform sanc-

these sanctions.⁷⁸ For example, the CML raised monetary fines for most violations from a maximum of fifty thousand or hundred thousand EGP to twenty million EGP.⁷⁹ These amendments make the sanctions more proportionate to violations such as insider trading and fraud.⁸⁰ The law ties the initiation of criminal proceedings to the EFSA's Chairman's demand and gives him the power to conciliate on such crimes at any stage of the action, even during the punishment execution,⁸¹ and even though it may jeopardize law enforcement.

3.1.2. *Executive Regulations' Crucial Role*

Egypt's CML enjoys a great deal of flexibility as a law. The CML's provisions provide broad guidelines to regulate the different areas of securities law and to leave the details for secondary regulations.⁸² This allows the government wide latitude to regulate a variety of market activities by adding a new chapter or a few articles to its executive regulations through a Ministerial Decree, rather than having to amend the law through the Parliament.⁸³ This method of legislation is fast and easy, but has many disadvantages. Legislating through executive regulations as secondary statutes jeopardizes procedural and objective guarantees offered by the law making process of a statute issued by Parliament.⁸⁴ Because executive regulations are nec-

tion for all breaches other than insider trading, assuming that different offenses have the same impact on the market and that insider trading has a less impact than the other offenses).

⁷⁸ See Law No. 123 of 2008 (amending the Law of Capital Market); see also MINISTRY OF INVESTMENT, FINANCING REFORM PROGRAM, <http://www.investment.gov.eg/en/NBFS/CapitalMarket/Pages/Financialprogram.aspx> (last visited Nov. 12, 2011).

⁷⁹ Law No. 95 of 1992 (Law of Capital Market), *Al-Jarida Al-Rasmiyya*, 22 June 1992, vol. 25, arts. 63, 64 (Egypt).

⁸⁰ *Id.* arts. 63-69.

⁸¹ *Id.* art. 69 (unless the EFSA's Chairman requests the initiation of criminal action against the violators, they will not be charged with any violations. In this sense, the law gives the EFSA's Chairman an exclusive authority to initiate criminal actions against any violations criminalized in the CML).

⁸² *Id.*

⁸³ This explains the consecutive large number of amendments of the CML's executive regulations in the last few years by Ministerial Decrees No. 46/2004, 192/2005, 1/2006, 14/2006, 139/2006, 140/2006, 141/2006, 301/2006, 314/2006, 84/2007, 12/2007, 126/2008 and others. See ALRAFIE, *supra* note 54, at 23-25 (discussing the features of CML and describing flexibility as one of the most significant features of that law).

⁸⁴ On the one hand, procedural guarantees include drafting of the first bill by specialized professionals, then revising it by a competent Parliamentary committee, and finally submitting it to a Parliamentary debate. On the other hand, objective guarantees include issuing an explanatory memorandum, which provides guide-

essary for the application of statutes, they are only valid insofar as they do not contradict the main statute.⁸⁵ Furthermore, executive regulations may not add to, amend, or disable the provisions of the statute for which they are issued.⁸⁶ Therefore, adding a chapter to the executive regulations to manage an area of the law that exceeds the scope of what was originally statutorily regulated is considered adding to the law and raises doubts about such regulations' validity.

The Egyptian government has increasingly used executive regulations to govern different areas of the capital market. For instance, the government added several activities related to securities, such as regulating the buying of securities with margin, borrowing securities for sale,⁸⁷ and securitization.⁸⁸ Executive regulations have also set forth rules banning the manipulation of prices and insider trading in its Eleventh Part.⁸⁹ Furthermore, executive regulations presented the first comprehensive takeover regulation in Egypt in 2007.⁹⁰ The importance of executive regulations in securities is clear, however, the excessive use of secondary statutes in regulating the capital market raises legitimate fears about the law's quality and validity.⁹¹

3.2. Institutional Framework: EFSA

The Egyptian Parliament issued Law No. 10 in 2009, establishing the EFSA by merging all entities involved with non-banking financial markets.⁹² Replacing, *inter alia*, the CMA,⁹³ the EFSA became the

lines to help the drafters of the executive regulations, the practitioners and the court to understand the law and capture the intent of the articles therein.

⁸⁵ See ABDUL-AZIZ, *supra* note 8.

⁸⁶ Case no. 528/1975/ Court of Cassation (Egypt).

⁸⁷ See Ministerial Decree No. 48 of 2007 (Regulating Buying Securities with Margin and Borrowing Securities for Sale), *Al-Waqa'i' al-Misriyah*, 22 Mar. 2007, vol. 66 (Egypt).

⁸⁸ See Ministerial Decree No. 46 of 2004 (Regulating the Securitization Activity), *Al-Jarida Al-Rasmiyya*, 18 Nov. 2004, vol. 260 (Sup.) (Egypt).

⁸⁹ See Ministerial Decree No. 141 of 2006 (Regarding the addition of Rules Banning the Manipulation of Prices and Exploiting Insider Information), *Al-Waqa'i' al-Misriyah*, 29 Apr. 2006, vol. 93 (Egypt).

⁹⁰ See Ministerial Decree No. 12 of 2007 (Regulating Acquisitions Through Tender Offers), *Al-Waqa'i' al-Misriyah*, 4 Feb. 2007, vol. 26 (Egypt).

⁹¹ See Ahmad A. Alshorbagy, *Orascom Telecom versus France Telecom: A Case Study on Egyptian Takeover Law*, 20 INFO. & COMM. TECH. L. 157 (2011).

⁹² Law No. 10 of 2009 (Regulating Non-Banking Financial Markets and Instruments), *Al-Jarida Al-Rasmiyya*, 1 Mar. 2009, vol. 9 (Egypt).

⁹³ *Id.* art. 3 ("The Authority shall replace the Egyptian Insurance Supervisory Authority, the Capital Market Authority, and the Mortgage Finance Authority in enforcing the provisions of the Insurance Supervision and Control Law no. 10 of 1981, the Capital Market Law no. 95 of 1992, the Depository and Central Registry Law no. 93 of 2000, the Mortgage Finance Law no. 148 of 2001, as well as any

major supervisor of non-banking financial markets and instruments including capital markets, derivative markets, insurance activities, mortgage finance, financial leasing, and factoring and securitization.⁹⁴ As a unified public authority, the EFSA harmonizes financial market regulation to ensure better supervision and more orderly markets.⁹⁵

The EFSA is a public reporting authority and is attached to the Ministry of Investment as the law stipulates.⁹⁶ Although EFSA has the power to decide most matters presented to it, it must obtain approval from the Minister of Investment for some of its decisions. For instance, when incorporators form a corporation,⁹⁷ a Ministerial Decree forms an evaluation committee of in kind shares upon the EFSA chairman's referral. This limits the EFSA's role to merely suggesting a course of action rather than actually rendering a binding decision.⁹⁸

Nevertheless, political and governmental influences are the real concern of the EFSA's subordination. The method of choosing and appointing the EFSA's board members also jeopardizes its independence. Because all EFSA's board members are appointed by the same method and authority – the Prime Minister upon the recommendation of the Minister of Investment – factors other than competence, like the individuals political affiliation, may affect board member nominations.⁹⁹ This, coupled with their four years renewable term, can also prejudice the judgment of board members who want to keep their positions.¹⁰⁰

other related laws and decrees that are part of the mandates of the above authorities. The Authority shall be considered the competent administrative body entitled to enforce the financial leasing provisions promulgated by Law no. 95 of 1995.”)

⁹⁴ *Id.* art. 2.

⁹⁵ *Id.* art. 4(a) (“The Authority shall maintain the safety, stability, organization and development of non-banking financial markets, and balance the market dealers rights. In addition, the Authority shall provide means and systems, and issue rules and regulations to guarantee the efficiency of non-banking financial markets and ensure transparency of activities undertaken.”).

⁹⁶ *Id.* art. 1(a).

⁹⁷ Establishing a public corporation under the Egyptian law requires going through several procedures, all of which fall under the following steps: drafting the articles of association and the charter of incorporation, subscribing, paying certain percentage of the nominal value of shares, inviting the founding assembly, the approval of the competent committee in the EFSA, the approval of the competent Minister and finally notarizing and registering the company. *See* MOSTAFA K. TAHA, ALSHRKAT ALTEGARIA [Commercial Companies] 145-84 (1998).

⁹⁸ ALRAFIE, *supra* note 54, at 23.

⁹⁹ Despite the multi-partisan political system, the National Democratic Party, controlled by influential businessmen, practically dominated all aspects of political life in Egypt before the January Revolution.

¹⁰⁰ The board formation could be enhanced. Lessons could be discerned from the organization of the French Autorité Des Marchés Financiers (Financial Market

In pursuit of its objectives, the EFSA enjoys powerful authority.¹⁰¹ Its authority falls under one of three categories: 1) license its activities to regulate the non-banking financial market; 2) inspect licensed entities, monitor market transparency, and disseminate information to effectively supervise the market; and 3) develop the non-banking financial market to enable communication and cooperation with similar foreign authorities.¹⁰² The EFSA's authority extends over

Authority – AMF) and the American Securities and Exchange Commission (SEC). Both the AMF and the SEC employ different strategies to ensure and sustain their independency, whether by dispersing the appointing authority of the members in France or by assuring that the commission remains non-partisan in the United States. Additionally, the wider formation of the board is an advantage due to the better representation and more experiences it allows. Having a staggered board is also urged to ease the transfer of powers from one board to another without shaking the stability of the authority.

¹⁰¹ See generally EGYPTIAN FINANCIAL SUPERVISING AUTHORITY, http://www.efsa.gov.eg/content/efsa2_en/efsa2_merge_about_en/efsa2_merge_efsa_en.htm#1 (last visited Sept. 12, 2011) (providing more details on the EFSA).

¹⁰² Presidential Decree No. 192/2009 (establishing the EFSA Charter), *Al-Jarida Al-Rasmiyya*, 14 June 2009, vol. 24, art. 4 (Egypt). The Decree enumerated the following list of authorities:

1. Licensing non-banking financial activities.
2. Inspecting entities licensed to operate in non-banking financial activities.
3. Overseeing the dissemination of non-banking financial markets-related information.
4. Ensuring transparency and competitiveness in rendering non-banking financial services through the proper control of non-banking financial markets.
5. Protecting and balancing non-banking market participants' rights
6. Taking necessary measures to limit market manipulation and fraud, taking into consideration the potential commercial risks relevant to that market.
7. Supervising training of non-banking market staffs and enhance their efficiency.
8. Communicating, cooperating and coordinating with other non-banking regulatory bodies abroad, which leads to the development of the means of supervision of non-banking financial markets.
9. Communicating, cooperating and coordinating with societies and organizations, which regulate the operation of financial supervision authorities across the globe, thus empowering the Authority to assume its competencies according to the best international practices.
10. Contributing to disseminating financial investment culture and awareness.

all capital market participants, including public corporations, intermediary companies, and investors.¹⁰³ Due to both the complexity of laws and regulations dealing with the capital market and then to EFSA's nascence, however, EFSA's staff still lack in experience, rendering them less than fully competent.¹⁰⁴ Like the EFSA, the Egyptian Exchange ("EGX") plays an important role in enforcing listing rules and disclosure requirements.¹⁰⁵

3.3. *Reforming Securities Regulations*

Before discussing the CML's reform proposal, it is crucial to examine the reasons of its current inefficiency and the effect of the January Revolution on the Egyptian capital market. This will help determine today's needs and the underlying purpose of the reform.

3.3.1. *Examining the Egyptian Market*

The Egyptian stock market dropped sharply following the eruption of the Revolution, incurring large losses in the two days it remained open—it then stayed closed until March 23.¹⁰⁶ The Revolution shook investor's confidence in the Egyptian market, especially foreign investors. Given the negative impact on the Egyptian economy as a whole and the continuing political instability, a liquidity problem is

Id.

¹⁰³ ALRAFIE, *supra* note 54, at 36.

¹⁰⁴ For example, the contradiction in the EFSA's behavior over the course of the Mobinil case, the most recent takeover case in Egypt, reflects a deep misunderstanding of the regulations and randomness of its interpretation. *See generally Dispute over ownership of Egypt's Mobinil*, REUTERS (Apr. 10, 2010), <http://www.reuters.com/article/idUSLDE63906K20100410> (describing in greater detail the facts of the Mobinil Case). It is worth mentioning that a group of investors reported EFSA's Chairman along with former EGX Chairman to the Egyptian Public Prosecutor (General Attorney) on the eight's of July 2010, accusing them of destroying the national economy and charging them with the deterioration of EGX. A week later following this event, the latter was removed from his position after four years in service. *See* Ahmed Chalabi & Abdul Rahman Shalabi, *Prosecutor Starts Probe Into Reports of Abuse of Public Funds in the Stock Market*, ARABNET (July 13, 2010), <http://www.almasry-alyoum.com/article2.aspx?ArticleID=262362>.

¹⁰⁵ EGX is the authority attributed with enforcing the Listing Rules and ensuring companies' compliance with them. In this regard, EGX has the power to suspend and delist non-complying companies. *See infra*.

¹⁰⁶ *See* Nikhil Lohade, *Political Strife Roils Egypt's Markets*, WALL ST. J. (Jan. 26, 2011), <http://online.wsj.com/article/SB10001424052748703293204576105852367008580.html>; *see also* THE EGYPTIAN EXCH., EGX RESUMES TRADING ON WEDNESDAY (Mar. 23, 2011), <http://www.egyptse.com/English/newsdetails.aspx?NewsID=92476>.

to be expected too. In these two aspects, Egypt's economic crisis is similar to that of Greece.¹⁰⁷ Additionally, preexisting corruption and the inefficiencies of the CML and EFSA have affected the Egyptian capital market.

The purpose of reforming securities regulations in Egypt is to restore investors' confidence in the Egyptian markets. Furthermore, resolving the existing flaws in the law and its enforcement should attract new categories of investors, such as middle class investors. Middle class investors were reluctant to invest in the Egyptian capital market either from fear of corruption or due to lack of transparency. Attracting new categories of investors will compensate for some of the investors who left the Egyptian market, and will introduce new sources of cash flows that can reduce the expected liquidity problem.

3.3.2. Reform Proposals

This section proposes reforms to some areas of securities law in the light of the previous discussion about the purpose of the desired reforms.

3.3.2.1. Disclosure

Currently, the disclosure rules are scattered among different regulations. For example, the CML requires the subscription prospectus of any incorporating company to disclose certain information relating to the company's purpose, its capital, its incorporators or previous shareholders, and its future plans.¹⁰⁸ CML also requires each corporation to present a semi-annual report, supported by documents, to the EFSA summarizing its activities, performance, and describing its financial status.¹⁰⁹

In addition, the Listing Rules impose the largest part of disclosure requirements.¹¹⁰ Articles 13 and 14 of the Listing Rules define the scope of disclosure by limiting it to necessary and document sup-

¹⁰⁷ Abdul-Rahman Shalaby, *EFSA Demands the Continuity of the Exchange's Closure Until the Election of a Civil Authority*, Almasy Alyoum (mentioning that although Greece's crisis is in essence a debt crisis, it is similar to Egypt's crisis in two aspects. Both crises have shacked investor confidence in the economy, and have caused a liquidity problem. He further explains that Greece did not start recovering from its crisis except with the assistance of a great European subsidy, which contributed to restoring the confidence in their economy and solved the liquidity problem.).

¹⁰⁸ Law No. 95 of 1992 (Law of Capital Market), *Al-Jarida Al-Rasmiyya*, 22 June 1992, vol. 25, art. 5 (Egypt).

¹⁰⁹ *Id.* arts. 6,7.

¹¹⁰ See Chairman of the Capital Market Authority Decree No. 30 of 2002 (defining the rules of listing and delisting), *Al-Jarida Al-Rasmiyya*, 18 June 2002, arts. 12-19 (Egypt).

ported information that does not affect the company's stability.¹¹¹ Furthermore, the Listing Rules require the board of directors of any listed company to present an annual report that summarizes the contracts and agreements between the company and any of its subsidiaries or any other related party.¹¹² The rules also require the company to disclose any fundamental changes in information initially filed in the listing prospectus.¹¹³ The Stock Exchange publishes this disclosed information once received.¹¹⁴

Although disclosure is adequately regulated, disclosure requirements are not fully complied with. The problem with disclosure is two-fold. First, Egyptian investors did not understand the purpose of disclosure requirements.¹¹⁵ Concerns arose as some legal literature discussed how transparency and disclosure requirements impinge company and controlling shareholder privacy.¹¹⁶ Furthermore, the high concentration of ownership in Egyptian corporations has amplified this problem. Controlling shareholders feel that they *own* the whole corporation, and that the disclosure rules require them to disclose personal wealth information. This Egyptian investor mentality, coupled with weakly applied EFSA and EGX law enforcement mechanisms, has led to long-term non-compliance with the disclosure requirements.

Fortunately, awareness of the importance of corporate governance practices, including disclosure, arose in the last few years. Since 2004, the law imposes daily fines for delays in submitting financial statements.¹¹⁷ In 2008, the penalties of noncompliance with disclosure requirements were significantly increased from a maximum of 50,000 EGP to a maximum of one million EGP.¹¹⁸ EGX has also taken stricter measures in enforcing the law. In 2009, EGX suspended the activities on shares of twenty-nine corporations that were not in compliance with the latest Listing Rules.¹¹⁹ This was followed by a massive wave of delisting of companies that failed to adjust to the new rules within the prescribed period.¹²⁰ While financial disclosure has improved sig-

¹¹¹ *Id.* arts. 13, 14.

¹¹² *Id.* art. 17

¹¹³ *Id.* art.18.

¹¹⁴ *Id.* art. 12/2.

¹¹⁵ ALI EL-DEAN, *supra* note 53, at 43.

¹¹⁶ *Id.*; *see also* ALRAFIE, *supra* note 54, at 506.

¹¹⁷ Law No. 95 of 1992 (Law of Capital Market), *Al-Jarida Al-Rasmiyya*, 22 June 1992, vol. 25, art. 67 (Egypt).

¹¹⁸ *Id.* art. 65.

¹¹⁹ THE EGYPTIAN EXCH., 2009 ANNUAL REPORT 16 (2010).

¹²⁰ *Id.* ("The number of listed companies continued to decrease, reaching 306 companies at the end of 2009, down from 373 at the end of 2008, owing to EGX effec-

nificantly over the years, non-financial disclosure in areas like corporate structure or governance remains largely inadequate.¹²¹

The problem with disclosure is not related to the inadequacy of the rule, but rather with its compliance. Improved compliance is crucial. Though delisting non-complying corporations enhanced disclosure practices, it has consequently led to a decline in market capitalization.¹²² Thus, educating investors, assisting corporations, and providing them with incentives to comply with the disclosure requirements are the best means to improve disclosure practices.

3.3.2.2. *Insider Trading*

Until 2006, a single article regulated insider trading, which imposed largely insufficient penalties on violators.¹²³ The Eleventh Part was then added to the CML's executive regulations, regulating price manipulation practices and insider trading.¹²⁴ This new Part added clarity by defining terms like insider, insider information, and material information.¹²⁵ It also widened the scope of prohibition on using and benefitting from insider information, and expressly raised violators' civil and criminal liability.¹²⁶ Moreover, the Listing Rule's 2009 amendment sets a blackout period for an insider that extends up to 15 days before and 3 days after the issuance or publication of any material information.¹²⁷ Penalties on violators were raised to at least two

tive policy in enforcing listing, disclosure and corporate governance rules on issuers.”).

¹²¹ THE WORLD BANK, REPORT ON THE OBSERVANCE OF STANDARDS AND CODES (ROSC): A CORPORATE GOVERNANCE ASSESSMENT FOR THE ARAB REPUBLIC OF EGYPT 13 (June 2009) (mentioning for example that the remuneration policy for board members was disclosed only by 13 percent of EGX-30 companies – which contains the largest thirty listed companies – in 2007, 16 percent disclosed their governance structure such as the board level committees and only three percent disclosed policies with respect to their internal audit, internal control, and external audit process).

¹²² THE EGYPTIAN EXCH., 2010 QUARTERLY REPORT 10 (Jan.-Mar. 2010).

¹²³ Law No. 95 of 1992 (Law of Capital Market), *Al-Jarida Al-Rasmiyya*, 22 June 1992, vol. 25, art. 64 (Egypt). Before the article was amended in 2008, persons who were found guilty of insider trading were punished by at least two year of imprisonment and/or a fine that does not exceed 50,000 EGP, which is less than 10,000 USD.

¹²⁴ Minister of Economics and Foreign Trade Decree No. 135 of 1993 (Executive Regulations of the Capital Market Law), *Al-Jarida' al-Rasmiyya*, 8 Apr. 1993, vol. 81 F., pt. 11 (Egypt).

¹²⁵ *Id.* art. 319.

¹²⁶ *Id.* arts. 318, 322, 323.

¹²⁷ See Chairman of the Capital Market Authority Decree No. 30 of 2002 (defining the rules of listing and delisting), *Al-Jarida Al-Rasmiyya*, 18 June 2002, art. 19 (Egypt).

years imprisonment and/or up to twenty million EGP.¹²⁸ These amendments and measures have decreased the insider trading that the Capital Market Authority recognized as an immense problem a few years ago.¹²⁹ Most market participants recognize insider trading as an “ongoing, albeit diminishing” issue.¹³⁰

While the enhanced insider trading regulation is essential to its elimination, unmitigated impediments include corruption, lack of EFSA and EGX independence, and impaired law enforcement. Many hope that reforms following the January Revolution will overcome these impediments and achieve new levels of equality and transparency in the Egyptian capital market. Improved disclosure practices provide more transparency to market participants, and therefore contributes to solving the insider trading problem.

3.3.2.2.1. *Price Manipulation*

As with insider trading, price manipulation was regulated by a general CML provision that gave the Stock Exchange Chairman the power to suspend manipulative transactions.¹³¹ Fines, comparably trivial to the violations’ market impact, were used to punish certain forms of price manipulation.¹³² The CML’s executive regulations, however, regulated price manipulation more comprehensively in 2006.¹³³

The Eleventh Part of the executive regulations defines price manipulation and gives several examples of manipulative practices, including acts that were not criminalized before.¹³⁴ These now illegal acts include spreading rumors and performing transactions on a certain security to create delusionary circulation and artificially raise its

¹²⁸ Law No. 95 of 1992 (Law of Capital Market), *Al-Jarida Al-Rasmiyya*, 22 June 1992, vol. 25, art. 64 (Egypt).

