THE MÉRIDA INITIATIVE FOR MEXICO AND CENTRAL AMERICA: THE NEW PARADIGM FOR SECURITY COOPERATION, ATTACKING ORGANIZED CRIME, CORRUPTION AND VIOLENCE

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The Mérida Initiative (the "Initiative") offers the United States, Mexico, and Central America the opportunity to deepen mutual commitments to each other and join together to attack a common enemy: organized crime and corruption.

Why Should We Care?

As Americans, we must both confront and admit that our citizens have a problem with narcotics. In 2007, approximately 24,000 Americans died because of drugs — a figure approximately eight times the number of victims from September 11, 2001.[1] One in four families is affected by substance abuse.[2] About one million Americans are heroine addicts.[3] Drugs have a $200 billion negative effect on the U.S. economy.[4] Roughly eighty percent of all persons in prison in the United States are either drug traffickers, or they committed a crime while on drugs, or they committed a crime to get money to buy drugs.[5] There is no school district in the United States, no Congressional district for that matter, which is not affected by drugs.

Mexico also has serious narcotic problems expanding beyond issues with our joint border.[6] According to the United States General Accounting Office, Mex-

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[1] Enterprise Institute for Public Policy Research, Presentation by Robert "Bobby" Charles, Assistant Secretary of State for International Narcotics and Law Enforcement, Washington, DC, Nov. 8, 2007 *available at* http://www.aei.org/events/filter.,eventID.1584/transcript.asp [hereinafter Charles].

[2] *See generally* Common Sense for Drug War Policy, "Drug War Facts" Dec. 31, 2007, *available at* http://www.drugwarfacts.org/prisdrug.htm.

[3] Charles, *supra* note 1; *Drug War Facts*, *supra* note 2 at 49 (noting that a National Survey on Drug Use and Health 2005 estimated that the US population aged twelve and over frequently using heroin was very slight).

[4] Charles, *supra* note 1.

[5] *Id.*

[6] *See* Alfredo Corchado, *Exclusive: Drug Cartels Operate Training Camps Near Texas Border Just Inside Mexico*, DALLAS MORNING NEWS, March 29, 2008.

ico's drug trade is worth twenty-three billion dollars a year.[7] The Washington Post noted that, "[m]ore than 20,000 Mexican troops and federal police are engaged in a multi-front war with the private armies of rival drug lords, a conflict that is being waged most fiercely along the 2000 mile length of the U.S.-Mexico border."[8] The U.S. State Department notes that about ninety percent of all cocaine coming into the U.S. comes through Mexico.[9]

In terms of citizen security situations, Nuevo Laredo and Tijuana have elements of failed states. Nuevo Laredo actually has checkpoints manned by gang members of the Zetas, an organized criminal enterprise reminiscent of the cruel Chicago-style mafia of the 1930s.[10] Through threats and intimidation, along with selective assassination, drug gangs, including the Zetas, have managed to stifle the press.[11] Today, drug cartels decide what the media will publish in Nuevo Laredo. When the newspaper editor from "El Mañana" did not comply, he was killed, and the press effectively silenced.[12] Seventy-one Americans have been killed there by drug traffickers.[13] Texas Congressman Henry Cuellar notes that just across the border from his district, in Nuevo Laredo, there were sixty kidnappings of American citizens last year.[14] Through intimating and silencing dissent, the civic movement has effectively died. Adding to security problems, two thousand weapons enter Mexico daily from the United States.[15]

In April 2006, the United States Agency for International Development's (USAID) assessment on gangs noted that rising crime is threatening democratic development and slowing economic growth across Central America and Mexico.[16] Gang activity has transcended the borders of Central America, Mexico,

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[7] Manuel Roig-Franzia, *Drug Trade Tyranny on The Border: Mexican Cartels Maintain Grasp With Weapons, Cash and Savagery*, WASH. POST, Mar. 16, 2008 at A01. (Estimate based on U.S. Government Accountability Office Report).

[8] *Id. See also* Lourdes Garcia-Navarro, *Mexico's Drug-Related Murders Rise*, National Public Radio, Morning Edition broadcast (Dec. 17, 2007), *recording available at* www.npr.org/templates/story/story.php?storyId=17307578.