¹²⁹ THE WORLD BANK, REPORT ON THE OBSERVANCE OF STANDARDS AND CODES (ROSC): A CORPORATE GOVERNANCE ASSESSMENT FOR THE ARAB REPUBLIC OF EGYPT 7 (Mar. 2004).

¹³⁰ THE WORLD BANK, *supra* note 121, at 19.

¹³¹ Law No. 95 of 1992 (Law of Capital Market), *Al-Jarida Al-Rasmiyya*, 22 June 1992, vol. 25, art. 21 (Egypt).

¹³² For example, disclosing incorrect information in the prospectus or in the company’s records. *See* Law No. 95 of 1992 (Law of Capital Market), *Al-Jarida Al-Rasmiyya*, 22 June 1992, vol. 25, art. 63/3-5 (Egypt).

¹³³ Minister of Economics and Foreign Trade Decree No. 135 of 1993 (Executive Regulations of the Capital Market Law), *Al-Jarida’ al-Rasmiyya*, 8 Apr. 1993, vol. 81 F., pt. 11 (Egypt).

¹³⁴ *Id.* art. 319 (defining price manipulation as any action or abstention aiming at influencing the price of securities that would harm all or some of the investors in the securities market).

price.¹³⁵ The Listing Rules also prohibit spreading any undocumented information that does not conform to the reality of the corporation.¹³⁶ As a further deterrent, the law increased fines on violators from a maximum of one hundred thousand EGP to twenty million EGP.¹³⁷ Furthermore, the law holds the actual corporation manager, in most cases the controlling shareholder, personally liable for violations committed by his corporation.¹³⁸

Improving the regulation of price manipulation in the Egyptian capital markets reduced the prevalence of such practices. The underlying problem of price manipulation, however, is not its lack of regulation, but market supervision and law enforcement. This can be improved by granting the EFSA more independence and by applying the law equally to all investors—which necessarily requires developing more means to battle corruption.

3.3.2.2.2. *Takeovers*¹³⁹

Takeovers rarely occurred in Egypt until recently.¹⁴⁰ “The increasing number of mergers and acquisitions in the banking, communication, and construction sectors,”¹⁴¹ led the Egyptian government to

¹³⁵ *Id.* arts. 319(a), 321; *see also* ALRAFIE, *supra* note 54, at 553 (demonstrating the shortage of CML in regulating price manipulation before it was regulated in the executive regulations. An example of a form of price manipulation that was not previously criminalized occurred in the Egyptian stock markets when two speculators, by switching their roles from buyers to sellers every other day, increased the share value of the Egyptian British Bank by five percent daily from 80 EGP to 210 EGP. The Minister of Economy was recalled before the Egyptian Parliament because of this incident, who asserted that the two speculators benefited from the vulnerability of the law. The two speculators were not punished.)

¹³⁶ Chairman of the Capital Market Authority Decree No. 30 of 2002 (defining the rules of listing and delisting), *Al-Jarida Al-Rasmiyya*, 18 June 2002, art. 13 (Egypt).

¹³⁷ Law No. 95 of 1992 (Law of Capital Market), *Al-Jarida Al-Rasmiyya*, 22 June 1992, vol. 25, art. 63/3 (Egypt).

¹³⁸ *Id.* art. 68.

¹³⁹ *See* Alshorbagy, *supra* note 91.

¹⁴⁰ Abdel Shahid, *supra* note 47, at 14.

¹⁴¹ Alshorbagy, *supra* note 91, at 157 n.3 (“In the last decade, mergers and acquisitions deals have increasingly taken place in the Egyptian market. Takeovers soared in 2008 mounting to almost 20% of the total value of trade in that year. Takeovers decreased in 2009 partially because of the effect of the universal financial crisis, as revealed in the following table:

regulate takeovers for the first time in 2007.¹⁴² Unfortunately, the government chose to regulate takeovers by issuing secondary regulations rather than by drafting statutes, for example, by adding a new part to the CML executive regulations.¹⁴³ While this accelerated the regulatory process and provided more legal flexibility, the many issues of using secondary regulations to govern takeovers have negated its benefits because of their inefficiencies.¹⁴⁴

The Egyptian takeover regulations largely adopted the European takeover approach. Similar to the European takeover law,¹⁴⁵ the Egyptian takeover regime features a mandatory tender offer rule.¹⁴⁶ The mandatory tender offer requires anyone seeking control over a target corporation to launch a tender offer to purchase all the outstanding shares of the target corporation at the highest price an acquirer paid in a tender offer during the previous twelve months.¹⁴⁷ Furthermore, the non-frustration rule prohibits target corporations in Egypt from committing any action that may be considered a “significant detrimental event” that may hinder the completion of the tender

Year	Number of Deals	Total Value*	Total Market Trade*	Percentage
2006	42	39	287	13.5%
2007	28	37	363	10.2%
2008	28	105	530	19.8%
2009	11	42	448	9.4%

*Values are represented in billions of EGP.)

See THE EGYPTIAN EXCH., 2009 ANNUAL REPORT (2010); THE EGYPTIAN EXCH., 2008 ANNUAL REPORT (2009); THE EGYPTIAN EXCH., 2007 ANNUAL REPORT (2008); THE EGYPTIAN EXCH., 2006 ANNUAL REPORT (2007), http://www.egyptse.com/English/services_reports.aspx.

¹⁴² See Taher S. Mo’emn, AL’ISTHWATH A’LA ALSHARIKA: DRASA NTHRIA WA TATBIKIA [Acquiring the Company: A Theoretical and Empirical Study] 63-64 (2009) (discussing two of the most prominent deals in the building materials and construction sector and their significant effect on the Egyptian market).

¹⁴³ Minister of Economics and Foreign Trade Decree No. 135 of 1993 (Executive Regulations of the Capital Market Law), *Al-Jarida’ al-Rasmiyya*, 8 Apr. 1993, vol. 81 F., pt. 12 (Egypt).

¹⁴⁴ Alshorbagy, *supra* note 91, at 166.

¹⁴⁵ Directive 2004/25, of the European Parliament and of the Council of 21 Apr. 2004 on Takeover Bids, arts. 12, 23, 2004 O.J. (L 142) (EC).

¹⁴⁶ See Alshorbagy, *supra* note 91, at 162.

¹⁴⁷ Minister of Economics and Foreign Trade Decree No. 135 of 1993 (Executive Regulations of the Capital Market Law), *Al-Jarida’ al-Rasmiyya*, 8 Apr. 1993, vol. 81 F., arts. 353-56 (Egypt); Directive 2004/25, of the European Parliament and of the Council of 21 Apr. 2004 on Takeover Bids, art. 25, 2004 O.J. (L 142) (EC); see also Alshorbagy, *supra* note 91, at 162-66 (explaining the mandatory tender offer requirement and examining its points of weakness including the inefficiency of the price determination mechanism of the mandatory tender offer).

offer as the law defines.¹⁴⁸ This rule extends from the time that the decision approving the tender offer is published until the deal's conclusion.¹⁴⁹ The regulations, however, do not impose a breakthrough rule on target corporations that prohibit its board of directors from adopting general pre-bid defensive tactics – such as “poison pills” – against prospective bidders as required under the European Directive on takeovers.¹⁵⁰

The executive regulations governing takeovers have several substantive shortcomings not limited to threats of illegality and unconstitutionality.¹⁵¹ The Egyptian regulations omitted the breakthrough rule, which is an integral part of the European scheme.¹⁵² This omission is a problematic because it renders the non-frustration rule futile. Moreover, because the language employed in the Egyptian regulations is so poorly drafted, it suggests a different meaning than that originally intended. For example, the method to determine the mandatory tender price offer demonstrates these problems.¹⁵³

¹⁴⁸ Minister of Economics and Foreign Trade Decree No. 135 of 1993 (Executive Regulations of the Capital Market Law), *Al-Jarida' al-Rasmiyya*, 8 Apr. 1993, vol. 81 F., art. 326 (Egypt) (defining a significant detrimental event as “any expected event arising after launching the offer that would have a negative effect on the target company, its business or the share value.” Specifically, Article 343 expressly mentions two examples of detrimental events. The first is increasing the target capital, or issuing new convertible bonds if such an increase would make the acquisition difficult or impossible. The second example is a broad one that covers any action, which would detrimentally impact the target's assets or increase its obligations).

¹⁴⁹ *Id.* art. 343; Directive 2004/25, of the European Parliament and of the Council of 21 Apr. 2004 on Takeover Bids, art. 9, 2004 O.J. (L 142) (EC).

¹⁵⁰ See Directive 2004/25, of the European Parliament and of the Council of 21 Apr. 2004 on Takeover Bids, art. 11, 2004 O.J. (L 142) (EC); see also Alshorbagy, *supra* note 91, at 166 (discussing the board passivity rules under the Egyptian Takeover regulations and explaining the inefficiency of dropping the breakthrough rule from the regulations).

¹⁵¹ See Directive 2004/25, of the European Parliament and of the Council of 21 Apr. 2004 on Takeover Bids, arts. 14, 15, 2004 O.J. (L 142) (EC). Originally, takeovers were barely regulated in the CML, which means that by regulating takeovers, the CML's executive regulations may have added to the law. This raises many doubts about the validity of the new regulations.

¹⁵² See Marco Ventoruzzo, *Europe's Thirteenth Directive and U.S. Takeover Regulations: Regulatory Means and Political and Economic Ends*, 41 TEX. INT'L L. J. 171, 200 (2006) (explaining the breakthrough rule).

¹⁵³ Minister of Economics and Foreign Trade Decree No. 135 of 1993 (Executive Regulations of the Capital Market Law), *Al-Jarida' al-Rasmiyya*, 8 Apr. 1993, vol. 81 F., art. 354 (Egypt) (requiring the price of the mandatory tender offer to be as high as the highest price paid by the acquirer, or any of its affiliates, in a previous tender offer during the 12 months preceding the tender offer in question. However,

Because of these inefficiencies, Egyptian takeover regulations generally discourage takeovers. The mandatory tender offer requirement inevitably increases the takeover price. Moreover, the *all-cash* rule, which requires the consideration for the transaction to be paid in cash, makes it harder for any potential acquirer to succeed.¹⁵⁴ The breakthrough rule's omission can often lead the acquirer poorly positioned under Egyptian takeover rules because the incumbent now controls pre-bid defensive measures that make it unlikely for any potential raider to succeed in a company takeover.¹⁵⁵

The regulations' negative effect also extends to the company's minority shareholders, as they do not have adequate protection. By discouraging takeovers, the regulations favor the interests of incumbent controlling shareholders over those of minority shareholders.¹⁵⁶ "Although the regulations guarantee minority shareholders a fair exit strategy if a takeover attempt is successful, the protection is negated by the great unlikelihood of a successful hostile takeover."¹⁵⁷

To summarize, securities regulation in Egypt has vastly developed over the past few years. Legal and institutional changes have enhanced the Egyptian CML either by amending inefficient provisions or by adding new provisions to address legislative gaps and regulate new areas of the law. It is fair to say that the current CML in Egypt is a substantively good law in general, however, it is not very well organized. The same topic is sometimes dealt with in different places and regulations, which makes it difficult for investors to understand the law. Moreover, a few parts of the law need to be improved, for example, the regulation of takeovers. Also, some topics addressed in the executive regulations need to be incorporated in the statute itself to avoid any doubts about its validity.

The main concern about CML is regarding its enforcement. The EFSA, as the capital market's main supervisor, should be granted more independence by stating expressly in the law that it is an institution independent from the government and enhancing the board's formation. This will allow the EFSA to exercise its discretion freely and will guarantee that its decisions be unbiased. Eventually this will also lead to applying the law equally to all investors, curbing the effects of corruption. The non-compliance of market participants is sometimes attributed to the lack of awareness of the importance of corporate governance. It is thus equally important to focus the reform endeavors on

the article neglects the case where no previous tender offer exists, despite it is the case that is more likely to occur.).

¹⁵⁴ *Id.* art. 358.

¹⁵⁵ Alshorbagy, *supra* note 91, at 166.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

educating market participants of the importance of complying with the law. Achieving higher levels of transparency, fairness and accountability will raise confidence in the Egyptian capital markets, allay the anxiety of current investors, and attract new investors.

4. INVESTMENT

4.1. *History and Development of Investment in Egypt*

President Gamal Abdel-Nasser, from 1952 to 1970, adopted nationalism as an economic policy and promoted the role of the public sector in developing the economy.¹⁵⁸ This resulted in only temporary economic development because of unrealistic development programs and bureaucratic policies.¹⁵⁹ Economic laws in this era were concentrating on developing agriculture, confiscating property, governing and organizing public companies, controlling prices, nationalizing laws, and other similar efforts.¹⁶⁰

President Al-Sadat, 1970 to 1981, transformed economic policy from a public sector based economy to a private sector based economy, adopting the “Open Door Policy,”¹⁶¹ which aimed to liberalize trade and free the economy.¹⁶² The Open Door Policy failed, however, because the main sources of Egyptian revenue, including the Suez Canal dues, the oil industry, and leveraging the political location of Egypt, stayed under the public sector’s control.¹⁶³ Also, Egypt’s external debt increased due to the extensive import of goods.¹⁶⁴ The Egyptian GDP, nevertheless, registered high scores due to services produced, rather than economic production and trade.¹⁶⁵ In other words, the revenue obtained from the Suez Canal and similar sources of income and the return of exporting labor to the Gulf region helped to increase the Egyptian GDP.¹⁶⁶ Thereafter, a Gulf area recession caused Egyptians working in the Gulf area to return to Egypt causing loss to the Egyptian economy.¹⁶⁷ President Mubarak, from 1981 to 2011, made use of Egypt’s geopolitical position in the Middle East for Egypt’s benefit. For instance, the Egyptian government received subsidies in return for enhancing the American role in the Middle East.¹⁶⁸ Economic laws

¹⁵⁸ MARAT TERTEROV, *DOING BUSINESS WITH EGYPT* 9 (2001).

¹⁵⁹ Abu-Odeh, *supra* note 40, at 359.

¹⁶⁰ *Id.* at 357-58.

¹⁶¹ TERTEROV, *supra* note 158, at 4.

¹⁶² *Id.* at 9.

¹⁶³ Abu-Odeh, *supra* note 40, at 360.

¹⁶⁴ *Id.* at 361.

¹⁶⁵ TERTEROV, *supra* note 158, at 11.

¹⁶⁶ *Id.*

¹⁶⁷ Abu-Odeh, *supra* note 40, at 360.

¹⁶⁸ *Id.* at 362.

during Mubarak's era concentrated on foreign direct investment, corporate, telecommunications, imports and exports, competition, free tariffs zones, and industrial cities laws.¹⁶⁹

The main sources of Egyptian economy are from Suez Canal dues, tourism, the gas industry, and remittances from expatriates working abroad.¹⁷⁰ Aside from industry and agriculture, trade lies heavily as one of the primary Egyptian economic activities.¹⁷¹ According to the World Bank's 2008 estimation, Egyptian exports of goods and services mount to 53,277 million USD, while imports of goods and services are 63,086 million USD,¹⁷² Egypt's main imports are agricultural products, food components, medicines, metal industrial components and their primary exports are oil and cotton.¹⁷³ Egypt's main trade partners include the United States, China, the United Kingdom, Spain, Germany, Syria, and Saudi Arabia.¹⁷⁴

The main investment tools in the Egyptian market include: 1) privatization, 2) build-own-operate-transfer (BOT) projects, 3) franchising, and 4) investment legal incentives.¹⁷⁵ The Egyptian government started moving toward putting an end to the country's monopoly over the industrial and investment sector and encouraging private investment in 1999.¹⁷⁶ Privatization included sectors such as construction, tourism, transportation, and finance.¹⁷⁷ The Egyptian government also started encouraging BOT projects in different sectors such as infrastructure in 1999.¹⁷⁸ Egypt is considered the franchising center of the Middle East, whose value has grown to over 14 billion

¹⁶⁹ *Id.* at 365.

¹⁷⁰ GIL FEILER, *THE MIDDLE EAST IN THE NEW MILLENNIUM: ECONOMIC DEVELOPMENT & BUSINESS LAW* 46-49 (2000).

¹⁷¹ *Id.* at 47-49.

¹⁷² THE WORLD BANK, *EGYPT: COUNTRY DATA PROFILE*, http://ddp-ext.worldbank.org/ext/ddpreports/ViewSharedReport?REPORT_ID=9147&REQUEST_TYPE=VIEWADVANCED (last visited Nov. 14, 2011).

¹⁷³ FEILER, *supra* note 170, at 49.

¹⁷⁴ INT'L FRANCHISE ASS'N, *COUNTRY FACT SHEET: EGYPT*, <http://franchise.org/IndustrySecondary.aspx?id=45590> (last visited Nov. 11, 2011). For instance, the Egyptian market is the fourth exporter of American products in the Middle East and one of the most important importers of specific American products such as agricultural equipments and products. Also the United States is the second biggest foreign investor in the Egyptian market. U.S. COMMERCIAL SERV., *DOING BUSINESS IN EGYPT: 2010 COUNTRY COMMERCIAL GUIDE FOR U.S. COMPANIES*, http://www.franchise.org/uploadedFiles/Franchise_Industry/International_Development/Country_Profiles/Egypt_2010%20CCG.pdf (last visited Nov. 11, 2011).

¹⁷⁵ FEILER, *supra* note 170, at 49-55.

¹⁷⁶ *Id.* at 49.

¹⁷⁷ *Id.* at 50.

¹⁷⁸ *Id.* at 53.

USD.¹⁷⁹ President Al-Sadat's 1973 "open door" policy opened the door for franchising.¹⁸⁰ Around forty international franchisors are currently investing in Egypt; twenty-five in the food sector and fifteen in other franchising sectors.¹⁸¹ In the last decade, Egypt adopted new laws, regulations, and introduced several amendments to promote investment and enhance production. The best example of this is the Investment Law Incentives No. 8 of 1997, discussed below.¹⁸²

4.2. *Investment Law Incentives No. 8 of 1997 ("ILI")*

Scope of application: The ILI provides incentives, guarantees and benefits in case of investing in specific fields.¹⁸³ The list of these fields embodied in the ILI is not exclusive and the Cabinet can add other fields and activities.¹⁸⁴ Examples of included fields are: reclamation and cultivation of desert, animals and fish production, mining works, hotels and motels, tourists' transportation, transportation and storage of goods, air and maritime transportation, housing furnishings, roads and communication industry electricity services, medical sets, financial leases, securities, and software production, among others.¹⁸⁵

Incentives: ILI provided incentives and guarantees apply to both foreign and local investors.¹⁸⁶ Examples of guarantees include protection against confiscation, nationalization, administrative sequestration, seizure, price control, cancellation of licenses, and the like.¹⁸⁷ One example of an incentive is the exemption of taxes for a specific period of time.¹⁸⁸ In addition, the ILI specifies geographical areas, called free zones, which the Cabinet determines.¹⁸⁹ Free zones

¹⁷⁹ *Economic Update: Bright Franchising Future*, OXFORD BUS. GROUP (Feb. 23, 2007), http://www.oxfordbusinessgroup.com/economic_updates/bright-franchising-future.

¹⁸⁰ The Open Door Policy is the policy through which President Mohamed Anwar Al-Sadat, who stayed in presidency from 1970 to 1981, transferred the Egyptian economic policies to be more liberal with free trade that supports foreign investment. See Abu-Odeh, *supra* note 40, at 360.

¹⁸¹ Kendal Tyre, *Franchising Sector in Egypt Receives Financial Boost*, NIXON PEABODY LLP (June 29, 2009), http://www.nixonpeabody.com/linked_media/publications/Franchise_Alert_06_29_09.pdf.

¹⁸² Law No. 8 of 1997 (Investment Incentives Law), *Al-Jarida Al-Rasmiyya*, 11 May 1997, vol. 19 (Egypt).

¹⁸³ *Id.* art. 1.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* art. 12.

¹⁸⁷ *Id.* arts. 8-14.

¹⁸⁸ *Id.* art. 16.

¹⁸⁹ *Id.* arts. 16-27.

are areas where investors in specific activities can receive high incentives such as removing customs, wide exemption from taxes, and fewer requirements on imports and exports.¹⁹⁰

Imports and exports: The Law of Importation and Exportation No. 118 of 1975 prevents foreigners from importing into Egypt.¹⁹¹ Even Egyptians need to be registered in the Registrar of Imports to import into Egypt.¹⁹² To facilitate investment, the ILI provides an exception to this rule, allowing investors in the activities provided by the ILI, Egyptians or foreigners, to import raw materials without being registered in the Registrar of Imports.¹⁹³

Settlement of disputes: Decree No. 170 of 2009 amended the ILI by establishing a dispute settlement center to resolve any conflicts arising between companies subject to the ILI, so long as the disputing parties agree.¹⁹⁴

Enforcement: The competent authority to enforce and supervise ILI application is the General Authority for Investment (“GAFI”). The ILI established the GAFI and is subject to the Minister of Investment.¹⁹⁵

4.3. *The Effects of the Revolution on the Egyptian Investment*

The January 25 Revolution had significant effects on investment and the economy. After the Revolution, Egypt suffered large losses in the production and services sectors.¹⁹⁶ These losses are estimated at 55 million to 100 million Egyptian pounds (“EGP”).¹⁹⁷ This includes loss of real estate value and also of stock.¹⁹⁸ International companies working in Egypt closed after sending their employees back

¹⁹⁰ *Id.*

¹⁹¹ Law No. 118 of 1975 (Law of Importation and Exportation), *Al-Jarida Al-Rasmiyya*, 25 Sep. 1975, vol. 39 (Egypt); *see also* Riad, *supra* note 20, at 119.

¹⁹² Law No. 118 of 1975 (Law of Importation and Exportation), *Al-Jarida Al-Rasmiyya*, 25 Sep. 1975, vol. 39 (Egypt).

¹⁹³ Law No. 8 of 1997 (Investment Incentives Law), *Al-Jarida Al-Rasmiyya*, 11 May 1997, vol. 19 (Egypt).

¹⁹⁴ Minister of Investment Decree No. 170 of 2009 (Establishing GAFI Investors’ Disputes Settlement Center), *Al-Jarida Al-Rasmiyya*, 18 Aug. 2009, vol. 192 (Egypt).

¹⁹⁵ Presidential Decree No. 284 of 1997 (Establishing the General Authority For Investment), *Al-Jarida Al-Rasmiyya* 9 Aug. 1997, vol. 32 (Egypt).

¹⁹⁶ *Egypt Economic Losses on the Rise*, AL BAWABA (Feb. 10, 2011), <http://www1.albawaba.com/main-headlines/egypt-economic-losses-rise>.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

to their respective countries, banks were closed for several days, and the stock exchange remained closed for nearly two months.¹⁹⁹

Consequently, the GDP is expected to decrease from 5.8% in 2010 to 2.9% in 2011.²⁰⁰ Also, industrial production is expected to decrease from 5.1% in 2010 to 1.3% in 2011.²⁰¹ Moreover, the EGP exchange rate compared to the American dollar is expected to increase from 5.97 in 2010 to 6.31 in 2011.²⁰² Similarly, inflation is expected to increase from 11.8% in 2010 to 12.0% in 2011.²⁰³ To boost the Egyptian economy's recovery and to improve Egypt's post-Revolution financial situation, Egyptian investment law needs to be reconsidered.

4.4. Recommendations to Restore Investment Cycle After the January 25 Revolution

General Recommendation: The Egyptian government needs to do intensive work to restore confidence in the Egyptian economy. To achieve higher gross rates, more attention should be given to the productive sectors, such as industry, agriculture, and trade, in contrast to the declining services sectors, such as the Suez Canal, tourism, and expatriates working abroad. It may be useful to institute programs to spread awareness, and offer training services and investment advice for specific kinds of young or uneducated investors.

The Islamic economic sector, represented in banks and companies working according to Islamic teachings, constitutes an extralegal sector representing a parallel market.²⁰⁴ These institutions are kept outside the legal organization in that they consider themselves as politically and economically powerful as the secular state.²⁰⁵ Ignoring such a large amount of Muslim worker owned capital causes a huge loss to the economy and leads investors to work in a parallel mar-

¹⁹⁹ Heineken Company evacuated 25 employees, Nestlé SA evacuated around 20 employees, and Nissan Motor Co. stopped its operations in Egypt. See *Egypt Unrest: Banks Reopen After Week of Closure*, BBC NEWS (Feb. 6, 2011), <http://www.bbc.co.uk/news/business-12376403>; Adam Mitchell & Nour Malas, *Firms Pull Staff, Halt Operations*, WALL ST. J. (Feb. 1, 2011), <http://online.wsj.com/article/SB10001424052748703439504576115631410098672.html>; Ivan Watson, *Egyptian Stock Market Opens, Plunges*, CNN (Mar. 23, 2011), http://articles.cnn.com/2011-03-23/world/egypt.stock.market_1_stock-market-egyptian-voters-plunges?s=PM:WORLD.

²⁰⁰ Oren Klachkin, *Country & Industry Forecasting: Egypt*, IHS GLOBAL INSIGHT, <http://myinsight.ihsglobalinsight.com/servlet/cats?filterID=1147&serviceID=4078&TypeID=15431&pageContent=report&pageType=ALL> (last visited Oct. 15, 2011).

²⁰¹ *Id.* at 27.

²⁰² *Id.* at 37.

²⁰³ *Id.* at 4, 35.

²⁰⁴ Abu-Odeh, *supra* note 40, at 366.

²⁰⁵ *Id.* at 367.

ket.²⁰⁶ Hence, the Egyptian market's regular cycle needs to involve Islamic capital. For instance, to fully involve them in the market, Muslim workers should be allowed to have their own labor unions and organizations. This would allow their capital to flow through the entire economic cycle, instead of isolating it within their own legal, economic and political cocoons.²⁰⁷

The formalities and procedures required to open new business investments in Egypt need to be streamlined through legal reform. Complicated procedures reduce investment opportunities and the chances of expanding businesses.²⁰⁸ Thus, to save time and money and encourage young investors, the required fees to establish a new business should be lowered, electronic procedures should be accessible, and the license issuing process should be easier.

Also, legal reform with regard to loans and financing should be reconsidered. Real or personal collateral are usually required to guarantee loans in Egypt.²⁰⁹ Real collateral usually consists of mortgages on movable and immovable assets.²¹⁰ The problem with real estate collateral is the difficulty in proving ownership as per the lending banks requirements.²¹¹ This difficulty is due to the lack of asset ownership registration with governmental authorities.²¹² Although Egypt has a comprehensive law on property registration, property owners are usually reluctant to satisfy property title registration because it helps them avoid paying high registration fees and taxes.²¹³ About 92% of Egyptians own unregistered property,²¹⁴ estimated at a value of 248 billion USD.²¹⁵ This property cannot be used as collateral for loans or to secure any other long-term contractual transaction.²¹⁶ Having easy, quick, and reasonable registration procedures creates better investment opportunities.

²⁰⁶ See *id.* at 366.

²⁰⁷ See *id.* at 380-81.

²⁰⁸ Abdul Ghaffar Shokr, *Tackling the Leviathan: Reforming Egyptian Bureaucracy for Improved Economic Growth*, in CTR. FOR INT'L PRIVATE ENTER. 11 (2010), <http://www.cipe-arabia.org/files/pdf/Bureaucracy-EN.pdf>.

²⁰⁹ See Z. Bahaa-Eldin, *Formal and Informal Finance in Egypt*, in LEGAL PLURALISM IN THE ARAB WORLD 210, 211 (Baudouin Dupret, Maurits Berger & Laila al Zwaini eds., 1999).

²¹⁰ *Id.*; see ALLEAUME, *supra* note 14, at 11-12.

²¹¹ Bahaa-Eldin, *supra* note 209, at 213.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Hernando De Soto, *Egypt's Economic Apartheid*, WALL ST. J. (Feb. 3, 2011), <http://online.wsj.com/article/SB10001424052748704358704576118683913032882.html>.

²¹⁵ *Id.*

²¹⁶ *Id.*

Other investment tools also need to be legally regulated. For instance, Egypt does not have a law that organizes franchising transactions.²¹⁷ Egypt has a specialized franchise association, the EFDA, but with little awareness of what franchising entails.²¹⁸ Economic risks, lack of franchising laws, and changes in political conditions represent the most important constraints to the development of Egyptian franchising.²¹⁹ Because no specific law regulates franchising in Egypt, general provisions of a host of different laws govern franchising transactions, including contracts, commercial transactions, intellectual property, taxation, insurance, and labor laws.²²⁰ The applicable law is usually the law that has the most proper linkage to the franchise agreement.²²¹ The application of such a variety of laws and regulations contradicts the specific nature of franchising transactions. These franchising transactions require high protection for both parties, especially with the fast growth of technology and the complexity of the recent technical aspects of international licensing transactions. Therefore, a specialized Egyptian franchising law is necessary because franchising parties usually prefer agreements to be governed by a simple and comprehensive law rather than different laws. The application of various laws complicates decisions on various issues arising from franchise agreements.

Getting the money to start a new program may pose an obstacle for investors. Hence, the government needs to help create access to credit. Providing government-lending programs to new businesses with reasonable interest rates may also prove beneficial.

Recommendations related to the ILI: The discretionary power granted to the Cabinet under the ILI should be limited to prevent abuse of power. For instance, if needed, the Cabinet has the right to add any other economic activity to those mentioned in the law.²²² Similarly, the Cabinet has absolute discretionary power to allow investors

²¹⁷ Radwa S. Elsaman, *Towards an Egyptian Franchising Law Based on a Comparative Study of the Laws Of The United States, China, and Malaysia* (Jan. 2009) (unpublished Ph.D. dissertation, American University) (on file with author).

²¹⁸ J. Perry Maisonneuve, *Franchising in the Middle East and North Africa: Business Perspective*, A.B.A. FORUM ON FRANCHISING & A.B.A. CTR. FOR CONTINUING LEGAL EDUC. 16 (2010).

²¹⁹ *Id.*

²²⁰ Elsaman, *supra* note 217.

²²¹ Michael K. Lindsey, *Introduction to Franchising in the Middle East: Navigating the Risks and Rewards of the World's Most Interested Market*, A.B.A. FORUM ON FRANCHISING & A.B.A. CTR. FOR CONTINUING LEGAL EDUC. 15 (2010); Maisonneuve, *supra* note 218.

²²² Law No. 8 of 1997 (Investment Incentives Law), *Al-Jarida Al-Rasmiyya*, 11 May 1997, vol. 19, art. 2 (Egypt).

to own the necessary land to exercise their activities.²²³ Also, the ILI gives the Cabinet the authority to grant any public sector owned land to investors who are subject to the ILI. Moreover, the Cabinet is given the absolute power to establish free zones.²²⁴ Likewise, the ILI prohibits decisions regulating the establishment and operation of projects except after obtaining Cabinet approval.²²⁵ Hence, giving the prime minister absolute discretion to decide ILI enforcement may lead to its abandonment, particularly in instances of corruption. Therefore, there should be a supervision or limitation of the absolute power granted to the prime minister in ILI application. This supervision may take place through the establishment of an authority or committee that is independent of the Cabinet. This committee may watch ILI enforcement to ensure that the ILI guaranteed incentives are effective.

Similarly, the ILI allows the prime minister to form a committee to decide upon any complaints investors submit against the administrative bodies enforcing the ILI rules.²²⁶ The ILI also requires that the prime minister must approve this committee's decisions.²²⁷ This leads to loss of neutrality because if the Cabinet is in a dispute, the deciding committee is not independent of the Cabinet. This rule should be amended so that the deciding committee is independent of the Cabinet. Similarly, GAFI, the competent authority that enforces and supervises ILI application, is subject to the Minister of Investment.²²⁸ GAFI needs to be independent from the Ministry of Investment to facilitate as much transparency as possible.

To attract investments and restore the Egyptian economy, the ILI should renew temporary incentives. For instance, the ILI provides tax exemptions and free tariffs for specific periods of time after the ILI becomes enforceable.²²⁹ These exemptions almost have expired and need to be renewed.

Finally, Law No. 114 of 2008 amended the ILI. This law excluded companies working in oil production, iron, and fertilizers from the scope of ILI application and from all investment incentives and guarantees.²³⁰ The amending law offers no reason for such exclusion

²²³ *Id.* art. 12.

²²⁴ *Id.* art. 29.

²²⁵ *Id.* art. 49.

²²⁶ *Id.* art. 66.

²²⁷ *Id.*

²²⁸ Presidential Decree No. 284 of 1997 (Establishing the General Authority For Investment), *Al-Jarida Al-Rasmiyya* 9 Aug. 1997, vol. 32, art. 1 (Egypt).

²²⁹ Law No. 8 of 1997 (Investment Incentives Law), *Al-Jarida Al-Rasmiyya*, 11 May 1997, vol. 19., art. 16 (Egypt) (as amended by Law No. 91 of 2005, 9 June 2005, vol. 23 (Egypt)).

²³⁰ Law No. 114 of 2008, *Al-Jarida Al-Rasmiyya*, 5 May 2008, vol. 18, art. 11 (Egypt).

except personal goals arising from financial corruption and private ends of its supporters. The exclusion of all companies working in these fields led to the elimination of investment in these sectors, concentrating these industries in the hands of very few producers. This concentration, in turn, led to monopolies and cartels. This law needs to be eliminated to protect competition and prevent monopolies. Similarly, Law No. 133 of 2010, preventing oil-refining companies established in free zones from benefiting of ILI provided tax exemptions,²³¹ also needs to be reconsidered.

5. CONCLUSION

Egypt underwent many economic and legal reforms that resulted in remarkable economic growth at the turn of the century. Due to widespread corruption, however, this economic growth mostly benefited the small clique of powerful officials and businessmen. Unsatisfied Egyptians then took their demands for a better life to the streets, culminating in the January Revolution. Although there were other political motivations to the Revolution, socioeconomic stances were at its heart.

The Revolution is expected to have a positive impact on curbing corruption and enhancing law enforcement. Still, the social anarchy and political instability caused by the Revolution have shaken investor confidence in the Egyptian market. To restore confidence in Egyptian markets and encourage post-Revolution investment, Egypt's economic laws, particularly the Capital Market Law and the Investment Law should be attractive to investors.

The CML was initially an incomprehensive regulation of Egypt's capital market and did not include vital activities and practices in its provisions. Due to several amendments over the years, the CML has become a substantively mature legislation. The major concern about Egypt's capital markets is a lack of legal compliance. Therefore, new methods that encourage better compliance must be developed.

Similarly, the ILI has progressively introduced a number of incentives designed to promote various aspects of investment within the last few years. Most of these incentives, however, ended due to either ILI operation or unfair practices that restricted competition and monopolized specific production sectors. The ILI needs to be reconsidered to restore investment in Egypt in the aftermath of the Revolution.

Raising legal compliance and developing methods to enhance its enforcement are amongst the most crucial reforms imminently re-

²³¹ Law No. 133 of 2010, *Al-Jarida Al-Rasmiyya*, 19 June 2010, vol., 24, art. 1 (Egypt).

quired to boost the Egyptian economy. These reforms will increase the level of transparency and promote investors' confidence in the Egyptian market.

**ARAB SPRING BRINGS WINDS OF CHANGE TO
THE MAGHREB AND MENA REGION: DOES THAT
SPELL OPPORTUNITY FOR INFRASTRUCTURE
DEVELOPMENT AND PROJECT FINANCE?**

*By Silvano Domenico Orsi**

“You must be the change you wish to see in the world.”**

TABLE OF CONTENTS:

I. INTRODUCTION	77
II. PROJECT FINANCE AND ITS CONSTRAINTS IN THE REGION	82
III. CURRENT SITUATION, SELECT PROJECTS, KEY AREAS OF OPPORTUNITY	89
1. <i>Tunisia</i>	89
2. <i>Egypt</i>	95
3. <i>Libya</i>	100
IV. OBLIGATIONS AND RISK MANAGEMENT	106
1. <i>Obligation to Deliver</i>	106
2. <i>Risk Management “Musts”</i>	107
V. POSSIBLE SOLUTIONS AFTER THE STORM	111
1. <i>Internationalization and Partnership</i>	111
2. <i>Combining Traditional Project Finance and Islamic Finance</i>	113
3. <i>CDM and Carbon Financing for Renewable Energy Projects</i>	120
VI. CONCLUSION	123

I. INTRODUCTION

Turmoil and revolution accompanied the 2011 Arab Spring, beginning in Tunisia and spreading to Egypt and Libya, bringing change across the Maghreb and Middle East and North Africa (“MENA”) region. Whether any of the new political, institutional or social reforms that might be implemented will actually work to attract international investment in the region, or work to increase opportunities for project finance and infrastructure development in general, remains to be seen.

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** Mahatma Gandhi, Indian philosopher, internationally esteemed for his doctrine of non-violence (1869-1948).

The outlook seems positive, however, especially in key areas such as clean energy, infrastructure development, and projects that export power, oil, gas, water, and renewable energy to more developed and energy-starved nations. Positive predictions by key players heavily involved in the region, such as the World Bank and EBRD, are also beginning to surface as the uprisings begin to subside, and as the region begins to favour new democracy, foreign investment, and greater social reform.

This article provides a positive perspective on what is currently transpiring in the MENA region, encouraging greater foreign investment in infrastructure development and project financing initiatives, as well as promoting increased trade with the region. It highlights the fact that enormous opportunities in these sectors will result once the period of unrest and revolution begins to decline. Growing international interest exists in Public-Private Partnership (“PPP”) projects in the MENA region as outside investors seek greater access to functioning infrastructure that will help supply them with precious oil commodities and clean energy resources.¹ This article also discusses the need to strengthen the region’s capital markets. Building stronger domestic financial markets in the region will also help ensure the availability of international funding for new infrastructure development and project-financings as the region rebuilds. This is definitely an area for foreign investors to involve themselves as they work to develop partnerships with the MENA region’s newly formed governments, financial institutions, and regulators.²

Demand for projects that utilize flexible methods such as the Clean Development Mechanism (“CDM”) and Carbon Financing are on the rise, as they enable developed nations to cost-effectively achieve emission reductions and removal of carbon from the atmosphere, via projects carried out in developing countries.³ Developed nations seek credits under the Kyoto Protocol Rules for their clean energy projects in the developing MENA region.⁴ High revenues from these projects

¹ The World Bank, *Global Economic Prospects*, Regional Annex, Middle East and North Africa (2011); The World Bank, *Infrastructure Development: The Roles of the Public and Private Sectors* (2005); The World Bank, MENA Regional Conference on Infrastructure Reform and Regulation, *Taking the Infrastructure Agenda Forward in the Middle East and North Africa* (2009).

² See Abraham Akkawi, Developing the Financial Capital Market to Raise Adequate Levels of Infrastructure Financing, MENA Regional Conference on Infrastructure Reform and Regulations (2009).

³ See Roland Berger, *Green Growth, Green Profit: How Green Transformation Boosts Business*, in STRATEGY CONSULTANTS GMBH (2011) (“The Middle East and North Africa (MENA) is the region to watch for remarkable solutions on a grand scale.”).

⁴ *Id.*

can be used to finance major infrastructure and re-building needs.⁵ Exporting clean energy to areas like Europe, the United States, GCC countries, and Asia – all of whom are eager to move away from oil dependency and fossil fuels, so as to reduce their carbon footprints – will certainly result in massive revenues as well.⁶ Governments of developed countries, (*as well as their corporations, banks, and investment funds*), will pursue hundreds of emission-reduction projects in the next ten years, seeking greater access to the virtually untapped renewable energy resources in the region; and many of these cost-effective clean energy projects will also involve the solar, wind, and water sectors.⁷

A growing need also exists for innovative methods to finance projects in the region and attract greater investment. Since the region is comprised primarily of Muslim populations, one solution may be to combine Islamic Finance and conventional Project-Financing, as this would attract both outside investors and wealthy Arab investors from the GCC countries on mutually beneficial and joint-partnership development projects. The importance of focusing on exportation-related projects in the region is also key to securing access to foreign investment and lending. This has proven to be scarce in the past, for fear of the usual currency devaluation issues, elevated project risks, and lack of stable local institutions across the region—especially in the dictatorial regimes found in North Africa. In short, if outside nations can also reap the benefits of any new or existing energy-producing projects and/or exporting projects in the region, (that give outside nations greater access to oil, gas, power, and renewable energy resources), then it may just be worth the risk for them to invest in the MENA region's development.

Western nations should act now and not wait for the dust to finish settling. They must do more to invest in the region's infrastructure development projects and truly "*internationalise*" them⁸ by injecting stable currencies into the MENA region's projects and markets. The use of only local currencies generated by non-exporting projects would create a deadly formula – one that is certain to dissuade any outside investment, overburden the local banking structure, and ulti-

⁵ Saleh S. Jallad, *The MENA Region and Global Energy Risk*, 1 MEES RESEARCH RPT. 1 (2010).

⁶ AFRICAN DEVELOPMENT BANK AND THE WORLD BANK, MENA REGIONAL CONCENTRATED SOLAR POWER SCALE-UP PROGRAM: 2ND JOINT CSP WORKSHOP (2009), <http://www.docstoc.com/docs/20105419/MENA-Regional-Concentrated-Solar-Power-Scale-up-Program>.

⁷ See Nikolaus Wohlgemuth, Presentation before the MENA Carbon Forum, Carbon Financing for RE Projects: How to overcome the Barriers to unlock the CDM potential in the RE Sector (2009).

⁸ See KFW Banken Gruppe & T. Prien, Financing Wind Energy in the MENA Region, Wind Energy and Development Dialogue (2010).

mately continue the general feeling of pessimism amongst the region's project owners, sponsors, and lenders.⁹

News has begun to flourish of positive changes sweeping through the MENA region since the Arab Spring uprisings, and many G20 countries have recognized the democracy-seeking rebel fractions as the new legitimate leaders of countries such as Tunisia and Egypt.¹⁰ Even in Libya, the most resource-rich nation in the region, a new leadership has arisen to meet the demands of change.¹¹ The impact of very recent events, such as Gaddafi's dictatorial regime's downfall in Libya and Osama bin Laden's death, may help elevate investor confidence in region projects and boost stock markets and increase positivity levels of world leaders, inside and outside the region.¹²

Change across the MENA region also means that both outside and regional governments must deliver on their promises of democracy, stability, and prosperity, before violence and extremism arrive in their place.¹³ One terrorist's death does not mean terrorism's demise. Nor does it provide for the total elimination of any such project risk in the region. This also does not mean that we should totally forget the solid investment opportunities that are becoming available in this flourishing region.¹⁴ Walking away now and not getting properly involved in re-building this region would be devastating to both local and global economic recovery. It would only ensure more gloom in the form

⁹ THE WORLD BANK, WORLD BANK AND PARTNERS JOIN EFFORTS TO TACKLE ARAB WORLD INFRASTRUCTURE CHALLENGE (2011).

¹⁰ *A new Government in Tunisia: Out with the Old?*, THE ECONOMIST (Jan. 19, 2011), http://www.economist.com/blogs/newsbook/2011/01/new_government_tunisia; Nicole Gauoette, *Clinton meets with Egypt's Transitional Leadership, Visits Tahrir Square*, BLOOMBERG (Mar. 16, 2011), <http://www.bloomberg.com/news/2011-03-16/clinton-visits-tahrir-square-site-of-egyptian-protests-1-.html>.

¹¹ Stacey Meichtry & Jay Solomon, *Allies Plan Fund for Libyan Rebels*, WALL ST. J. (May 5, 2011), <http://online.wsj.com/article/SB10001424052748703937104576303161699450494.html>.

¹² See Julia Kollwe & Rowenna Davis, *Osama bin Laden's death boosts stock markets*, THE GUARDIAN (May 2, 2011), <http://www.guardian.co.uk/world/2011/may/02/osama-bin-laden-stock-markets>; *World Leaders Welcome Bin Laden's Death*, CNBC NEWS (May 2, 2011), <http://www.cnbc.com/id/42852851>.