[9] BUREAU FOR INT'L NARCOTICS & LAW ENFORCEMENT AFFAIRS, U.S. DEP'T OF STATE, INT'L NARCOTICS CONTROL STRATEGY REPORT Vol. I, at 167 (Mar. 2007) [hereinafter *Int'l Narcotics Control Strategy Report*], *available at* http://www.state.gov/documents/organization/81446.pdf; *accord* Roig-Franzia, *supra* note 7; *accord U.S. Security Assistance to Mexico: Hearing Before the Subcomm. on the Western Hemisphere of the H. Comm. on Foreign Affairs*, 110th Cong. 69 (2007) (testimony of Joy Olson, Exec. Director, Washington Office on Latin America).

[10] Richard Walker, *Terror Plagues Border: Corruption, Kidnapping, Crime Ruining Texas Town*, AM. FREE PRESS, Aug. 1, 2005, *available at* http://www.americanfreepress.net/html/terror_plagues_border.html; *see also* John Ross, *Drug War Mayhem Boils Over from Border to Border*, COUNTERPUNCH, February 14, 2008 *available at* http://www.counterpunch.org/ross02142008.html.

[11] Susana Hayward, *Local Press Silent on Drug War*, EL UNIVERSAL MEXICO NEWS, Aug. 13, 2005, *available at* http://www2.eluniversal.com.mx/pls/impreso/noticia.html?id_nota=11540&tabla=miami.

[12] *Id.*

[13] *Id.*

[14] U.S. Rep. Henry Cuellar, Keynote Address at the American Enterprise Institute for Public Policy Research on Battling the Deadly Drug Cartels in Mexico: A Shared Responsibility (Nov. 8, 2007), (transcript *available at* http://www.aei.org/events/filter.,eventID.1584/transcript.asp).

[15] *Id.*

[16] U.S. AGENCY FOR INT'L DEV., CENTRAL AMERICA AND MEXICO GANG ASSESSMENT, 5 (April 2006), *available at* http://www.usaid.gov/gt/docs/gangs_assessment.pdf.

and the United States and evolved into a transnational concern that demands a coordinated, multi-national response to effectively combat increasingly sophisticated criminal gang networks. The U.S. Department of Justice estimates that there are some 30,000 gangs with approximately 800,000 members operating in the United States.[17]

Whereas gang activity used to be territorially confined to local neighborhoods, globalization, sophisticated communications technologies, and travel patterns have facilitated the expansion of gang activity across neighborhoods, cities, and countries. The monikers of notorious gangs such as Mara Salvatrucha (MS-13) and the 18th Street gang (Barrio 18) now appear in communities throughout the United States, Central America, and Mexico. Members of these international gangs move fluidly in and out of these neighboring countries.[18]

In October 2007, Congress passed a resolution calling for the administration to fund the inter-agency anti-gang strategy, something the Mérida Initiative would do.[19]

How We Got Here

A historical context is important at this point in order to fully grasp the situation. Mexican President Felipe Calderón was elected in September 2006.[20] Notably, Calderón's predecessor, Vicente Fox, was the first democratically-elected president in Mexico since the Mexican Revolution seventy years earlier who was not a member of the ruling Institutional Revolutionary Party (PRI).[21] Calderón's inaugeration represented the first democratic transfer of power in Mexican history from one democratically-elected president to his successor. For Mexico, this was a moment on par with the significance of the fall of the Berlin Wall to East and West Germans.

One of the first things Calderón did, as President, was to meet with President Bush in Mérida, Yucatán, México in March 2007.[22] Again, this is highly unusual for a Mexican president to seek out American cooperation at such an early point in his Administration. At that meeting, President Calderón shared some alarming

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[17] *Id.* at 10-11.

[18] *Id.* at 5.

[19] H.R. Res. 564, 110th Cong., 153 CONG. REC. 11090 (2007) (enacted).

[20] Roberto Mallen, Council on Hemispheric Affairs, Mexico's Felipe Calderón (Nov. 6, 2007), http://www.coha.org/2007/11/06/mexicos-felipe-caldern/.

[21] Kevin Sullivan & Mary Jordan, *For Mexico's Fox, a 'Revolution' Unfulfilled*, WASH. POST, June 27, 2005, at A01.

[22] State Department Office of the Spokesman, "Fact Sheet: The Merida Initiative: United States – Mexico – Central America Security Cooperation," U.S. Department of State, Oct. 22, 2007, *available at* http://www.state.gov/r/pa/prs/ps/2007/oct/93800.htm.

news with his American counterpart;[23] he noted that organized crime had a serious grip on Mexico.[24]

The day before Presidents Bush and Calderón met in Mérida, President Bush was in Guatemala, meeting with their President Oscar Berger.[25] On March 12, 2007, speaking from Guatemala City, President Bush noted:

> Our countries are working together to fight transnational gangs. And the President [Berger] was right — I suggested we think about this issue regionally. You've got to understand that these gangs are able to move throughout Central America and up through Mexico into our own country, and therefore, we've got to think regionally and act regionally.[26]

Historically, through the narcotics certification process, the U.S. issued country reports assessing how well various third world countries were working to stop the flow of illegal drugs.[27] The identified countries, in turn, often criticized the United States for causing the problem through U.S. demand for drugs, and wondered how the U.S. could sit in judgment on its neighbors.[28] It was a historic opportunity for both the U.S. and Mexico to join forces in a new collaborative way. This partnership is unprecedented between the two countries in that it provides for collaborative, peer-to-peer coordination on a scale never before imagined.

With the Mérida Initiative, the old "name and blame" game has receded to the past, and has been replaced with a new security partnership based on collaboration and mutual respect.[29] We realize that we cannot succeed without the help of the Mexicans, and they cannot succeed without our help. Historically, Mexico has not asked for our help and has received little help from anyone else for that matter. On our side, we like to think that we can get the job done ourselves. But in this case, we are all fighting an enemy in organized crime that is opportunistic and borderless.

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[23] Roberta Jacobson, Statement, *in Five Perspectives on the Merida Initiative,* LATIN AMERICAN OUTLOOK (Am. Enter. Inst. for Pub. Policy, Wash., D.C.), Mar. 4, 2008, *available at* http://www.aei.org/publications/pubID.27601/pub_detail.asp.

[24] *Id.* President's Remarks at a Dinner Hosted by President Felipe de Jesus Calderón in Mérida, Mexico, 43 WEEKLY COMP. PRES. DOC. 327 (Mar. 13, 2007).

[25] President's News Conference with President Oscar Berger Perdomo of Guatemala in Guatemala City, 43 WEEKLY COMP. PRES. DOC. 317 (Mar. 12, 2007).

[26] *Id.* at 318.

[27] *See, e.g., Hearing Before the Subcomm. on the Western Hemisphere of the S. Comm. on Peace Corps, Narcotics, and Terrorism,* 105th Cong. (Mar. 12, 1997) (testimony of Robert S. Gelbard, Assistant Sec'y for Int'l Narcotics & Law Enforcement Aff.), *available at* http://www.fas.org/irp/congress/1997_hr/s970312g.htm. The new procedure is laid out by the U.S. Dep't of State. *Narcotics Certification Process,* U.S. DEP'T OF STATE, *available at* http://www.state.gov/p/inl/c11766.htm.

[28] Mark A. Chinen, *Presidential Certifications in U.S. Foreign Policy Legislation,* 31 N.Y.U. J. INT'L L. & POL. 217, 219, 271-72 (1999).

[29] Alfredo Corchado & Tim Connolly, *U.S. Seeks Unity Against Drug Trade,* DALLAS MORNING NEWS, Jan. 16, 2008.

Like us, Mexico perceives organized crime, including the narcotics trade, as having serious consequences[30] and Mexico is willing to do its part to attack this problem.[31] The Calderón government is working diligently to increase and sustain public security by strengthening the rule of law as a basic tenet of Mexico's democracy.[32] In tandem, the Initiative remains respectful of Mexican sovereignty by tracking the Mexican National Development Plan and responding to Mexican requests for assistance.[33] But, as President Calderón discovered for himself during the transition and early in his presidency, there are geographic areas of Mexico where even the government has no control.[34] The situation was much worse than even he ever imagined. It was a crisis.

The Mexican situation erupted regionally in January 2008. Street battles in Ciudad Juarez, Tijuana and Tamaulipas between security forces and drug traffickers involved heavy weaponry and resulted in multiple casualties and arrests.[35] The regional nature of the threat is evident from the January 2008 murder of a border patrol agent, the kidnapping of Americans by drug traffickers, and the arrests of three American citizens following the gun battles in Tamaulipas.[36]

The Mexican government has adopted a clear policy to foment the rule of law and security as integral and interdependent components of a safe and democratic society.[37] It has made that policy one of the five basic themes of its National Development Plan.[38] The challenge is to implement that policy in a way that achieves the fruition of both components, both security and the rule of law.

"The Congressional Research Service notes that Latin America has among the highest homicide rates in the world, and in recent years murder rates have been increasing in several countries in Central America."[39] "Latin America's average rate of 27.5 homicides per 100,000 people is three times the world average of 8.8

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[30] *See, e.g.*, Press Release, White House Office of the Press Secretary, Request to Fund Security Cooperation with Mexico and Central America, (Oct. 22, 2007), *available at* http://nicaragua.usembassy.gov/october_22_2007.html.