¹³ Dr. Amani Abeid Karume, Former President of Zanzibar, Inaugural Lecture before the Boston University African Presidential Archives and Research Center (Mar. 10, 2011), <http://www.bu.edu/aparc/presidents/karume/>.

¹⁴ See *World Bank President: One Shock away from Crisis*, BBC NEWS (Apr. 17, 2011), <http://www.bbc.co.uk/news/business-13108166> (quoting Robert Zoellick: "The crisis in the Middle East and North Africa underscores how we need to put the conclusions from our latest world development report into practice. . . waiting for the situation to stabilise will mean lost opportunities. In revolutionary moments, the status quo is not the winning hand.").

of an expanded global financial crisis and greater unemployment on all sides of the spectrum.¹⁵ Additional elements required for the success of PFI and PPP infrastructure development projects in the MENA region are the better use of socially responsible governance strategies,¹⁶ and the use of innovative financing techniques, such as the combination of Islamic Finance with conventional project-financing methods, to ensure the availability of investment, partnership, and non-recourse debt lending from outside sources.¹⁷

There are numerous opportunities available in the resource-rich MENA region, and it is important for those interested in progressing new and existing development projects to remain positive, as the region settles and becomes an ideal investor's market.¹⁸ Our ultimate task as project managers and project financiers is to seize this new era of opportunity in the region, while mitigating risks and overcoming any of challenges that may arise. Thus, we may ultimately delve into the risky (but lucrative) world of project finance in a up-and-coming MENA region.¹⁹

For this author in particular, "internationalized" project financings, of mega-infrastructure development initiatives, and renewable energy projects that serve to export energy and commodities from the MENA region may be the best way forward for growth and stable recovery.²⁰ During these times of rapid change, there is also a notable lack of scholarly research in the project finance sector.²¹ This note attempts to change that by providing insight on some of the important

¹⁵ Erin Williams, *The Mozal Smelter Project, River of Aluminium*, 16 PM NETWORK 20 (2002).

¹⁶ The World Bank, World Bank Supports Social Accountability Network across Arab World, Press Release No. 2011/434/MENA (Apr. 15, 2011).

¹⁷ See FRANK E. VOGEL & SAMUEL L. HAYES, III, ISLAMIC LAW AND FINANCE: RELIGION, RISK AND RETURN 27-28 (Kluwer Law Int'l 1998).

¹⁸ SEZNECK & KIRK, INDUSTRIALIZATION IN THE GULF: A SOCIOECONOMIC REVOLUTION (Routledge Pub. 2011).

¹⁹ WORLD BANK, INFRASTRUCTURE DEVELOPMENT: THE ROLES OF THE PUBLIC AND PRIVATE SECTORS (2005).

²⁰ See also INT'L FIN. CORP., LESSONS OF EXPERIENCE NO. 4: FINANCING PRIVATE INFRASTRUCTURE 43-44 (1996). See generally JEFFREY DELMON, PRIVATE SECTOR INVESTMENT IN INFRASTRUCTURE: PROJECT FINANCE, PPP FINANCE AND RISKS (2d ed. 2009).

²¹ Although the number of research articles on project finance has dramatically increased in latter part of this decade, it was reported by Benjamin Esty in early 2002 that, "there has been only one article directly on project finance published in the four leading finance journals, and not more than 15 articles in all finance journals, over the last 20 years,"; furthermore, the coverage of project finance in corporate finance text books is very thin compared to other financing mechanisms, such as IPO's, venture capital, and leasing. Benjamin C. Esty, *Why Study Large Projects? An Introduction to Research on Project Finance*, EUROPEAN FIN. MGMT.

elements that those involved in infrastructure development and project finance in the MENA region and beyond should consider.

II. PROJECT FINANCE AND ITS CONSTRAINTS IN THE REGION

No single definition for Project Finance (“PF”) exists.²² One definition holds that PF involves the creation of a “legally independent project company financed with equity from one or more sponsoring firms and non-recourse debt, for the purpose of investing in,” and financing a single purpose or multi-purpose industrial asset.²³ An essential feature of PF is that a Special Purpose Vehicle (“SPV”) or “project company” must be established where the project is to take place.²⁴ The debt used to finance the project is “non-recourse debt,” which means that sponsors are only liable for the amount of equity they put into projects, and that any debt repayment comes from the project company only, rather than from any other entity involved.²⁵ There are three key decisions to recognize in the use of PF. First, there is an *investment decision* involving an industrial asset (the term “industrial asset” includes infrastructure development projects).²⁶ Second, there is an *organizational decision* to create a legally independent entity to own and, if a concession is involved, run the asset.²⁷ Project assets do not appear on the sponsor’s balance sheet, representing a form of “off-balance sheet” finance.²⁸ “The exact accounting treatment is, however, a function of the chosen organizational form for the SPV entity (corporation, partnership, etc.), and the sponsor’s fractional interest in and control over the project.”²⁹ In cases such as those involving only one sponsor, the project’s assets and liabilities may appear on the sponsor’s balance sheet.³⁰ “Lastly, there is a *financing decision* involving nonrecourse debt.”³¹ Since the SPV is a le-

vol. 10, no. 2, 2004 at 213-24, available at http://www.blackwellpublishing.com/pdf/EUFM_Esty.pdf.

²² “There is no single, generally agreed upon definition of project finance. A recent article in the *Wall Street Journal* illustrates the confusion that surrounds the definition. The article defined project finance as, ‘a term that typically refers to money lent to build power plants or oil refineries.’” *Id.* at 213 n.1.

²³ *Id.* at 213.

²⁴ ANDREW FIGHT, INTRODUCTION TO PROJECT FINANCE 10 (Elsevier Linacre House ed., 2006).

²⁵ *Id.* at 3-5.

²⁶ BENJAMIN ETSY, MODERN PROJECT FINANCE 25 (John Wiley & Sons 2004).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

gally independent entity, “the debt can be structured without recourse to the sponsors.”³² Legal independence is important in other ways as well. Specifically, capital providers may assess a project’s cash flows and assets. This assessment may be made independent of concerns regarding a sponsor’s financial wellbeing or pre-existing claims on the assets of that sponsor.³³ Historically, private firms have only used PF to finance industrial projects such as mines, pipelines, and oil fields; but more recently, many private firms are becoming more involved in PF and are readily utilizing it to finance infrastructure projects in regions like the Maghreb and Middle East by providing greater access to mines, oil, gas, and other natural resources in those areas.³⁴

According to the World Bank, the need for successful infrastructure investment and development in Asia and the MENA regions alone is “enormous.”³⁵ Africa and the MENA region only receive a very small share of investment in its infrastructure from the outside due to difficulty in getting funding, low creditworthiness, limits on the local financial markets, its banks, and local currencies, and to the high risk profiles typical of infrastructure projects.³⁶ Whether the region will be able to attract foreign currency funds will depend highly on the ability to reduce foreign exchange risks, and reduce the risks/constraints associated with PF in the region.³⁷ One of the main constraints includes limited access to non-recourse debt, which actually damages an economy’s ability to attract private investment in infrastructure because project sponsors are usually reluctant to finance infrastructure with equity only, or take the project’s debts fully on their balance sheets.³⁸ Therefore, many such development projects never get underway. More importantly, the local infrastructure remains an

³² *Id.*

³³ *Id.*; see also THE WORLD BANK, WORLD DEVELOPMENT REPORT 1994: INFRASTRUCTURE FOR DEVELOPMENT (Oxford Univ. Press 1994).

³⁴ Infrastructure includes investments in water, transportation, electricity, natural gas, clean energy, and telecommunications. See John W. Kesinger & John D. Martin, *Project Finance: Raising Money the Old-Fashioned Way*, 3 J. APPLIED CORP. FIN. 69 (1988); see also DAVID EITMANN, ARTHUR STONEHILL, & MICHAEL MOFFETT, MULTINATIONAL BUSINESS FINANCE (Denise Clinton et al. eds., 8th ed. 1998).

³⁵ Boey Yin, *Reality Bites-A Quieter PF Horizon*, PFI ASIA PACIFIC REV. 2-3 (1998), <http://www.pfie.com/reality-bites-a-quieter-pf-horizon/364187.article>.

³⁶ See Robert Sheppard, Stephen von Klaudy & Geeta Kumar, *Financing Infrastructure in Africa*, in GRIDLINES: NOTE No. 13 (2006), <http://www.ppiaf.org/ppiaf/sites/ppiaf.org/files/publication/Gridlines-13-Financing%20Infrastructure%20in%20Africa%20-%20RSheppard%20SvKlaudy%20GKumar.pdf>.

³⁷ See generally PRISCILLA AHMED, PROJECT FINANCE IN DEVELOPING COUNTRIES (Int’l Finance Corp. 1999).

³⁸ See Sheppard et al., *supra* note 36 (discussing how the region can attract more project finance and its key constraints).

tiquated, and in some cases, non-existent. Even efforts to raise PF funds in capital markets via project bonds prove to be unsuccessful due primarily to the region's well-known devaluating currency issues.³⁹

Three main factors limit the MENA region's ability to tap into foreign and local currency markets in its efforts to raise funds for infrastructure development projects, especially the long-term debt finance.⁴⁰ First, most African countries have low sovereign credit ratings, making foreign commercial lending difficult to come by, and even if accessed, it is only for short-term financing transactions.⁴¹ One way to improve this is to have local projects export their "end product" (i.e. - whether it be gas, oil, water, clean energy, etc.) so that a project may mitigate debt repayment risks through the use of foreign currencies it generates.⁴² Exportation to Asia, Europe, and other developed areas is key, as it ensures the ability to tap into more sophisticated financial markets, thus attracting investment.⁴³ "Second, most local markets have limited capacity to finance infrastructure projects," due to inferior domestic bank structures that do not permit long-term financing, and if they do, they often need to obtain guarantees from official agencies to attract local currency debt.⁴⁴ They "have longer pay-back and build-out periods" and tend to be more susceptible to unstable political and legal institutions, and to regulatory interference.⁴⁵

Many of the past ruling regimes in the area also had a strong bias against projects that involved little regulatory intervention, or to those with U.S. dollar revenues, such as export-oriented ports, railways, and gas pipelines.⁴⁶ Their greed created serious regulatory risks to outsiders seeking to invest in those markets, and a quick trip throughout the region demonstrates the major need for the railways, modern roadways, ports and pipelines that would permit access to the regions valuable resources for resale and profit. Those significant profits could in turn be invested into infrastructure, in partnership with those nations that the MENA region could export to; creating what could become one the most advanced infrastructure systems in the world. Local banks must demonstrate that they are able finance

³⁹ HENRY A. DAVIS, *PROJECT FINANCE: PRACTICAL CASE STUDIES* (1996).

⁴⁰ See Sheppard et al., *supra* note 36, at 13.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Farida Mazhar, *Reform, Private Capital Needed to Develop Infrastructure in Africa: Problems and Prospects for Private Participation*, in GRIDLINES No. 8 (2005).

⁴⁴ Sheppard et al., *supra* note 36, at 2 (explaining how virtually all infrastructure projects undertaken by African countries need credit enhancements to attract local currency financing).

⁴⁵ *Id.*

⁴⁶ *Id.* at 3.

long-term debt and themselves, so that outside investors will have confidence in their stability and in depositing foreign currencies into the region via long-term PF loans.⁴⁷

Pension reforms are key to improving the local capital market structures, and to improve the availability of loans and funds for infrastructure development and PF. Pension reform could increase local savings and transform pension funds into *investment funds* for infrastructure projects by allowing governments to begin to offer long-term fixed rate debt—a key element in being able to provide local currency financing to projects in the region.⁴⁸ In time, local capital markets would develop, moving away from local full-guarantee bond issuances, to being able to finance most of the region's new infrastructure financing needs via the creation of investment funds, eliminating the heavy risk mitigation associated with guarantees that actually work to deter outside investment.⁴⁹

The MENA region may become a major international center of economic development if it successfully transitions to democracy.⁵⁰ The mainly young population that spurred the uprisings witnessed in the Arab Spring of 2011 is due to increase by more than 60 percent by 2050, creating a gross MENA population of around 690 million people.⁵¹ That growth increase will require a major investment in new infrastructure.⁵² The region has ageing assets as well, and the population is moving rapidly into new areas with key asset sectors such as utilities, transport, and social infrastructure.⁵³ An estimated 500 Billion is to be spent in the MENA region by 2020 on infrastructure development via use of the Public Private Partnership (“PPP”) model as a

⁴⁷ THE WORLD BANK, *INFRASTRUCTURE AT THE CROSSROADS: LESSONS FROM 20 YEARS OF WORLD BANK EXPERIENCE* (2006), <http://lnweb90.worldbank.org/EXT/epic.nsf/ImportDocs/F4431415FD5E1A738525739F00788A59?opendocument&query=CO>.

⁴⁸ *Id.* at 2.

⁴⁹ *Id.* See generally Emmanuel Nyirinkinda, *The Uganda Distribution Concession* (2005), <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Financing%20Africa%20Through%20the%20Crisis%20and%20Beyond.pdf> (discussing Africa in relation to the reforms referenced above).

⁵⁰ Abraham Akkawi, Head of Infrastructure and PPP Advisory Serv. Middle East, Address at the MENA Regional Conference on Infrastructure Reform and Regulations: Developing the Financial Capital Market to Raise Adequate Levels of Infrastructure Financing 3 (Dec. 7, 2009), http://siteresources.worldbank.org/INT/MENA/Resources/Akkawi_MNAReg.Conference2009.pdf.

⁵¹ *Id.*; Farzaneh Roudi-Fahimi & Mary Kent, *Challenges and Opportunities: The Population of the Middle East and North Africa*, 62 POPULATION REFERENCE BUREAU, No. 2, at 5 fig. 2 (2007).

⁵² Akkawai, *supra* note 50.

⁵³ *Id.* at 4.

firmly established project delivery technique.⁵⁴ Future project pipelines include investments of over 500 Billion USD from the UAE, Saudi Arabia, Kuwait and Qatar in oil, gas, clean energy, power utilities, transport, water and tourism-related projects alone.⁵⁵ The scale of those investments requires a larger pool of lenders due to a lack of investment-grade bond funding.⁵⁶ The necessary national legal framework needs to be re-developed into new democratic-based institutions to attract outside investment and assure market confidence.⁵⁷ Political issues, foreign exchange rates, and country risk profiles are also constraints at the forefront, as the region's varied political forces all fight for prominence during this transitory period of political, legal, social, and institutional change.⁵⁸

The use of the PPP model for projects in the region is a welcome solution for access to long-term financing (equity and debt).⁵⁹ Demand for over \$100 Billion USD in investments exists for infrastructure PPP projects over the next several years.⁶⁰ PPP's can be an alternative way of funding projects by introducing private finance to public sector projects.⁶¹ Thus, the public sector would define and buy a *service* (as opposed to an *asset*), and the private sector would deliver that service (and any necessary assets).⁶² The PPP structure consists of creating an independent business financed and operated by the private sector.⁶³ The asset is created and then the service is delivered to the public sector client, in exchange for payment warranted by the level of service provided.⁶⁴

In the immediate future, the MENA PF model should consist of a “*no payment until the asset is complete and available for use*” approach. This model shifts the risk of cost and time overruns to the private sector until it is later shared with the government.⁶⁵ New and poorly funded governments and related project institutions may develop as a result of the recent turmoil, and they will be unstable in the beginning. Therefore, risk must be alleviated if the region is to prosper and rebuild. Said infrastructure projects should fix their costs to the

⁵⁴ Roudi-Fahimi & Kent, *supra* note 51.

⁵⁵ Akkawai, *supra* note 50, at 5.

⁵⁶ *Id.* at 8.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 9.

⁶⁰ Dylan Bowman, *Region needs \$100bn of PPP investment over next five years*, ARABIANBUSINESS.COM (Nov. 2, 2008).

⁶¹ Akkawi, *supra* note 50, at 10.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

government at the financial close of such projects, and for the length of any granted concessions.⁶⁶ This allows development of the region's financial and capital markets, as the demand that rests with government bodies and supply is enhanced by investment from banks, pension funds (as described above), infrastructure funds, outside sovereign wealth funds, and development funds.⁶⁷

On the supply side, limits on investment bank involvement are largely due to the region's recent credit shortage.⁶⁸ Long-term financing remains an issue as well, as investment banks usually handle the debt portion under a PF structure, a typical financing structure in the early project developmental phase.⁶⁹ Notable limitations and constraints in the use of pension funds also exist because their governance rules often limit direct investment and lending of any borrowed funds. Equity houses usually have superiority in this area of finance. Pension funds could be utilized, however, to replace senior lenders and equity investors during refinance stages. Infrastructure funds are also struggling to raise cash, and are definitely more cautious lately, due to the recent uprisings. They are decreasing individual investment amounts. This could be due to fear of expropriation in the affected areas; a possibility further analyzed in the MENA region possible solutions sections of this note.

With the rise in commodity prices, however, (due mainly to the recent uprisings in the region), there are also positives such as an increased cash flow to sovereign wealth funds. These may in turn be utilized as equity investment vehicles for infrastructure projects in the region. But this is often limited by national government protectionism and preference for commodity-only investments, rather than growing areas like infrastructure projects that benefit the community (i.e. - clinics, social programs, clean energy, and electricity or water projects). Although, as discussed below, some sovereigns are intently seizing the region's growth opportunities and moving towards diversifying their wealth fund investment portfolios into some of the aforementioned clean and renewable energy projects.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Andrew England, *Credit Shortage Blamed for Slow Growth*, FIN. TIMES (May 31, 2010, 4:58 PM), <http://www.ft.com/intl/cms/s/0/b0a0a7d0-6cc5-11df-91c8-00144feab49a.html#axzz1ZHUZGUzo>.

⁶⁹ Rajeev L. Sawant, *The Economies of Large-Scale Infrastructure FDI: the Case of Project Finance*, J. INT'L BUS. STUDIES 1036, 1037 (2010), available at <http://www.palgrave-journals.com/jibs/journal/v41/n6/pdf/jibs200963a.pdf>; see also *Taking the Infrastructure Agenda Forward in the Middle East and North Africa*, THE WORLD BANK, <http://go.worldbank.org/UY6Y3FLP00> (discussing the issues addressed in the MENA Regional Conference on Infrastructure Reform and Regulation in December 2009) (last visited Sept. 28, 2011).

There are also constraints and limitations on development funds like the IBRD, World Bank, EBRD, UN Development Programme, African Development Bank, EIB, and the Asian Development bank. This is mainly due to their sector-specific criteria, geographic area criteria, requirements that funding made available only for specific outcomes, and insistence upon sovereign guarantees. They do not always match all funding and usually finance projects from *markets* rather than from their own *resources*. This adversely limits the Maghreb region, which has inferior markets and an inability to raise sufficient capital for mega-projects as stated above. On the demand side, an obvious need for the development of legal framework exists so as to underpin private finance. A great demand for power, water, oil, gas, and renewable energy projects also exists in the MENA region, with most governments already displaying their “open for business signs.”⁷⁰

The MENA region’s current status, with regard to unity, challenges, and constraints are further evidenced by the recent politically motivated “change” of events associated with the Arab Spring of 2011.⁷¹ The Arab people continue to aggressively demonstrate that they want equality, democracy, prosperity, and better public services, including more efficient and better-designed infrastructure.⁷² At the same time, government budgets are still under heavy pressure in the region, and the private sector perceives the risk of political upheavals as extremely dangerous to any PF investment.⁷³ As a result, it has become harder to finance any necessary infrastructure project in the region. While most people have access to public services, the quality and reliability of services is a real challenge that constrains competitiveness, regional economic activities, and growth prospects.⁷⁴ Add to this one of the world’s largest youth populations, and clearly infrastructure becomes both a *need* and a tremendous *opportunity* for creating jobs, and also for driving the region’s prosperity and productivity.⁷⁵

⁷⁰ See generally Akkawi, *supra* note 50 (referencing the topic of defining project finance, its limitations, and its key constraints in the MENA region).

⁷¹ Mehran Kamrava, *The Arab Spring and the Saudi-Led Counterrevolution*, 56 ORBIS 96, 96-104 (2011).

⁷² Erin Snider & David Faris, *The Arab Spring: U.S. Democracy Promotion in Egypt*, 18 MIDDLE E. POL’Y, 49-62 (2011).

⁷³ Michael Ross, Nimah Mazaheri & K. Kaiser, *The Resource Curse in MENA? Political Transitions, Resource Wealth, Economic Shocks, and Conflict Risk* (World Bank Policy Research Working Paper No. 5742, 2011).

⁷⁴ Uri Dadush & Michele Dunne, *American and European Responses to the Arab Spring: What’s the Big Idea?*, 34 WASH. Q. 131-45 (2011).

⁷⁵ See generally Rina Bhattacharya & Hirut Wolde, *Constraints on Growth in the MENA Region* (Int’l Monetary Fund, Working Paper No. 10/31, 2010), available at <http://www.imf.org/external/pubs/ft/wp/2010/wp1031.pdf>.

Arab countries in the MENA region have been spending around 5 percent GDP per annum on infrastructure, whereas other developing countries like China have a comparative advantage in spending up to 15 percent GDP per annum.⁷⁶ Arab countries need to double their spending in infrastructure to 10 percent GDP per annum (the equivalent to \$75-100 Billion USD) to sustain the growth rates that have been achieved in recent years and to boost economic competitiveness.⁷⁷ The importance of leveraging the *private sector* also comes into play as it adds value to PPP with the right risk allocation.⁷⁸ PPP's are crucial vehicles for the region's Arab countries to keep pace with their infrastructure needs and to ensure growth.⁷⁹ Involving the private sector in infrastructure development can be a cost-effective solution, and as alluded before, result in economic growth and recovery, and spur much needed job creation, both inside and outside the region.⁸⁰

III. CURRENT SITUATION, SELECT PROJECTS, KEY AREAS OF OPPORTUNITY

1. Tunisia

Once known as the “*Switzerland*” of North Africa,⁸¹ Tunisia was always one of the more stable areas in the region. It traditionally has had great success in attracting FDI and local project investment in areas of infrastructure development, power projects, social projects, as well as stable banking and tourism sector investment.⁸² Tunisia, how-

⁷⁶ Taking the Infrastructure Agenda Forward in the Middle East and North Africa (Dec. 7-8, 2009) (unpublished summary of conference, on file with the Richmond Journal of Global Law and Business), *available at* http://siteresources.worldbank.org/INTMENA/Resources/MENAINfr.Reg.Forum_ConferenceProceedings.pdf.

⁷⁷ *Id.* at 9.

⁷⁸ *See id.* at 23.

⁷⁹ *See id.* at 9.

⁸⁰ *See generally* World Bank and Partners Join Efforts to Tackle Arab World Infrastructure Challenge, ARAB WORLD INITIATIVE (Apr. 27, 2011), <http://arabworld.worldbank.org/content/awi/en/home.html> (addressing the challenges and constraints to project finance and to infrastructure projects in the MENA region in general).

⁸¹ REBECCA HILLAUER, THE HISTORY OF THE CAMERA AND THE VEIL, ENCYCLOPAEDIA OF ARAB WOMEN FILM-MAKERS 22 (2005); Alison James, *Rome Rebuilt in Tunisia*, VARIETY (2002), <http://www.variety.com/article/VR1117872554>.

⁸² *See* STEVE ONYEIWU, ANALYSIS OF FDI FLOWS TO DEVELOPING COUNTRIES: IS THE MENA REGION DIFFERENT? 4, 6, 12 (2003), <http://www.mafhoum.com/press6/172E11.pdf>; *Tunisia Welcomes FDI with Open Arms*, FEMISE (June 1, 2011), <http://www.femise.org/en/2011/01/discussions/tunisie-terre-d%E2%80%99accueil-des-ide/>.

ever, was the first Arab nation in the MENA region to protest and oust its long-standing dictatorial regime, headed by former President Zine Al-Bidine Ben Ali, in what became known as the “Jasmine Revolution.”⁸³ A forerunner to larger demonstrations, on December 17, 2010, a Tunisian man set himself on fire in the capital city of Tunis because of low employment.⁸⁴ Through December and January, major protests spread to capital and dozens of deaths resulted from a violent government crackdown.⁸⁵ The government appealed for tranquillity to no avail, and in early January 2011, it attempted to appease the swell of uprisings by sacking its Interior Minister and promising political and legal reforms.⁸⁶ This also failed to pacify protestors, and the uprisings became more violent, leading eventually to President Ben Ali promising to step down by 2014.⁸⁷ Shortly thereafter, Ben Ali fled to Saudi Arabia with his family and billions of dollars in Tunisian assets.⁸⁸ The new Tunisian regime subsequently sought extradition to prosecute the former President and his family for human rights violations and misuse of State funds.⁸⁹ Since then, the new government has made strides on its promises of reform and better infrastructure.⁹⁰ The most promising infrastructure projects proposed in Tunisia at this time (and since the Arab Spring) are those in the Independent Power Producer (“IPP”) sector.⁹¹

With the demand for electricity rising annually, Tunisia has embarked on an aggressive programme to increase its electric and clean energy production capacity, focusing on the development of combined cycle gas turbine (“CCGT”) facilities, and seeking PPP projects in partnership with its gas and electric company, “Société Tunisienne

⁸³ *Arab Revolt: Tunisia’s Stolen Revolution?*, BBC NEWS (Mar. 2, 2011), <http://www.bbc.co.uk/news/world-africa-12629758>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Tunisia Protests: President Sacks Interior Minister*, BBC NEWS (Jan. 12, 2011, 11:45 PM), <http://www.bbc.co.uk/news/world-africa-12171183>.

⁸⁷ *Tunisia Leader to Step Down in 2014*, BELFAST TELEGRAPH (Jan. 13, 2011), <http://www.belfasttelegraph.co.uk/news/world-news/tunisia-leader-to-step-down-in-2014-15053429.html#>.

⁸⁸ Anthony Shadid, *Joy as Tunisian President Flees Offers Lesson to Arab Leaders*, N.Y. TIMES (Jan. 14, 2011), <http://www.nytimes.com/2011/01/15/world/africa/15region.html?ref=zineelabidinebenali>.

⁸⁹ *Tunisia Seeks Ben Ali’s Extradition*, REUTERS (Feb. 20, 2011), <http://www.reuters.com/article/2011/02/20/tunisia-benali-idUSLDE71J0LQ20110220>.

⁹⁰ See, e.g., Rachele Younglai, *Tunisia Financial System Stabilizing – Central Banker*, REUTERS (Sept. 21, 2011), <http://www.reuters.com/article/2011/09/22/imf-tunisia-idUSS1E78K29420110922> (asserting that Tunisia’s financial system is stabilizing).

⁹¹ Hisham Katib, *Power generation in the Middle East: can the boom continue?*, in MIDDLE E. ECON. SURVEY 46 (2007).

de l'Electricité et du Gaz" ("STEG").⁹² The government has reportedly set itself the objective of establishing three new combined cycle plants at Ghannouch (by way of expanding the existing facility), Sousse, and in Bizerte, and a fourth combined cycle plant at Cap Bon, which will be used for both domestic and export needs.⁹³ The first of Tunisia's new projects at Ghannouch is already under construction.⁹⁴ The projects at Sousse, Bizerte, and Cap Bon should ensue each year from 2012 to 2015.⁹⁵ The upcoming projects in Tunisia, such as the Bizerte IPP project, consist of a proposed 350-500MW plant which is being tendered by the Ministry of Industry, Energy and Small and Medium Enterprises on a build, own, and operate basis ("BOO"), on a 20 year concession.⁹⁶ The Ministry has reportedly already received 17 expressions of interest.⁹⁷ Five or six companies have been short listed, and the bid date has not even been announced yet publicly; but the Ministry is reportedly seeking to select a preferred bidder by year-end. Financial close was targeted for May 2011 but that has been delayed until the end of the year due to the recent turmoil across the region.⁹⁸ The new plant is scheduled to become operational in the second quarter of 2014,⁹⁹ and is an excellent opportunity to revive this nation's economy.

The upcoming El Med/Cap Bon IPP project is also an interesting area for opportunity, as a tender is being prepared for a 1,200MW power plant in Al-Haouaria that will both supply the local market in Tunisia and export power to Italy; an ideal and vital export scenario, as detailed above.¹⁰⁰ STEG and Italian grid operator Terna agreed in June 2007 to carry out joint studies for the facility. Under their agreement, up to 800MW of power would be exported to Italy from 2015 via a 200 kilometer subsea transmission line. The other 400MW will be

⁹² Ulrich Laumanns, Regional Workshop on CDM PoA's, Utilization of Wind Energy by Large Industrial Companies in Tunisia 300-03 (Jan. 26-27, 2010), *available at* http://www.jiko-bmu.de/files/basisinformationen/application/force-download/poa_workshop_tunis_presentations.pdf.

⁹³ Andrea Pinna, European Investment Bank, Regional Workshop on CDM PoA's The Role of Project Mechanisms in the Southern & Eastern Mediterranean: Views from the European Investment Bank 300 (Jan. 26-27, 2010), *available at* http://www.jiko-bmu.de/files/basisinformationen/application/force-download/poa_workshop_tunis_presentations.pdf.

⁹⁴ Laumanns, *supra* note 92.

⁹⁵ *Id.*

⁹⁶ IN-MED & ASEM, INVESTMENT OPPORTUNITIES IN THE TUNISIAN AND EGYPTIAN ENERGY SECTORS 38 (2011), http://www.invest-in-med.eu/en/agenda/operation_485_medenergy_study_ve_2011_def-9_ms.pdf.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 37.

used to supply the local market.¹⁰¹ STEG will buy the domestic power produced by the plant under a 20-year power purchase agreement.¹⁰² In addition to the power produced by the plant, the related cable facilities could export up to 200MW of electricity generated by the project to neighbouring MENA countries or to cross-sea areas such as Europe. In Sousse, STEG is also seeking bids for a 380MW- 450MW turnkey combined cycle and “single shaft” power plant, to supply the industrial sector. The project is scheduled to come on-stream in the first quarter of 2013, and STEG will reportedly finance the scheme itself, with the successful bidder taking-on a 12-year operations and maintenance (“O&M”) contract.¹⁰³

There are also new and interesting gas-supply developments in Tunisia that should lead to increased natural gas and renewable energy PF projects. In May 2009, PERENCO, an independent Anglo-French oil and gas company started pumping gas through a new 73 kilometer pipeline connecting the El-Franig and Baguel fields directly to the national grid.¹⁰⁴ Gas production from the Hsadrubal field, a joint venture by British Gas Tunisia Limited (“BGT”) and Enterprise Tunisienne D’Activités Pétrolières (“ETAP”), began in 2009.¹⁰⁵ Operation of this plant made British Gas (“BG”) the largest gas producer in Tunisia.¹⁰⁶ Finally, additional gas is expected from an offshore oil field development in the Gulf of Hammamet, operated by ENI, a large Italian multi-national oil and gas company present in 70 countries and currently Italy’s largest industrial company.¹⁰⁷ “Tunisia is also seeking ways to substantially increase its gas production in the south of the country.”¹⁰⁸ “At present, there is no way to transport the gas in the south, to population centers in the center and north, and therefore

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 37.

¹⁰⁴ *Perenco Inaugurates LOOP Project at CPF in Matmata, Tunisia*, ENERGY BUS. REV.: DRILLING AND PRODUCTION (May 13, 2009), http://drillingandproduction.energy-business-review.com/news/perenco_inaugurates_loop_project_at_cpf_in_matmata_tunisia_090513.

¹⁰⁵ *Hasdrubal Gas Processing Plant*, HYDROCARBONS-TECHNOLOGY.COM, <http://www.hydrocarbons-technology.com/projects/hasdrubal> (last visited Oct. 3, 2011).

¹⁰⁶ *Tunisia*, BG GROUP, <http://www.bg-group.com/OurBusiness/WhereWeOperate/Pages/pgTunisia.aspx> (last visited Oct. 3, 2011).

¹⁰⁷ *In Tunis Eni’s CEO Paolo Scaroni met with Tunisia’s Prime Minister Monsieur Mohamed Ghannouchi and Tunisia’s Minister of Industry*, ENI, http://www.eni.com/en_IT/media/notes/2008-01-04-in-Tunis-CEO-Scaroni-met-Prime-Minister-Ghannouchi.shtml (last visited Oct. 3, 2011) [hereinafter ENI].

¹⁰⁸ Charles Whitney, *Spotlight on the Tunisian Power Market*, NORTON ROSE LLP (2009), <http://www.nortonrose.com/knowledge/publications/23144/spotlight-on-the-tunisian-power-market>.

the government is planning a new 320 kilometer pipeline connecting a gas-gathering facility in the south with existing facilities in the north, also with a new liquefied gas terminal.”¹⁰⁹ The pipeline is expected to be used for both domestic consumption and export, and would be developed by the Tunisian national oil company, “Enterprise Tunisienne d’Activités Pétrolières” (“ETAP”),¹¹⁰ and three international oil companies are to be determined via the bidding and award process.¹¹¹ The Ministry of Industry, Energy and Small and Medium Enterprises is expected to make a final investment decision soon, launching EPC tenders by early 2012, and according to the current schedule, construction should be completed by the end of 2014.¹¹² “How ETAP will finance its share of the pipeline is currently under review.”¹¹³ “Negotiations are also under way between Tunisia and the Algerian national oil company, Sonatrach on an agreement which would allow Tunisia to use capacity in the Algerian Trans Med pipeline.”¹¹⁴ “The 20-year-old pipeline transports Algerian natural gas to Sicily, crossing the Mediterranean Sea from Cap Bon.”¹¹⁵ Tunisia receives royalties from the pipeline as payment for access through its territory.¹¹⁶

Investors in IPP’s should also be aware of legal and commercial issues, such as Tunisia’s privatization program. Tunisia has privatized and/or restructured over 200 enterprises since the start of its privatization program in 1987.¹¹⁷ The new Tunisian government expects the privatization programme to enter into a new accelerated phase with the aim of improving the attractiveness of the Tunisian economy to new foreign investors.¹¹⁸ The Tunisian Investment Code also provides a broad range of fiscal incentives for foreign developers, including tax relief on reinvested revenues and profits, exemptions on value-added tax on imported capital goods, and depreciation schedules

¹⁰⁹ *Id.*

¹¹⁰ ENI, *supra* note 107.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Tunisia Speeds up its Privatization Program*, WASH. TIMES (July 10, 2000); see also *Tunisia Enters a New Era*, PANGEA PARTNERS (1997), <http://www.pangaea-partners.com/tunpriv.htm>.

¹¹⁸ THE GOVERNMENT OF TUNISIA, PRIVATIZATION IN TUNISIA, <http://www.privatisation.gov.tn/www/en/doc.asp?mcat=1&mrub=50&msrub=13&dev=true> (last visited Oct. 31, 2011).

for production equipment.¹¹⁹ Political risks must also be well-considered and allocated at this critical time in Tunisia's development, before any FDI is made into Tunisian projects, especially because of the change that occurred in the government structure. Yet, even these changes have not adversely affected the general Tunisian business environment, as the environment is constantly improving.¹²⁰

The new Tunisian government has also concluded many Bilateral Investment Treaties ("BITS"),¹²¹ which offer added risk and dispute resolution protections with approximately eighty-one countries. In that regard, Tunisia's Association Agreement with the EU, which came into effect in 2008, is vital to investment protection from the EU investors with the aim of creating a free trade zone between Tunisia and EU member states. Developers are advised, however, to check whether a bilateral trade treaty is in place with their country of incorporation/domicile. Lastly, investors must be aware that developers and their bankers may be required to apply for the approval of the Tunisian Central Bank in relation to several aspects of funding of a PPP or IPP project-financing, including when funding any debt and equity by offshore investors. The Tunisian "dinar" is generally a convertible currency, but Central Bank authorisation is needed for foreign exchange transactions.¹²² In particular, developers should consider whether Tunisian Central Bank approval would be required for repatriation of dividends to sponsors or payments of principal and interest to offshore lenders, increases in the share capital of the project company following its formation, and for the sale or acquisition of shares in the project company by a non-resident company.¹²³

In what was called the "African Transport Deal of the Year" in 2008, Tunisia also boasted of its capability to realize major PPP projects with a recent \$605 million project-financing backed by the IFC, where TAV of Turkey partnered with the Tunisian government and created an SPV called "*TAV Tunisie*," which will be the concessionaire of two linked airport projects. The project, with total costs of

¹¹⁹ *Investment Incentives*, FOREIGN INVESTMENT PROMOTION AGENCY: FIPA-TUNIS., http://www.investintunisia.tn/site/en/article.php?id_article=789 (last visited Oct. 4, 2011).

¹²⁰ *Tunisia: Increase in Exports, Signs of Improvement*, GLOBAL ARAB NETWORK, <http://www.english.globalarabnetwork.com/2011061411063/Economics/tunisia-increase-in-exports-signs-of-improvement.html> (last visited Oct. 4, 2011).

¹²¹ See generally Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a bit. . .and they could bite* (World Bank Research Dept., Working Paper No. 3121, 2003).

¹²² U.S. DEPT. OF STATE, BACKGROUND NOTE: TUNISIA (2011), <http://www.state.gov/r/pa/ei/bgn/5439.htm>.

¹²³ See generally Whitney, *supra* note 108 (discussing Tunisia's power market opportunities and associated risks).

approximately \$1 Billion USD, is one the largest recent private sector investments in Tunisia, and the first airport private sector concession in the Maghreb region.¹²⁴ The concession project owes much of its success to the participation of the IFC, which not only helped provide longer-term debt from the commercial banks, but also helped TAV resolve a number of legal hurdles while it attempted to get financial close in its Tunisia deal. The project consists of two linked concessions, one for the design, building, financing and operation (“DBFO”) of a new international airport at Enfidha (for an initial capacity of 7 million passengers), and the second for the operation and upgrade of the existing Monastir International Airport (4.2 million passengers in 2006).¹²⁵ The tender for the PPP project was originally launched in 2004 as a single “green-field” airport concession, and has expanded to two linked concessions.¹²⁶

In all of the projects the World Bank is involved in across the MENA region, it is also important to note that it extends its support via a growing network of civil society organizations, development practitioners, and government agencies from across the MENA region, to foster the exchange of ideas, build capacity, and help members learn about participatory governance and social accountability mechanisms that are vital to success in this developing region. Active citizen participation and social accountability on all sides is fully encouraged, and Ms. Shamshad Akhtar, Vice President of the World Bank’s MENA Region is quoted in this regard as stressing that: “Development can only be strengthened if we are all partners in the effort.”¹²⁷

2. Egypt

Known as a stable MENA nation and as a valuable strategic partner of the United States and Israel, Egypt quickly followed in Tunisia’s footsteps, ousting its dictator of thirty years, President Hosni

¹²⁴ *Summary of Proposed Investment*, INT’L FIN. CORP. (Apr. 2008), <http://www.ifc.org/ifcext/spiwebsite1.nsf/0/9F0D31A0EFB9FC06852576BA000E2B83> (discussing the TAV Tunisie Project).

¹²⁵ *Id.*

¹²⁶ *See African Transport Deal of the Year 2008*, PROJECT FIN. MAG. (Feb. 2009), <http://www.projectfinancemagazine.com/Article/2409597/African-Transport-Deal-of-the-Year-2008.html>; *see also Summary of Proposed Investment*, INT’L FIN. CORP. (Apr. 2008), <http://www.ifc.org/ifcext/spiwebsite1.nsf/0/9F0D31A0EFB9FC06852576BA000E2B83> (discussing the TAV Tunisie Project).

¹²⁷ Press Release, The World Bank, World Bank Supports Social Accountability Network across Arab World (Apr. 15, 2011), *available at*: <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/LEBANONEXTN/0,,contentMDK:22891131~menuPK:294909~pagePK:2865066~piPK:2865079~theSitePK:294904,00.html>.

Mubarak.¹²⁸ Egypt has since moved aggressively towards political and constitutional reform.¹²⁹ In January 2011, soon after the Tunisian President fled to Saudi Arabia, protests began to rock Cairo's now famous *Tahrir Square*.¹³⁰ It quickly became the headquarters and principal site of Egypt's revolution.¹³¹ Clashes between protesters, the government, and its seemingly peaceful military forces continued until early February, leading to the ruling party stepping down—including the powerful sons of Egypt's former President.¹³² On the eighteenth day of protests, President Mubarak stepped down, exiling himself to his private residence in Sharm el-Sheikh, a Red Sea resort town on the eastern coast of Egypt.¹³³ Currently, he and his sons are being prosecuted in Cairo for alleged corruption and misuse of state funds.¹³⁴

Power or lack thereof, became the top agenda item in Middle Eastern countries, including Egypt, this past summer when power shortages increased due to the combination of high summer temperatures and Ramadan occurring at the same time.¹³⁵ Bidders for the 1,500MW Dairut independent power project ("IPP"), the first IPP in Egypt for a decade, started to form a consortium.¹³⁶ The Electricity & Energy Ministry is offering to pay for the project, and Egyptian Electricity Transmission Company ("EETC") will be supplying the power under a 20-year power purchase agreement ("PPA").¹³⁷ "The scheme will be a BOO plant."¹³⁸ The IFC is believed to be advising on the project, since it has also been actively advising on PPPs.¹³⁹ However, unlike the PPPs above, the IPP project is likely to have currency guarantees to encourage international banks to fund the project.¹⁴⁰ The PPPs are likely to be funded by "*ban teams*" that are believed to have

¹²⁸ *Spreading Revolution*, N.Y. TIMES, <http://www.nytimes.com/interactive/world/middleeast/2011-spreading-revolutions.html#intro> (last visited Oct. 5, 2011).

¹²⁹ *Id.*

¹³⁰ *Egypt Protests: Key Moments in Unrest*, BBC NEWS (Feb. 11, 2011, 11:57 AM), <http://www.bbc.co.uk/news/world-middle-east-12425375>.

¹³¹ *See id.*

¹³² *See id.*

¹³³ *Id.*; *Sharm el-Sheikh, Mubarak's New Home*, HUFFINGTON POST (Feb. 11, 2011), http://www.huffingtonpost.com/2011/02/11/sharm-el-sheikh-egypt-mubarak_n_821913.html?s238655&title=Sharm_elSheikh_Tourists.

¹³⁴ Iskandar El-Amrani, *The Resumption of Hosni Mubarak's Trial in Cairo*, THE GUARDIAN (Sept. 5, 2011, 12:35 AM), <http://www.guardian.co.uk/commentisfree/2011/sep/05/mubarak-trial-cairo-egypt>.

¹³⁵ Rob Morrison, *PFI: Power Tops the Middle East Agenda*, REUTERS (Sept. 14, 2010), <http://uk.reuters.com/article/2010/09/14/idUKLDE68D18F20100914>.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

formed between foreign and local companies that were shortlisted in June of last year.¹⁴¹

With internationalized PPP projects such as these, it appears that Egypt, like Tunisia, is looking at ways of creating power generation capacity more quickly. This seems to be one of the best areas of opportunity for new PF related projects in the region at this time. Local banks are also expected to play an important part in such PF deals considering that the risks are lower than on a normal green-field IPPs and PPPs, and the amounts required for financing are not too high.¹⁴² International banks could become involved in these projects, but they should be aware of typical Egyptian withholding tax issues.¹⁴³ The PF schemes are however, long-term dollar financings, so international banks could be required; and they should view this as an area for great returns, via possible power exportation to Europe, GCC countries, Asia, and beyond.¹⁴⁴

Another interesting Egyptian PPP project that may lead to opportunity for FDI is the “EAgrium” petro-chemical and fertilizers project.¹⁴⁵ It was one of the largest and most expansive oil and gas deals to be project-financed in Egypt, and the deal was completed with no export credit agency or EIB support.¹⁴⁶ The \$1 billion debt was placed in a mix of international and local banks.¹⁴⁷ EAgrium was a joint venture between Canada’s Agrium (60%), state-owned companies Echem and EGAS (24%), the national operator of the gas distribution grid GASCO (9%), and Arab Petroleum Investment Corporation (Apicorp) (7%).¹⁴⁸ The project was to consist of a nitrogen facility located in Damietta, scheduled for completion in 2010-2011,¹⁴⁹ but disputes related to environmental concerns have cancelled it (at least momentarily).¹⁵⁰ This project could be awaiting “opportunity-sniffing” investors from the international community to pounce upon the project, better

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See *Structured Finance*, COM. INT’L BANK (Oct. 6, 2011, 10:44 AM), <http://www.cibeg.com/en/InstitutionalBanking/StructuredFinance/Pages/default.aspx> (discussing the EAgrium project’s award for the “Middle East Petrochemicals Deal of The Year 2007” by Project Finance).

¹⁴⁶ *EAgrium: Fully Banked*, PROJECT FIN. MAG. (Aug. 1, 2007), <http://www.projectfinancemagazine.com/Article/2412149/EAgrium-Fully-banked.html>.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Egypt Cancels Agrium Project*, EDMONTON J. (Aug. 6, 2008), <http://www.canada.com/edmontonjournal/news/business/story.html?id=43442844-b819-48b0-8479-ccd9a208be93>.

mitigate and allocate the environmental risks involved, and get it back on its feet again as it appears creditworthy and bankable.¹⁵¹ In August 2008, Agrium reportedly sold their stake in the project for 26 percent share in the MISR Oil Processing Company (“MOPCO”). Under the deal, EAgrium was to be a wholly owned subsidiary of MOPCO.¹⁵² In 2008, the Egyptian government decided to relocate the fertilizer complex plant away from Damietta¹⁵³ since it was to produce potentially hazardous ammonia and urea that would cause environmental concerns near the heavily populated capital city of Cairo.¹⁵⁴ The original projects contracts awarded were Engineering, Procurement, and Construction (“EPC”) based contracts, and the project itself was to be paid back on Lump Sum Turnkey (“LSTK”) payment terms.¹⁵⁵ A dispute between the Egyptian government and the Canadian fertilizer producing company Agrium followed the project’s cancellation, but it was quickly resolved, and EFG-Hermes, the Egypt-based private investment bank has stated that, “The relatively quick resolution of the dispute should send a signal, from a regulatory and political risk standpoint, that foreign investment environment in Egypt is still favourable.”¹⁵⁶ New site selection, FDI, and a thorough environmental study could be possible solutions to get the project back on its feet again.

Water supply and sanitation in Egypt is an area for possibly vast PF expansion, as it is characterized by urgent need (and along with that need a host of achievements and challenges). Among the achievements in this sector are increases of piped water supply between 1990 and 2006 from 89 percent to 99 percent in urban areas, and from 39 percent to 82 percent in rural areas.¹⁵⁷ These improve-

¹⁵¹ Cf. *EAgrium: Fully Banked*, *supra* note 146 (describing EAgrium’s financing history).

¹⁵² See, e.g., *Agrium Reaches Agreement on Egyptian Nitrogen Facility*, AGRIMUM (Aug. 11, 2008), http://www.agrium.com/news/05784_9078.jsp.

¹⁵³ See, e.g., *Egyptian Parliament Fails to Support EAgrium Project on Existing Site*, AGRIMUM (June 20, 2008), http://www.agrium.com/news/05784_8886.jsp.

¹⁵⁴ See Abdel-Rahman Hussein, *Cairo Protest against Agrium Dispersed as Experts Condemn Plant*, DAILY NEWS EGYPT (May 26, 2008), <http://www.thedailynewsegypt.com/archive/cairo-protest-against-agrium-dispersed-as-experts-condemn-plant-dp1.html>.

¹⁵⁵ Sharif Elmusa & Jeannie Sowers, *Damietta Mobilizes for Its Environment*, in MIDDLE E. RESEARCH & INFO. PROJECT (Oct. 21, 2009), <http://www.merip.org/mero/mero102109>.

¹⁵⁶ Heba Saleh, *Egypt Resolves Project Dispute*, FIN. TIMES (Aug. 13, 2008), <http://www.ft.com/cms/s/0/2b902e0e-68de-11dd-a4e5-0000779fd18c.html#axzz1L3MquRN8>.

¹⁵⁷ Christine Haffner-Sifakis & Christoph Sommer, *Horizon 2020- Elaboration of a Mediterranean Hot Spot Investment Programme (MeHSIP)*, EUROPEAN INV. BANK (Jan. 2008), http://ec.europa.eu/environent.enlarg/med/pdf/mehsip_report.pdf.

ments are despite rapid population growth (with the elimination of open defecation in rural areas during that same period), and in general, with a relatively high level of investment in infrastructure during that period.¹⁵⁸ Access to improved water sources in Egypt is now practically universal. On the institutional side, the separation between regulation and service provision has been improved through the creation of a “National Holding Company for Water and Wastewater” in 2004, and of an economic regulator, the “Egyptian Water Regulatory Agency” (“EWRA”), in 2006.¹⁵⁹

Many challenges remain, however, in this area for Egypt, which could be turned to PF opportunities. Only about one third of the population is connected to sanitary sewers. Due to low sanitation coverage, about 17,000 children die each year because of diarrhea.¹⁶⁰ Low-cost water recovery, due to water tariffs that are among the lowest in the world, are also a challenge and require government subsidies to the country’s fourteen public water and sewer companies, even for simple operating costs.¹⁶¹ Poor facilities operation, such as wastewater treatment plants, is also a major issue, but it may be viewed by eager investors as an area of opportunity for foreign investment and partnership/participation.¹⁶² Foreign aid from the United States, the European Union, France, Germany, the World Bank, and Arab donors remains important in terms of financing and technical assistance.¹⁶³ This is particularly important in the case of Western donors, who promote sector reform that aims at higher levels of cost recovery and more efficient water service provision.¹⁶⁴ Private sector participation in operating water and sanitation systems has so far been limited, mainly to Build-Operate-Transfer (“BOT”) arrangements for large facilities, but PF for new projects is aggressively underway, and will hopefully lead to success stories in this area for the region.¹⁶⁵

One interesting Egyptian project in this sector, which may likely open doors for many others, is the Gabal El-Asfar Waste-Water Treatment Plant (“GAWWTP”) Project in Cairo. This project received approval in October 2009 from the Board of Directors of the African Development Bank Group (“AfDB”) for €53 Million Euros in initial project financing.¹⁶⁶ The project’s objective is to “improve the quality

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See generally *Egypt: AfDB Approves €53 Million Loan to Finance Waste Water Treatment Project*, AFR. DEV. BANK GRP. (Oct. 7, 2009), <http://www.afdb.org/en/>

of waste-water discharged into the drainage system in Cairo East, thereby contributing to improved sanitation and a cleaner environment for the nearly 8 million people living in the area.¹⁶⁷ The proposed additional treatment capacity will serve an additional 2.5 million people.¹⁶⁸ Other project beneficiaries include downstream villagers and those living along the system draining the effluent from the plant into Lake Manzala.¹⁶⁹ The project corresponds with the AfDB's 2008-2012 Medium-Term Strategy, which highlights the AfDB's focus on infrastructure development and better governance in PF, promoting a more robust private sector in the MENA region.¹⁷⁰

3. *Libya*

After witnessing popular revolutions in Tunisia and Egypt, the Libyans were a bit more hesitant to bring about their own. This appears to be a result of the Libyan people living in utmost fear and oppression for the past 42 years, under the iron-fist rule of their leader, Colonel Muammar Gaddafi. Gaddafi was toppled and killed in October 2011, and his 42 year oppressive ruling was also removed. Gaddafi's regime had targeted its own people, and "kill[ed] innocent civilians," to stay in power.¹⁷¹ Many lives were lost but the Libyan opposition forces, NATO, and Libyan rebels collaborated and captured the capital city of Tripoli and other pro-Gaddafi strongholds.¹⁷² These efforts have led to a new leadership in Libya, now called the National Transition Council ("NTC"). The NTC is preparing the country for its first free elections under a democratic Parliamentary system, apparently based on a Islamic law, with a promise to the Libyan people and

news-and-events/article/egypt-afdb-approves-eur-53-million-loan-to-finance-waste-water-treatment-project-5160 (discussing the Egyptian water project and other related initiatives).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Zuma tells Gaddafi: Stop Killing Innocent Civilians*, YA LIBNAN (Mar. 13, 2011), <http://www.yalibnan.com/2011/03/13/zuma-tells-gaddafi-stop-killing-innocent-civilians>; see also *Gaddafi killed in hometown, Libya eyes future*, REUTERS (Oct. 21, 2011), <http://uk.reuters.com/article/2011/10/20/us-libya-idUSTRE79F1FK20111020>.

¹⁷² Damien McElroy, *Libya: Battle for Tripoli Turns Bloody as Gaddafi Holds Out to the End*, THE TELEGRAPH (Aug. 23, 2011, 6:30 AM), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8716884/Libya-battle-for-Tripoli-turns-bloody-as-Gaddafi-holds-out-to-the-end.html>.

international community of respect for the rule of law and for human rights.¹⁷³

Libya presents itself as the most challenging situation in the MENA region, but at the same time, also the best possible 'hot-spot' for PF opportunity after the Gaddafi regime's fall. There will be major legal, institutional, operational, and political issues to address, once the country's new Parliament is elected and its Constitution is drawn. FDI and project investment from the outside world will quickly present itself to Libyan projects in the oil, gas, clean energy, and natural resources sectors, as is already occurring in its rebel-controlled and resource-rich cities, such as Ras Lanuf, Mizrata, and Benghazi.¹⁷⁴ These are places where some European nations and the United States have quickly recognized the rebel leadership as legitimate, so as to be the first players on the new mega-project scene in those cities.¹⁷⁵

Notably, the first international project-financing in Libya was reported in 2007, when ABC International Bank Plc and Standard Bank Plc jointly arranged \$16 Million USD financing for the redevelopment and expansion of the historic Al-Waddan Hotel in Tripoli.¹⁷⁶ The project sponsors provided a debt service undertaking with both onshore and offshore security over the project's assets.¹⁷⁷ The Libyan economy however, predominantly depends on revenues from petroleum so internal projects such as this were usually frowned upon, mainly due to the closed anti-tourism society that had been created under the Gaddafi regime. It is reported that strong diversification efforts are being sought, however, with clean energy projects and tourism as prime examples of opportunity in the non-oil sector.¹⁷⁸ Despite tourists not being allowed into the country under the former 2003 UN sanctions, the tourism industry is now growing and likely to become an attractive option for foreign investors.¹⁷⁹

Abu Dhabi's Al-Maskari Holding is funding a new \$3 Billion USD project to build an integrated "energy hub" in Libya and to de-

¹⁷³ See *A Vision of a Democratic Libya*, NAT'L TRANSITION COUNCIL (Oct. 2011), <http://www.ntclibya.org/english/libya/>.

¹⁷⁴ See generally Sami Zaptia, *Libya Launches \$54 billion 'Energy Cities' Master Plan*, THE TRIPOLI POST (Jan. 11, 2010), <http://tripolipost.com/articledetail.asp?c=2&i=5046>.

¹⁷⁵ See Mary E. Stonaker, *What Formal Recognition Given to Libyan Rebels Means for the Oil Markets*, AL ARABIYA NEWS (July 15, 2011), <http://www.alarabiya.net/articles/2011/07/15/157799.html>.

¹⁷⁶ See *First-ever International Project Financing Funds in Libya*, WHITE & CASE LLP (Oct. 13, 2011, 10:36 AM), http://www.whitecase.com/press_10262007/.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (quoting White & Case partner Jason Kerr).

velop an underwater cable for exporting electricity to Europe.¹⁸⁰ The project will include solar power and conventional electricity generation from fuels such as natural gas, and a high-voltage undersea transmission line from Libya to southern Italy.¹⁸¹ An agreement for the project was signed in Tripoli on December 12, 2010, according to the Libyan General Board of Privatization and Investment.¹⁸² Libya is proving to be an immense resource for solar projects and other clean energy projects that can be easily exported to Europe.¹⁸³ The Al-Maskari project's goals are to compete with Russia and cover any European gas shortages by sending Libya's clean energy to Europe via cables under the sea; these cables extend from northern Libya to southern Europe.¹⁸⁴ Sheikha Aisha Al-Maskari, the chairwoman of Al-Maskari Holding, said the group was interested in investing in all sectors of Libya's energy industry, including solar energy; she asserted that Libya has "the best solar resources in the world."¹⁸⁵

Other upcoming projects in Libya that present new areas of opportunity are, of course, in the oil and gas sector. Libya, a member of the Organization of Petroleum Exporting Countries ("OPEC"), is the fourth largest oil producer in Africa after Nigeria, Algeria, and Angola (with nearly 1.8 million barrels per day and has reserves estimated at 42 billion barrels).¹⁸⁶ Projects in infrastructure development and construction sectors are also successfully underway,¹⁸⁷ and will probably increase after the current civil-war-like conflict areas settle. Optimism is driving Libya's construction sector as well, with 2011 and 2012 expected to present the strongest growth.¹⁸⁸ Despite an optimistic outlook, there are still a number of risks for investors to consider, stemming predominantly from the business environment.¹⁸⁹ The major barrier to growth in Libya is related to Libya's own business environment, which has long been unpredictable and in desperate need of reform.¹⁹⁰ Libya scores 45.7 out of 100 for risks in BMI's infrastruc-

¹⁸⁰ See Tasmin Carlisle, *Al Maskari Holding in \$3bn Libya Energy Plan*, THE NAT'L (Dec. 27, 2010), <http://www.thenational.ae/business/energy/al-maskari-holding-in-3bn-libya-energy-plan>.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ See *id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Libya: Fourth Largest Oil Producer in Africa*, ENNAHAR ONLINE (Feb. 22, 2011), <http://www.ennaharonline.com/en/economy/5839.html>.

¹⁸⁷ BUS. MONITOR INT'L, LIBYA INFRASTRUCTURE REPORT 2011 (2011), <http://www.businessmonitor.com/infra/libya.html>.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

ture business environment scale, however, a rewards score of 53.2 from the same review scale reflects the tremendous opportunities for PF investors.¹⁹¹

The UN lifting of sanctions in 2003 increased investor interest in Libya, and the government has since actively pursued international private investment.¹⁹² Any new government must offer the same stability and security to an investor as the Gaddafi regime to ensure future growth. But, arbitrary decision-making and non-transparent investment laws may make this difficult.¹⁹³ Libya “is ranked the worst in North Africa according to Transparency International’s 2010 Corruptions Perception Index (coming in at 146 out of 178 states rated), while the World Economic Forum placed the country at 100 out of 139 economies in terms of competitiveness.”¹⁹⁴ The government’s recent liberalization of the economy is movement in the right direction, but current unrest may slow progress.¹⁹⁵ The business environment may remain, at least for the next six months to one year, the primary risk to any positive forecast.¹⁹⁶ But once the fighting ceases, this author predicts that outside investment will flourish into Libya. Investors will come just to get at the nation’s oil, gas, and clean energy resources. Not to mention that Libya’s ancient Mediterranean sea-resort areas and coastlines are developable and attractive tourism prospects.¹⁹⁷ In fact, the Marriott Hotels Corporation, and the new MENA regional offices of IATA have made efforts to gain an initial foothold in Libya.¹⁹⁸

Abu Dhabi financial services company Invest AD has also launched a Libyan investment fund. Invest AD has already committed its own capital to the fund, which will invest in Libya’s \$2.2 billion in the stock market, as well as participating in initial public offerings (“IPO”), and taking pre-IPO stakes in companies.¹⁹⁹ “Libya has taken positive steps to open its economy and is reaping the rewards, with

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *See generally Libya Offers Incredible Opportunity – But Only the Bold Need Apply*, LIBYANINVESTMENT.COM (Aug. 2, 2010), <http://www.libyaninvestment.com/libya-news/8193.html>.

¹⁹⁸ Alexandra Berzon, *Marriott Taps Mideast, Africa Chief*, WALL ST. J. (Oct. 3, 2011), <http://online.wsj.com/article/SB10001424052970203791904576607133323675082.html>.

¹⁹⁹ *Abu Dhabi Investment Company Launches Libya Fund*, GLOBAL ARAB NETWORK (Jan. 20, 2011), <http://www.english.globalarabnetwork.com/201101208707/Economics/uae-abu-dhabi-investment-company-launches-libya-fund.html>.

very high rates of economic growth,” said Invest AD Chief Executive Officer Nazem Fawwaz Al-Kudsi.²⁰⁰ Al-Kudsi further noted the firm was “glad to be [in Libya] at an early stage of this process, and [that Invest AD is] very much [a] long-term investor. This fund will contribute capital to some of the country’s most promising businesses to help them grow for years to come.”²⁰¹ The risk is that this optimism may vanish with the onset of war in Libya. With the end of conflict, investor confidence and financing opportunities in infrastructure development, renewable energy exportation, and solar and fuel-related projects may yet be restored.

Perhaps the most interesting and important of all possible new developments in Libya, and for the MENA region as a whole, is Italy’s proposed Libyan Motorway project.²⁰² The project will act as a foundational first project that will bring greater connectivity and greater accessibility throughout the region, permit increased future trade and commerce throughout the area, and foster subsequent PF projects in general once connected. The \$5 Billion USD cross-country motorway project that is to be constructed for Libya by the Italian government, will stretch from the Libya’s border with Tunisia to Libya’s border with Egypt.²⁰³ Italian firms have presented twenty different plans for the 1,700 kilometer motorway across Libya, which Italy’s Infrastructure Minister, Altero Matteoli, says is “the biggest project of its kind in Africa.”²⁰⁴ Italy will finance the project according to the terms of a friendship treaty signed by Italian Prime Minister Silvio Berlusconi and Libyan leader Muammar Gaddafi in 2008.²⁰⁵ Building of the motorway will be awarded to three different firms, which will divide the work between them.²⁰⁶ Italy will invest \$5 billion in Libya over the next twenty years under the terms of the treaty, primarily in infrastructure projects reserved exclusively to Italian firms, as the scheme is designed to compensate Libya for Italy’s colonial misdeeds in the first half of the twentieth-century.²⁰⁷ The two largest builders in Italy filed for pre-qualification to bid for the new motorway project connect-

²⁰⁰ *Abu Dhabi Invest AD launches Libya Fund to Tap High Growth*, AME-INFO (Jan. 19, 2011), <http://www.ameinfo.com/254206.html>.

²⁰¹ *Id.*

²⁰² Gulliver Cragg, *Berlusconi and Gaddafi launch Libya motorway project*, FRANCE 24 (Aug. 31, 2009), <http://www.france24.com/en/20090831-berlusconi-gaddafi-launch-libya-motorway-project>.

²⁰³ *Id.*

²⁰⁴ *See 20 Firms Bid for 1,700 km Libya Motorway*, TRADE ARABIA (Aug. 24, 2010, 12:33 PM), http://www.tradearabia.com/news/cons_184934.html (discussing the new motorway and its financing).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

ing Tunisia and Egypt.²⁰⁸ The road, expected to span four lanes, will span from Ras Ajdir, on the border with Tunisia, to Imsaad, close to Egypt.²⁰⁹

A recent change of strategy by the Italian government has seen it turn its back on its Libyan “friends” from the former Gaddafi regime, when Italy joined the NATO-led bombing campaign.²¹⁰ The campaign sought to enforce a UN resolution on the protection of civilians in Libya, who were targeted by pro-Gaddafi forces during the conflict.²¹¹ Additionally, Gazprom, a Russian oil giant, also intends to become involved in Libya by joining with the Italian oil company ENI in its “Elephant Oil” projects in Libya.²¹²

Another major but risky development in new Libyan housing infrastructure projects are those managed by the U.S. project management company AECOM, which already has a large American expatriate presence in Libya. AECOM recently signed a contract for a joint venture (“JV”) with Libya’s Housing and Infrastructure Board (“HIB”).²¹³ The new JV would allow several thousand HIB employees to leave Government of Libya (“GOL”) employment, enter the private sector; and prompt a sizeable increase in the number of expatriate Americans working in Libya under AECOM.²¹⁴ The new JV would initially focus on projects in Libya; however, the long-term goal is to implement projects throughout the African continent and MENA region under a Libyan banner. AECOM will capitalize the new JV and it believes funding for its project is secure.

Nonetheless, AECOM’s success to date has stemmed mainly from the relationship of its chairman with the chairman of the HIB, who was rumoured to be a potential candidate to take over as Prime

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Libya: Berlusconi backs NATO strikes by Italy jets*, BBC NEWS (Apr. 25, 2011 3:34 PM), <http://www.bbc.co.uk/news/world-africa-13188951>.

²¹¹ *Id.*

²¹² Lyubov Pronina, *Gazprom Agrees to Join ENI’s Oil Project in Libya*, BLOOMBERG (Feb. 16, 2011, 10:21 AM), <http://www.bloomberg.com/news/2011-02-16/gazprom-agrees-to-join-eni-s-elephant-oil-project-in-libya.html>.

²¹³ See Press Release, AECOM Technology Corp., AECOM Announces Contract with Libya Housing and Infrastructure Board with Potential Value of \$574 Million (Dec. 13, 2007), available at http://investors.aecom.com/phoenix.zhtml?c=131318&p=irol-newsArticle_print&ID=1087083&highlight=.

²¹⁴ See *Risky Business? American Construction Firm Enters Joint Venture with GOL*, THE DAILY TELEGRAPH (Jan. 28, 2009), <http://www.telegraph.co.uk/news/wikileaks-files/libya-wikileaks/8294919/RISKY-BUSINESS-AMERICAN-CONSTRUCTION-FIRM-ENTERS-JOINT-VENTURE-WITH-GOL.html> (releasing the content of a United States embassy cable to Washington, D.C. which was passed on by the Wikileaks organization).

Minister in an upcoming cabinet shuffle.²¹⁵ AECOM's increased profile places it in the crosshairs of those seeking to extract rents, such as foreign investors and lenders, but the endeavour remains a potentially risky proposition.²¹⁶ As a consequence of the uncertainty in Libya, AECOM had difficulty determining whether the project should continue, and it previously completed a pullback of expat employees and their families working on Libyan infrastructure projects.²¹⁷

IV. OBLIGATIONS AND RISK MANAGEMENT

1. *Obligation to Deliver*

A recent lecture by H.E. Dr. Amani Abeid Karume, the former President of Zanzibar, best summarizes the obligations of the players involved in infrastructure development and PF in the conflict-stricken MENA region.²¹⁸ In his lecture, Mr Karume stressed that, "the West must now intervene and 'deliver' on its democracy model, otherwise terror, lack of legal, political, and social institutions, and severe poverty may come in democracy's place."²¹⁹ He added that local governments and regional institutions must also help to deliver on this promise, and not that they should simply "wait on the West to do it for them."²²⁰ Mr. Karume also stressed the importance of "human relations" as being the "number one" skill that individuals working in the field of PF must have, since it is an important feature to use during conflicts and disputes.²²¹ Having those skills in place before a project begins is the best way to mitigate risk and prevent lengthy and costly litigation.

Mr. Karume mentioned the social duties we each have as lawyers and managers to help create prosperity and opportunity for the people of the MENA region. Furthermore, finance leaders should act upon those duties to propose new projects and seeing them through to the end.²²² As stated above, doing so means less unemployment, a safer environment, more competitive markets, less delinquency and violence, greater access to cleaner energy, and access to very precious

²¹⁵ *See id.*

²¹⁶ *See id.*

²¹⁷ *See AECOM Says Libyan Withdrawal Will Scuff Earnings*, FORBES (Feb. 3, 2011), <http://www.forbes.com/2011/03/02/aecom-withdraws-from-libya-unrest-buoys-oil-marketnewsvideo.html>.

²¹⁸ Dr. Amani Abeid Karume, Former President of Zanzibar, Inaugural Lecture before the Boston University African Presidential Archives and Research Center (Mar. 10, 2011), <http://www.bu.edu/aparc/presidents/karume/>.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

commodity resources that act as the “life-blood fuel” of our economies. Lessons learned from major infrastructure mega-projects, such as the Mozal Smelter Project in Mozambique, teach us the same idea: getting involved in riskier projects is what PF is all about, and that the secret to PF success is allocating those risks in a manner that is mutually beneficial to the local communities and investors involved. The true “key elements” to creating investor confidence in MENA’s future and expanding the PF sector is to follow the Mozal Smelter Project’s motto, “Together, We Can Make a Difference,” and getting the local communities involved to work on and buy into any development project undertaken in the region only bolsters such efforts.²²³

2. Risk Management “Musts”

Every project entails unique challenges that generate key considerations on risk management, allocation of risk, and project governance and documentation. Risk management affects project value and can be a valuable tool in reducing costly market imperfections and under-investment in positive net-present value (“NPV”) projects as well.²²⁴ One of the primary reasons why managers say they use project finance is to “achieve better risk mitigation and improved risk allocation.”²²⁵ Cases like Poland’s A2 Motorway and *Petrozuata* illustrate a four-stage process for successful risk management: identification, assessment, mitigation, and allocation.²²⁶ In the identification stage, the objective is to identify and classify project risks into four different categories: completion risks (completion on time and budget), operating risks (market demand and throughput, etc.), political/sovereign risks (expropriation, *force majeure* events, etc.), and financial risks (interest rate and exchange rate exposures).²²⁷ *Force majeure* events come in two forms: acts of God (such as floods, earthquakes, or other natural disasters), which are considered operating failures, and wars,

²²³ See Williams, *supra* note 15; see also James J. Emery et al., ADMINISTRATIVE BARRIERS TO FOREIGN INVESTMENT: REDUCING RED TAPE IN AFRICA 142, 158 (2000); Kathryn McPhail & Aidan Davy, *Integrating Social Concerns into Private Infrastructure Projects* (World Bank, Discussion Paper No. 384, 1998).

²²⁴ Tom Marshella, *Three R’s: Risk, Return, & Rating*, PROJECT FIN. MAG., May 15, 2001, at 5-8.

²²⁵ ETSY, *supra* note 29.

²²⁶ *Id.* at 279-320.

²²⁷ See generally *Rating Criteria for Infrastructure and Project Finance*, FITCH RATINGS (Sept. 29, 2009), <http://www.finance-quebec.com/Fitch%20Rating%20Criteria%20project%20finance.pdf> (describing various types of risk as categorized by one financial services firm).

strikes, riots, and expropriation, which are considered political/sovereign risks.²²⁸

After identifying the risks, the next step in the process is to assess the most important risks and then identify risks that may require active mitigation and management.²²⁹ The goal of risk mitigation is to reduce, in a cost-effective manner, cash flow variability to increase the project's debt capacity.²³⁰ By narrowing the distribution of possible returns, risk management allows projects to support leverage ratios in excess of 90 percent.²³¹ The final step is allocating risk to the parties that are best able to control the risks and that can bear them at least cost, as typically established through long-term contracts.²³² To induce optimal contractual behaviour between parties and reduce incentive conflicts between key decision makers, other governance measures, such as "shared ownership," are required to prevent and resolve conflicts.²³³

Governments must have the ability to negotiate, monitor, and enforce agreements to develop certain types of infrastructure.²³⁴ When these contracts are unenforceable, the project's property rights are uncertain, cash flows are high, and there is a high risk for expropriation.²³⁵ Many infrastructure projects in the MENA region, in particular where countries have non-existent, untested, or unpredictable legal systems, managing sovereign risk becomes one of the most important and critical tasks of the project manager.²³⁶ This is where the newer "structural" approach, illustrated above, better suits con-

²²⁸ C. RICHARD TINSLEY, *A PRACTICAL INTRODUCTION ON PROJECT FINANCE RISKS, STRUCTURES AND FINANCEABILITY* (1996).

²²⁹ See ETSY, *supra* note 29.

²³⁰ *Id.*

²³¹ TIMOTHY C. IRWIN, *THE WORLD BANK: ALLOCATING AND VALUING RISK IN PRIVATELY FINANCED INFRASTRUCTURE PROJECTS* 30 (2007).

²³² See ETSY, *supra* note 29; see also DEP'T OF HER MAJESTY'S TREASURY, PFI: STRENGTHENING LONG-TERM PARTNERSHIPS 76, 82-83 (Mar. 2006), http://web.archive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/media/7/F/bud06_pfi_618.pdf.

²³³ IRWIN, *supra* note 231, at 33.

²³⁴ THE WORLD BANK, *INFRASTRUCTURE DEVELOPMENT: THE ROLES OF THE PUBLIC AND PRIVATE SECTORS* 15 (Nov. 2005), <http://siteresources.worldbank.org/INTINFNETWORK/Resources/Rolesupdt.pdf>.

²³⁵ J.R. Markusen, *Contracts, intellectual property rights, and multinational investment in developing countries*, 53 J. INT'L ECON. 189-204 (2001).

²³⁶ Nasser Saidi, *Forum on Corporate Governance in Banks and Financial Institutions in Line with International Standards and Practices, Corporate Governance in the Arab countries: Role of the Banking System in ensuring Transparency & Disclosure* (Jan. 2005), http://iodlebanon.org/iodl/Files/13_1.Arab%20Banks.pdf; M. Haddad & Sam Hakim, *The cost of sovereign lending in the Middle East after September 11*, 1 J. GLOBAL BUS. ADVANCEMENT 127-39 (2007).

temporary risk management needs (with respect to management of sovereign risk), as opposed to the older and more limited “financial” approach to risk management. Under the “financial” approach, sponsors simply increase the project’s hurdle rate, and accept only those projects that generate sufficiently higher returns.²³⁷ This may actually increase project risk, because it makes the sponsors and lenders appear as if they are profiting at the expense of the local community. The idea that high rates of return can actually increase and induce higher project risk is known as the “paradox of infrastructure investment.”²³⁸ Evaluators of project risk must also remember to include not only negative risks, but also positive risks, such as accepting the initiatives advanced by an intergovernmental organization that may be adverse to a nation’s domestic industry. Likewise, high toll collection from roadway infrastructure projects can result in money which is unaccounted for in a project that individuals seek to claim. Finally, evaluators must consider scenarios where one nation is linked to other nations for commerce and trade, resulting in unfair competition and higher duty tariffs.

Other factors that must be considered when assessing and allocating project risk are: unexpected natural and operational catastrophes that may impact operations, climate change and greenhouse effects that may adversely impact operations and markets, human resource talent pools that may not be adequate in the region to support growth, and breaches in information technology that may impact the region’s conduct of business and confidentiality/privacy requirements.²³⁹ The identification and management of risk ensures better corporate governance structure, and good governance combined with social responsibility is key to delivering long-term value to project shareholders.²⁴⁰

²³⁷ BENJAMIN ETSY, *THE ECONOMIC MOTIVATIONS FOR USING PROJECT FINANCE* (2003), <http://www.people.hbs.edu/besty/BCE%20PF%20Motivations%202-14-03.pdf>; SCOTT HOFFMAN, *THE LAW AND BUSINESS OF PROJECT FINANCE* (Cambridge Univ. Press 2008).

²³⁸ Andrew F. Haughwout, *The Paradox of Infrastructure Investment: Can a Productive Good Reduce Productivity?*, *BROOKINGS REVIEW* (2000), http://www.brookings.edu/articles/2000/summer_productivity.aspx.

²³⁹ BHP BILLITON, 2010 ANN. REPORT 13 (2010), <http://www.youblisher.com/p/156535-2010-BHP-Billiton-Annual-Report> [hereinafter *BILLITON ANNUAL REPORT*]. For example, the EU has very strict privacy laws, and breaches/disclosures of private data can result in huge sanctions if not properly mitigated and reported, under the EU’s Data Privacy Directive.

²⁴⁰ *See generally id.* (providing insight into risk management and good corporate governance techniques utilized by one company to enhance their shareholder value and project returns).

An ideal project finance check-list would include the following items: (a) PF Goals List (define the goals and interests of the organization, goals of the project, and of your client in the project); (b) List of Advantages for using PF (such as non-recourse and limited-recourse debt, off balance sheet financing, leveraged debt, equity finance, political risk diversification, and credit opportunities), as opposed to other available financing methods for your project (such as the many risk allocation challenges, lender risk, higher interest rates, higher taxes and fees, lender monitoring, transaction costs, reporting requirements, and cost of insurance); (c) Project Finance Risk Management List, which includes identification, allocation, and mitigation of risks, and the development of a “risk matrix” that includes assessing developmental risk, financial risk, design risks, construction risks, start-up costs, operational risk, environmental risk, completion risk, and political risk, and with a section on the possible parties to whom you may allocate risk, and another section detailing risk mitigation from the pre-construction stage, to the local partners level, and for project phases.²⁴¹

Infrastructure project checklists should always include an environmental feasibility study, and project managers should look into warranty risks, contractual risks and remedies, contingency reserves and management reserves, guarantees and completion agreements, indemnification and liquidated damages policies, and plan on how to internationalize the project if possible. Foreign Direct Investment PF checklists should include structural solutions to possible agency conflicts, with detailed plans on organizational structure, ownership structure, capital structure, contractual structure, governance structure, and board structure.²⁴² Lastly, a sound project checklist will include project valuation details with the source and value of projected revenues, a revenue management plan with details of needed long-term contracts, a list of subsidies and guaranteed cash flow streams with premiums added to the values of the project and to investments (if they are risky), an outline of the social cost and internal benefits of the project, an equity cash flow valuation, and a corporate responsibility plan detailing the project’s benefits to the local community.²⁴³

²⁴¹ See generally GRAHAM D. VINTER & GARETH PRICE, *PROJECT FINANCE: A LEGAL GUIDE* (3d ed. 2006).

²⁴² Louis T. Wells & Eric S. Gleason, *Is Foreign Infrastructure Investment Still Risky?* HARV. BUS. REV., Sept. 1995, at 44-45.

²⁴³ See generally Theodore H. Moran, *Transnational Strategies of Protection and Defence by Multi-National Corporations: Spreading the Risk and Raising the Cost for Nationalization in Natural Resources*, 27 INT’L ORG. 273 (1973).

V. POSSIBLE SOLUTIONS AFTER THE STORM

1. *Internationalization and Partnership*

The MENA region needs to invest between \$75-100 billion a year in infrastructure to sustain the growth rates achieved in recent years, and to boost its economic competitiveness.²⁴⁴ Recent events in the region have demonstrated that people want better public services, and the World Bank Group, in cooperation with the Islamic Development Bank, is setting up a regional initiative that could raise up to \$1 billion in FDI to close the infrastructure gap in the MENA region.²⁴⁵ A new initiative aims to address this shortfall and brings together the World Bank Group with the Islamic Development Bank as potential anchor investors in a regional FDI investment, and as vehicles to support both conventional and Shariah-compliant investment in infrastructure.²⁴⁶ The new initiative is known as the “*Arab Financing Facility for Infrastructure*” (“AFFI”), and it is a partnership of the World Bank, International Finance Corporation (“IFC”), and the Islamic Development Bank (“IsDB”).²⁴⁷ This initiative “is an integrated facility which aims at fostering infrastructure development and regional dialogue in the Arab countries.”²⁴⁸ “[The AFFI] focuses on regional infrastructure programs and developing [more FDI for] PPPs.”²⁴⁹ AFFI will support infrastructure projects designed to boost regional connectivity,” including electricity, rail, road and maritime networks.²⁵⁰ “A private sector window with IFC and IsDB as anchor investors will provide private investment to support PPP deals and the possibility of Shariah-compliant financing.”²⁵¹ It is important to note

²⁴⁴ THE WORLD BANK, BANK ANNOUNCES FACILITY TO ADDRESS CRITICAL MENA INFRASTRUCTURE GAP (Oct. 9, 2010), <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22730539~pagePK:34370~piPK:34424~theSitePK:4607,00.html>.

²⁴⁵ *Id.*

²⁴⁶ THE WORLD BANK, WORLD BANK & PARTNERS JOIN EFFORTS TO TACKLE ARAB WORLD INFRASTRUCTURE CHALLENGE (Apr. 27, 2011), <http://arabworld.worldbank.org/content/awi/en/home/featured/infrastructure.html> [hereinafter WORLD BANK & PARTNERS].

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* The World Bank, Arab World Initiative (ABI), is a partnership with the countries of the Arab world “designed to foster effective cooperation and collaboration in the interests of economic integration and knowledge sharing. The Food and Agriculture Organization of the United Nations Regional Office for the Near East’s website offers access to the latest data, research, feature stories, briefs, multimedia presentations and project documentation about efforts in the Arab world to find opportunity and advantage in economic integration both across the

here that “World Bank (“IBRD”) lending to the MENA region for infrastructure projects. . .has already exceeded \$1 billion a year and is expected to increase further in the years ahead to help close the infrastructure gap.”²⁵² “In addition, over the past four years, IFC has invested more than \$1 billion in infrastructure projects in the region as well.”²⁵³ “IsDB investment in infrastructure projects in the region over the past 5 years has exceeded \$1.3 billion a year, including about \$300 million in PPP projects.”²⁵⁴

In a recent ABI website feature story,²⁵⁵ Mr. Robert B. Zoellick, World Bank Group President stated, “This regional initiative will unlock new flows of private sector investment to help countries like Egypt, Morocco, Jordan or Tunisia, eager to push ahead with critical infrastructure projects that will drive competitiveness and boost much needed job creation.”²⁵⁶ He added that the proposed regional initiative would include technical assistance to help governments tackle legal, policy, and institutional constraints to PPP projects, and develop cross-border infrastructure projects vital to regional integration and competitiveness.²⁵⁷ Dr. Ahmad Mohamed Ali, President of the Islamic Development Bank, headquartered in Jeddah, stated, “The Islamic Development Bank is excited to be part of this initiative as we know there is a pipeline of viable infrastructure projects out there and unmet demand,” and that, “The facility will have the flexibility to structure investments in accordance with Shariah principles, which will attract untapped, alternative sources of financing.”²⁵⁸ Both the IsDB and the IFC will work together to explore ways of providing project finance in both conventional and Shariah-compliant products, which would seek to attract private investors, especially from the wealthier and developed Gulf (“GCC”) nations.²⁵⁹ Mr. Lars Tunnel, Executive Vice President and CEO of IFC also elaborated that:

Infrastructure is one of our most important priorities in the Middle East and North. . .Large investments in in-

region and with the wider world.” FOOD & AGRICULTURE ORG. OF THE UNITED STATES, THE ARAB WORLD INITIATIVE AND THE WORLD BANK GROUP (Oct. 18, 2011), <http://neareast.fao.org/Pages/NewsDetails.aspx?ID=2402384&lang=EN&I=0&DIId=0&CIId=0&CMSId=5000912>.

²⁵² WORLD BANK & PARTNERS, *supra* note 246.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ Press Release, The World Bank, Bank announces Facility to Address Critical MENA Infrastructure Gap (Oct. 9, 2010) (on file with the University of Richmond Law School Library).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

infrastructure are needed across the region. This facility will demonstrate the viability of infrastructure investments for both the private sector and governments, and will help increase investments in this sector and improve services for a growing population.²⁶⁰

With the internationalization of infrastructure development project-financings, local government institutions and agencies become more reluctant to enact laws that permit expropriation of project assets. Prior to the recent period of turmoil, the region's dictatorial regimes frequently nationalized private property.²⁶¹ To mitigate such risks, local authorities should encourage developed areas like the U.S., Europe, Asia, and the GCC nations to invest in projects. This would trigger protections provided by the Bilateral Investment Treaty ("BIT"), the Multi-Lateral Investment Treaty ("MIT"), the ICSID Convention,²⁶² and other public and private laws.²⁶³

2. Combining Conventional Project Finance and Islamic Finance

The MENA region is comprised of primarily Islamic countries with large Muslim populations that do business with Asia, Eurasia, the United States, South America, Europe, and most of the Western secular world. These countries also do business with the GCC and

²⁶⁰ *Id.*

²⁶¹ Martin Amison, *Privatization and Project Finance in the Middle East*, 14 INT'L FIN. L. REV. 14 (1995).

²⁶² See Andreas F. Lowenfeld, INT'L ECON. L., 536-40, 544-70 (2d ed. 2008) (discussing the ICSID address investment disputes, the limitations of the ICJ, as an arbiter in expropriation-related FDI disputes and the "Hull Formula", a formula available in most BIT's, and which provides prompt, adequate, and effective relief in cases of expropriation and investment-related disputes); see, e.g., *Lanco Int'l Inc. v. Argentine Republic*, 40 I.L.M. 457 (2001), ICSID case No. ARB/97/B; *Wena Hotels, Ltd. v. Arab Republic of Egypt*, 41 I.L.M. 881 (2002), ICSID case No. ARB/98/4 (discussing ICSID investment disputes and related protections); *Feldman v. Mexico*, 42 I.L.M. 625 (2003), ICSID case No. ARB (AF) 99/1 (discussing specific NAFTA related protections); see also *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004) (discussing the Foreign Corrupt Practices Act (FCPA) protections that may be available in the U.S. Courts, to a government or corporation/lender/sponsor/owner that may be subject to the Act, when they are parties to an investment project and have payment-related disputes). *Accord Harris Corp. v. Nat'l. Iranian Radio & T.V.*, 691 F.2d 1344 (11th Cir. 1982) (discussing disputes that involve Letters of Credit); *American Bell Intl., Inc. v. Islamic Republic of Iran*, 474 F. Supp. 420 (S.D.N.Y. 1979).

²⁶³ See DANIEL C. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 375, 444 (Aspen Publishers 2010). See generally *Elettronica Sicula S.p.A. (U.S. v. It.)*, 1989 I.C.J. 15 (July 20) (regarding to expropriation and a discussion on BIT and MIT protection and concerns).

Southeast Asian nations, which represent the other predominantly Muslim societies.²⁶⁴ Attracting Muslim investors and Shariah-compliant loans from those outside areas, and combining Islamic Finance (“IF”) and Islamic Banking (“IB”) with traditional PF methods, is quickly becoming one of the best ways to secure project financing in the MENA region.²⁶⁵ It will also prove to be one of the most utilized strategies to PF in the region, as Muslim investors become more confident in PF to provide a solid return on their investments.²⁶⁶ N.B. Many project ventures also fail in the region because the people they employ from outside do not have specific knowledge in Islamic Finance or do not pursue it as a possible means to financing their projects in the region.

Muslims now represent one quarter of the world’s population, and Muslim countries control 10% of the global GDP.²⁶⁷ They represent an increasingly important segment of the global economy, but nevertheless, few know much about Islamic finance, other than the basic and rudimentary requirement that interest is forbidden. What essentially is Islamic finance then? To start with, even the term “Islamic,” when applied to banking or finance is considered inappropriate by some based on the belief that *Allah’s* word applies to both Muslims and non-Muslims alike.²⁶⁸ Some Muslims prefer terms such as *profit bank* and *equity investor* instead of *Islamic bank* or *Islamic investor*.²⁶⁹

Shariah law lays down the main prohibitions that distinguish Islamic Finance from traditional finance.²⁷⁰ Interest returned on any investment is prohibited to prevent social exploitation and maximize social benefits.²⁷¹ This highlights the emphasis on social welfare over individual welfare in Islam in general, as directed by *Allah* and the Muslim holy book, the *Qur’an*. Uncertainty in contracts is also considered un-Islamic and is prohibited under Shariah law, which again, dictates Islamic Finance.²⁷² For example, the sale of a building, prior to

²⁶⁴ Masood Ahmed et al., *Trade Competitiveness and Growth MENA*, THE WORLD ECONOMIC FORUM’S ARAB WORLD COMPETITIVENESS REVIEW (2010), available at <http://www.imf.org/external/np/vc/2010/103010.htm>.

²⁶⁵ *Id.*

²⁶⁶ See Paul Wouters, *Islamic Private Equity and Venture Capital Conference*, Islamic Private Equity Opportunities in the Middle East (2009).

²⁶⁷ See generally *The Future of the Global Muslim Population*, THE PEW FORUM ON RELIGION & PUB. LIFE (Jan. 27, 2011), <http://pewforum.org/The-Future-of-the-Global-Muslim-Population.aspx>.

²⁶⁸ VOGEL & HAYES, *supra* note 17, at 27.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 23.

²⁷¹ *Id.* at 2; MUHAMMAD AYUB, UNDERSTANDING ISLAMIC FINANCE 54-57 (2007).

²⁷² AYUB, *supra* note 271.

its constructing is forbidden, due to the uncertainty of its existence at the time of contract.²⁷³ Shariah also prohibits any financing or commercial transactions related to the use of pork products or alcohol.²⁷⁴ But more than the interpretive uncertainty that surrounds various IF topics, the real issues that divide Islamic countries is the degree to which the state and government institutions integrate Islamic principles into everyday life and business.²⁷⁵ There are countries such as Pakistan, Iran and Sudan, where the entire economic and political system is tied to Islamic principles;²⁷⁶ and others more moderate nations such as Bahrain, Kuwait and Turkey, which embrace Islamic banking via support of a dual banking system with conventional banks.²⁷⁷ There are countries that neither discourage nor support IF and IB, such as Egypt, Singapore, and Indonesia;²⁷⁸ and yet others that totally discourage IB and IF, such as Saudi Arabia and Oman, which believe that by declaring certain financial institutions as *Islamic*, they would be implicitly branding others as *un-Islamic*, and therefore prefer not to distinguish them.²⁷⁹

Profit is not the sole purpose of an IB or IF, as opposed to our profit-mined conventional banks.²⁸⁰ The IB's prefer to share in the financial risks and reward with customers, rather than view the relationship as creditor and debtor.²⁸¹ A Shariah committee oversees the operation of IB institution, and they meet quarterly to discuss the IB's products and transactions.²⁸² The committees determine what is permissible, known as *halal*, and what is not, known as *haram*.²⁸³ IBs derive their deposit base from two main sources, "*transaction deposits*," which do not pay interest and do not have insurance on deposits but are treated as if they were shares in a firm where the IB pays a

²⁷³ *Id.*

²⁷⁴ Shah M. Nizami, Note, *Islamic Finance: The United Kingdom's Drive to Become the Global Islamic Finance Hub and the United States' Irrational Indifference to Islamic Finance*, 34 SUFFOLK TRANSNAT'L L. REV. 219, 223 (2011).

²⁷⁵ See generally AYUB, *supra* note 271, at 459 (discussing many Muslim countries reluctance to promote Islamic Finance).

²⁷⁶ Mone Wai Nie & Ramin Maysami, *Empirical Evidence on Islamic Banking: Iran, Pakistan and Sudan*, 3 E. ASIAN ECON. ISSUES 387-401 (1997).

²⁷⁷ INDUSTRIALIZATION IN THE GULF: A SOCIOECONOMIC REVOLUTION (Jean-François Seznec & Mimi Kirk eds., Routedledge Pub. 2011).

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ See AYUB, *supra* note 271, at 9.

²⁸¹ ISLAMIC BANKING AND FINANCE: NEW PERSPECTIVES AND PROFIT-SHARING AND RISK (Munawar Iqbal & David T. Llewellyn eds., Edward Elgar Pub. 2002).

²⁸² See AYUB, *supra* note 271, at 387-88 (describing a Shariah committee's responsibilities in overseeing an IB institution).

²⁸³ *Business & Economics*, THE ECONOMIST (2002).

return only based any profit earned by the investment of the deposits, and “equity capital.”²⁸⁴

The main instruments used by IB institutions in IF are: (a) *Modaraba* (trust financing) where under a contract, an IB provides the capital to finance a project, and the entrepreneur provides the management skills to manage the project; (b) *Moshakara* (profit sharing) where the contract is similar to the *Modaraba* except that the partners are not confined to distinct roles, as either financier or manager, and the provision of capital and expertise are shared; and (c) *Preferred Stock*, where the offering of different dividend pay-offs is not permitted, but the utilization of different classes of common stock is.²⁸⁵ Debt-like instruments in IF include: (a) *Morabaha* (cost-plus financing) the IB’s profit is the difference between the price paid for the commodity and the price paid by its client; (b) *Ijara* (leasing), where the IB purchase the asset and then leases it for a rate that is periodically reviewed; (c) *Mukarada*, which is similar to a revenue bond issued by an IB to finance a specific project, but the investors have no voting rights and are only entitled to a proportional interests in profits and losses of the venture; (d) *Salam* (a forward purchase) where payment is made at the time of signing the contract; and (e) *Istisna’* (commissioned manufacture) which is a contract where one party agrees to buy goods from a second party, with payment occurring at a future date.²⁸⁶ The strengths of IF are best demonstrated by the qualitative changes that are occurring in the industry. Rather than becoming entangled in ideological debates, practitioners have instead created new product lines that are now available for investors, the corporate world, and wealth managers. . .The MENA region now accounts for three-fourths of global Shariah-compliant assets. This dominant position is often obscured by the uneven developments in the region.²⁸⁷

The GCC, however, the most stable area of the MENA region, appears to be taking the lead on the operational side, and IF now accounts for 10% of the GCC’s project finance.²⁸⁸ A substantial number of deals are emerging to finance mega infrastructure projects with a

²⁸⁴ THE HANDBOOK OF ISLAMIC BANKING 106 (M. Kabir Hassan & Mervyn K. Lewis eds., 2007).

²⁸⁵ SUDIN HARON & NURSOFIZA WAN AZMI, ISLAMIC FINANCE BANKING SYSTEM (2009).

²⁸⁶ ABU UMAR FARUQ AHMAD, THEORY AND PRACTICE OF MODERN ISLAMIC FINANCE: THE CASE ANALYSIS FROM AUSTRALIA (2010).

²⁸⁷ Shamshad Akhtar, Vice President, Middle East and N. Afr. World Bank, Symposium on Islamic Finance in Roma, Developments in the MENA Region: Islamic Finance Seminar (Nov. 11, 2009), available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/0,,contentMDK:22391906~menuPK:2246554~pagePK:2865106~piPK:2865128~theSitePK:256299,00.html>.

²⁸⁸ *Id.*

combination of IF and traditional finance methods.²⁸⁹ A prime example, Abu Dhabi's recent project-financing for a \$1.6 Billion USD independent water and power plant in the city's Shuweihat District, included a significant Islamic tranche.²⁹⁰ "This deal stands out as the longest tenor for any IF deal in the region at 20 years."²⁹¹

IF has a varied presence in the MENA region. For example, IF initially had a strong presence in Egypt.²⁹² Today, IB only has about a seven percent market share in the region, which indicates the country's more cautious approach following the collapse of numerous Islamic money management firms in the 1980s.²⁹³ In Tunisia, on the other hand, there is only one active Islamic bank, which opened in 2010.²⁹⁴ Similarly, Morocco only recently authorized fully-fledged Islamic Banking. The government previously permitted limited Islamic Banking, and only allowed conventional banks to offer *Ijara* leasing products, *Murabaha* contracts to buy and re-sell underlying goods, and *Musharaka* co-ownership financing structures.²⁹⁵ It also imposed higher taxes on IF products than on conventional banking products.²⁹⁶

Unlike other countries, which depend on a regulator-led approach to IF, MENA takes a distinctive, industry-driven approach.²⁹⁷ One of the key concerns with this approach is the lack of regulatory infrastructure development.²⁹⁸ For example, some MENA countries do not have a specific IF policy for regulators or laws mandating industry regulation in general.²⁹⁹ Nor do they have laws mandating Shariah compliance within their country or any adopted Islamic banking regulations for neighbouring countries.³⁰⁰ These Islamic banks are thus regulated and supervised within conventional, prudential regulatory frameworks similar to traditional banks.³⁰¹

²⁸⁹ *Id.*

²⁹⁰ *Id.*; see also *Shuweihat Independence Water and Power: Expanding Water in Abu Dhabi*, PARSONS BRINCKERHOFF CORP., http://www.pbworld.com/capabilities_projects/shuweihat_independent_water_and_power_project.aspx (last visited Oct. 24, 2011).

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ Mona Yahia, *Islamic Bank a first for Tunisia*, MAGHAREBIA (June 2, 2010), http://www.magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/features/2010/06/02/feature-03.

²⁹⁵ See Akhtar, *supra* note 287.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

Although IBs did report greater losses than conventional banks during the first half of 2009, due in large part to their greater exposure to the real estate and construction sectors, they tend to be less affected by financial crises than conventional banks due to their large capital, liquidity, and the risk-sharing aspect of Shariah-compliant contracts that allow banks to pass some losses on to investors.³⁰² While the unique features of IBs may provide additional robustness to risk and uncertainty, they still face many of the same credit risk exposures as traditional finance; mainly because, at the heart of their businesses, IBs operate on similar lines in terms of raising cash flow resources and recycling them.³⁰³ IF's "exclusion principles," such as the ban on transactions and activities that are interest-based, or that deal with speculative products, do keep IB's risks better contained.³⁰⁴ This also helps discourage leveraging.³⁰⁵

The counter-argument holds that a comparatively small and concentrated market in Shariah-compliant products leads to the concentration of risk, and "real asset" transactions required by IBs are usually complex and costly, while involving greater bank risk exposure to the underlying tangible assets.³⁰⁶ Unrecognized legal and transactions risks in IBs could also be higher if banks are involved in newer Shariah-compliant products and services. Almost all IBs face Shariah compliance risks that are subject to different interpretations, depending on the Islamic jurisprudence followed in each nation.³⁰⁷ Therefore, in view of the recent uprisings in the region, and the aforementioned risks, it is important that arrival of democracy in the region also means a steady launch and sustained effort to strengthen regulatory and supervisory infrastructures.³⁰⁸ The Islamic Financial Services Board ("IFSB") has already played a valuable role in this regard, by developing an Islamic financial regulatory and supervisory infrastructure, and it is now providing capacity building to its members.³⁰⁹ The World Bank group also recognizes the IF industry's potential.³¹⁰ Besides support to the IFSB, the World Bank has been selectively supporting specific transactions in the region, with the objective of promoting innovative Shariah-compliant financing vehicles and the development of regulatory systems and corporate governance to under-

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

pin those operations.³¹¹ The Multilateral Investment Guarantee Agency (“MIGA”), which provides investment guarantees against political risk, was hired recently to provide political risk insurance for an IF structure funded Djibouti project.³¹²

The World Bank has also set up an Islamic development working group to promote IF.³¹³ The group will work with regulators and banks to promote the introduction of Shariah-compliant financial services, and examine ways on how to exploit IF in the MENA region. This will promote access to social development, product development, infrastructure financing via PPP’s, and regional infrastructure projects.³¹⁴ Asian companies and financial players are also becoming increasingly active in the Middle East to secure access to energy resources.³¹⁵ The MENA region in general has seen a surge in bidders from Malaysia, Singapore, Korea, Japan, India, China, and others, as evidenced by bids for the regional IWPP’s, such as the UAE project mentioned above.³¹⁶ For many large-scale projects in the Middle East, funding procurement is now commonly done through a combination of conventional financing and Islamic financing. Sovereign Wealth Funds are diversifying as well, and combining IF with traditional finance on energy and infrastructure projects.³¹⁷ In fact, the use of combined finance methods is becoming so popular, that the Islamic Development Bank (“IDB”) is raising capital for a second infrastructure fund, called the EMP Energy Fund, and it plans to invest 80 percent in energy and 20 percent in infrastructure projects throughout the GCC and MENA region, as well as South-East Asia.³¹⁸

Over the past several years, even larger institutions such as the Dow Jones have created Islamic investment funds, due to the growing interest in IF.³¹⁹ One of the biggest challenges and opportunities in the Islamic world today is infrastructure development and attracting investment to PF in this area – the main theme of this

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ Terry Newendorp, Chairman & CEO, Taylor-DeJongh, Presentation at the Taylor-DeJongh Merchant Banking Corporation’s forum, The East-East Corridor: MENA-Asia Energy and Trade (June 10, 2008), *available at* <http://siteresources.worldbank.org/INTOGMC/Resources/336099-1204142303639/4716098-1213972331102/newendorp-energy-trade.pdf>.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ Benjamin C. Etsy, Fuaad A. Qureshi & Mathew M. Millett, Note, *An Introduction to Islamic Finance*, HARV. BUS. REV., 1999, at 6.

note.³²⁰ By one estimate, over the next ten years, the potential market for infrastructure projects in the MENA region is \$45-60 Billion USD, and there are now well over 300 project-financed infrastructure projects pending in the MENA region - not including those in the oil, gas, and petroleum sectors.³²¹ Localized currency financing of these and the many projects that are emerge in the region daily will stress the local banking structure and soon outstrip its capabilities, given that most MENA region countries are poor and make few actual deposits.³²²

To capitalize on the possibility of prosperity, infrastructure building or other economic development opportunities in the region requires international investment capital. The key will be to create co-financing or “*combined financing*” structures, which integrate international capital with regional Islamic principles, linking traditional financing formats with Shariah-compliant IF methods and instruments.³²³ Through innovations like co-funding and co-financing, Islamic countries of the MENA region will be able to invest in their much-needed local infrastructure projects, while simultaneously meeting the interests of Islamic investors and citizens in those developing Muslim communities.³²⁴ To do so, however, Islamic bankers will have to resolve complex legal, financial, and religious issues that fall into play with IF.³²⁵ The continued evolution of Shariah principles is not only necessary for the growth of IF institutions, but also for the successful development and growth of Islamic countries in the MENA region.³²⁶

3. CDM and Carbon Financing for Renewable Energy Projects

Unlocking the potential of clean energy sources and carbon assets in the MENA region is crucial in securing its growth and prosperity in the immediate future. It is also necessary to combat climate change and to ensure the health of the global environment in gen-

³²⁰ See *id.* at 7.

³²¹ Germana Canzi, *You Cannot Afford to Wait*, PROJECT FIN. MAG., July 1999, at 18, 20; see also *id.*

³²² Canzi, *supra* note 321.

³²³ See *Islamic institutions plan private infrastructure fund*, 322 INT'L TRADE FIN. 1, 6 (1998).

³²⁴ Esty et al., *supra* note 319, at 7.

³²⁵ *Id.*

³²⁶ *Id.* See generally Lauren Page Ambinder, Nimali De Silva, & John Dewar, *The Mirage Becomes Reality: Privatization and Project Finance Developments in the Middle East Power Market*, 24 FORDHAM INT'L L. J. 1029 (2000) (discussing combining IF and traditional finance and what is essential in tapping the multitude of growth opportunities in the MENA region).

eral.³²⁷ Solar, wind, and other clean energy exportation projects are vital, and are already under way in the region.³²⁸ High revenues from these types of projects can be used to finance the major infrastructure and re-building needs of the region.³²⁹ Currently, investment from the outside is bountiful for clean energy and exportation-related projects in the region. Infrastructure development, however, still requires investment, and that will be achieved when conflict moves out of the region. Increasingly, foreign owners, sponsors, and lenders seek to improve their social responsibility efforts in the MENA region. They make it a point to deliver better governance on projects, so as to add value for their shareholders.³³⁰ Investors also seek access to the large revenues that can be achieved when exporting clean energy to areas like Europe, the U.S., and Asia – all of whom are eager to move away from foreign oil dependency and reduce their carbon imprints.³³¹

Financing for such projects is done via an innovative process known as Carbon Financing (“CF”), which utilizes Clean Development Mechanism (“CDM”), (one of the “flexibility” mechanisms defined in the Kyoto Protocol).³³² Annex I parties are industrialized countries and non-Annex I parties are developing countries.³³³ CDM is defined in Article 12 of the Protocol, and is intended to assist parties not included in Annex I to achieve sustainable development and contribute

³²⁷ See RONALD BERGER, *GREEN GROWTH, GREEN PROFIT: HOW GREEN TRANSFORMATION BOOSTS BUSINESS* (2011) (“[T]he Middle East and North Africa (MENA) is the region to watch for remarkable solutions on a grand scale.”).

³²⁸ *Id.* at 202.

³²⁹ Saleh S. Jallad, *The MENA Region and Global Energy Risk*, 1 ENERGY & GEOPOLITICAL RISK, Jan. 2010, at 7, http://www.mees.com/system/assets/000/000/610/original_jan2010.pdf.

³³⁰ THE WORLD BANK, *CORPORATE SOC. RESPONSIBILITY IN THE MENA REGION: YOUNG LEADERS SPEAK OUT* (Nov. 21, 2007), <http://siteresources.worldbank.org/CGCSRLP/Resources/VC-Summary-OECD.pdf>.

³³¹ MARIO RAGWITZ & CHRISTOPH KOST, *MENA REGIONAL CONCENTRATED SOLAR POWER SCALE-UP PROGRAM* (Oct. 2009), available at http://www.medemip.eu/Calc/FM/MED-EMIP/OtherDownloads/Docs_related_to_renewable_energies/AfDB_Workshop_Oct_2009/Policy_and_regulation_%20aspects_of%20CSP_scale-up_in_MENA.pdf.

³³² See Ben Thornley et al., *Impact Investing: A Framework for Policy Design and Analysis*, in PACIFIC COMMUNITY VENTURES CASE STUDY 5 (2011), available at http://www.pacificcommunityventures.org/insight/impactinvesting/report/05-Clean_Development_Mechanism.pdf; see also INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOSSARY J-P (2007), http://www.ipcc.ch/publications_and_data/ar4/wg3/en/annex1sglossary-j-p.html (providing basic definitions and historical development of the Kyoto Protocol and “Carbon Financing” utilization of CDM).

³³³ GLOBAL CARBON MECHANISMS: EMERGING LESSONS AND IMPLICATIONS, CARBON TRUST 12 (Oct. 2009), http://www.carbontrust.co.uk/Publications/pages/publication_detail.aspx?id=CTC748.

to the ultimate objective of the United Nations Framework Convention on Climate Change (“UNFCCC”): to prevent dangerous climate change.³³⁴ It also assists parties included in Annex I to achieve compliance with their quantified emission limitation and reduction commitments (greenhouse gas and emission caps).³³⁵ How CF works is that Annex I countries are permitted to meet part of their caps by using “Certified Emission Reductions” from CDM emission reduction projects in developing countries (such as all of the MENA region nations discussed in this note).³³⁶ This is subject to oversight, so as to ensure that emission reductions are real and “additional.”³³⁷ The CDM and Carbon Financing process is supervised by the CDM Executive Board (“CDM EB”) and is under the guidance of the Conference of the Parties (“COP/MOP”) of the UNFCCC.³³⁸

CDM allows industrialized countries to direct emission-reduction investment into the cheapest option.³³⁹ Countries began registering CDM projects in 2001 and the Kyoto commitment period will end in 2012.³⁴⁰ During that span, the CDM is expected to reduce emissions by about 1.5 billion tons of carbon dioxide.³⁴¹

A new modality of CDM also addresses several weaknesses. Named as the “Programme of Activities,” it moves away from accrediting single projects, and instead bundles all projects of one type of activity and accredits them all together.³⁴² Emissions reductions by Annex I countries are allowed to use flexible mechanisms for financing emission reduction projects, renewable energy projects, reforestation projects, and fossil fuel projects abroad, via the Kyoto Protocol (i.e. – in the MENA region, where there are no emissions targets for non-Annex

³³⁴ *Id.* at 7.

³³⁵ *Id.* at 18, 81.

³³⁶ *Id.*

³³⁷ *Id.* at 14.

³³⁸ See, e.g., UNITED NATIONS, STATUS OF RATIFICATION OF THE KYOTO PROTOCOL, http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php (referencing article 25, which entered into force February 16, 2005, with 84 signatories and 192 parties) (last visited Nov. 1, 2011).

³³⁹ Michael Grubb, *The Economics of the Kyoto Protocol*, 4 WORLD ECON. 143, 159 (2003), available at <http://www.econ.cam.ac.uk/rstaff/grubb/publications/J36.pdf>.

³⁴⁰ WORLD BANK, WORLD DEV. REPORT 2010, GENERATING THE FUNDING NEEDED FOR MITIGATION AND ADAPTATION 262 (2010), <http://siteresources.worldbank.org/INTWDR2010/Resources/5287678-1226014527953/Chapter-6.pdf>.

³⁴¹ *Id.*

³⁴² FRANÇOIS BEAURAIN & GUIDO SCHMIDT-TRAUB, DEVELOPING CDM PROGRAMMES OF ACTIVITIES 10 (2010).

I countries).³⁴³ Flexible finance mechanisms include CDM, Joint Implementation, and International Emissions Trading.³⁴⁴

Carbon financing funds mainly consist of carbon credit purchasing funds and there are only a few PF funds in this area (again room for improvement and opportunity).³⁴⁵ Fortunately, new funds are on the rise and project finance in this area of investment will grow rapidly as governments of Annex I countries, as well as their corporations, banks, and investment funds, all vie for emission reduction credits in the next ten years.³⁴⁶ These organizations will also compete for priority positioning to these renewable energy projects in the vastly untapped MENA region.³⁴⁷

VI. CONCLUSION

The Arab Spring's "winds of change" will generate increased opportunities for the utilisation of Project Finance in infrastructure development projects and renewable energy projects in the MENA region. It should be centered on the exportation of various forms of clean energy, fuels, and commodities to more developed partner nations. The international community has a lot of work to do now in this region, and should not wait for things to settle down before investigating and proposing new projects. We should be more involved in existing projects as per our social responsibilities. Any lawyer, analyst, sponsor, lender or project manager involved, must always keep a level head. Many agree that *this* is the time for us to deliver on our promises of prosperity and freedom; especially with the fresh advent of democracy throughout the MENA region. By making funds, knowledge, institutions and other resources more readily available, we will provide a much-needed boost to the region and to its markets and projects, and also help prevent other non-productive ideologies from taking a foothold in their place.

This form of new and positive activity will assist in greater prosperity for the region's inhabitants, and thus trigger the facilitation of increased trade between the region and its partners, spurring global economic recovery. The WTO must take the lead on the trade facilitation end, and assess the legal infrastructure that is in place as the region rebuilds. The WTO should work closely with its members to address any competition and antitrust concerns as well, as part of its

³⁴³ Nicholas Wohlgemuth, Regional Manager MENA & Pakistan, Presentation to MENA Carbon Forum: Carbon Financing for RE Projects (May 7, 2009).

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *See id.* (discussing CDMs, Carbon Financing, and the vast opportunities available in the MENA region for renewable energy exportation projects).

overall re-vamping processes. The international community should be looking at the future of Project Finance and Infrastructure Development in this region optimistically.

Project financiers should be prudent during the region's development process and not fear risk to achieve our desired benefits. For those who have an interest in the worlds of Project Finance, Global Trade, and Infrastructure Development, the joys of managing the unique challenges, risks, and benefits mentioned above are just now beginning to unfold across a prospering and revitalized region.