[31] *Id.*

[32] *See generally, Fact Sheet: The Merida Initiative: United States – Mexico – Central America Cooperation,* U.S. DEP'T OF STATE, Oct. 22, 2007, *available at* http://www.state.gov/r/pa/prs/ps/2007/oct/93800.htm; *see also* Armand Peschard-Sverdrup, CEO of the Peschard-Sverdrup and Associates, Speaker at the American Enterprise Institute for Public Policy Research on Battling the Deadly Drug Cartels in Mexico: A Shared Responsibility (Nov. 8, 2007), *transcript available at* http://www.aei.org/events/filter.,eventID.1584/transcript.asp [hereinafter Peschard-Sverdrup].

[33] Peschard-Sverdrup, *supra* note 32.

[34] Jo Tuckerman, *Drug Violence Raises Fears in Mexico*, BOSTON GLOBE, Feb. 8, 2007.

[35] James C. McKinley Jr., *Mexico Hits Drug Gangs With Full Fury of War*, N.Y. TIMES, Jan. 22, 2008 *available at* http://www.nytimes.com/2008/01/22/world/americas/22mexico.html?_r=1&oref=slogin.

[36] *See, e.g.*, Press Release, U.S. Congressman Tom Tancredo of Colorado, Tancredo Demands Pardon of Border Agent amid New Killing (Jan. 22, 2008), *available at* http://tancredo.house.gov/PRArticle.aspx?NewsID=1335.

[37] *El Plan Nacional de Desarrollo* 2007-2012, Mensaje del Presidente Felipe Calderón Hinojosa (2007), http://pnd.presidencia.gob.mx/.

[38] *Id.*

[39] Clare M. Ribando, Congressional Research Service, Report on Gangs in Central America, CRS Report for Congress 2 (July 27, 2007), http://www.wola.org/media/crs%20gangs_07.pdf.

homicides per 100,000 people."[40] "Based on the most recent Crime Trend Surveys (CTS) data available from the United Nations Office on Drugs and Crime (UNODC), Guatemala and El Salvador are among the most violent countries in the world for which standardized data has been collected."[41] "Whereas homicide rates in Colombia, historically the most violent country in Latin America, have fallen in the past few years, homicides have increased dramatically in El Salvador, Guatemala, and Honduras."[42] "In 2005, the estimated murder rate per 100,000 people was roughly fifty-six in El Salvador, forty-one in Honduras, and thirty-eight in Guatemala."[43]

What is in the Mérida Package?

The Mérida Initiative is an American foreign assistance package consisting of training and equipment that has been proposed to the U.S. Congress. This package is the result of extensive negotiations with our Mexican and Central American counterparts.[44] Through the Merida Initiative, the United States seeks to strengthen our partners' capacities in three broad areas: (1) Counter-Narcotics, Counterterrorism, and Border Security; (2) Public Security and Law Enforcement; and (3) Institution Building and Rule of Law.[45] In order to strengthen our partners in these areas, four goals were set:

1) Break the power and impunity of criminal organizations;
2) Assist the Governments of Mexico and Central America in strengthening border, air, and maritime controls from the Southwest border of the United States to Panama;
3) Improve the capacity of justice systems in the region to conduct investigations and prosecutions; implement the rule of law; protect human rights; and sever the influence of incarcerated criminals with outside criminal organizations; and
4) Curtail gang activity in Mexico and Central America and diminish the demand for drugs in the region.[46]

Funding is currently split between a multi-year plan, potentially encompassing two to three fiscal years.[47] About a third of the money is in the President's

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[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] Press Release, Washington Office on Latin America (WOLA), WOLA Sees Positive Points, Shortcomings in Bush Administration's Mexico and Central America Aid Package (Oct.22, 2007) *available at* http://www.wola.org/index.php?option=com_content&task=viewp&id=587&Itemid=8.

[45] Jacobson, *supra* note 23.

[46] *The Mérida Initiative: Assessing Plans to Step up our Security Cooperation with Mexico and Central America: Hearing Before the Comm. on Foreign Affairs*, 110th Cong. 14 (2007) [hereinafter *Mérida Initiative Hearings*] (testimony of David T. Johnson, Assistant Sec'y of State) *available at* http://foreignaffairs.house.gov/110/joh111407.pdf.

[47] Colleen W. Cook, Rebecca G. Rush, & Clare Ribando Seelke, Congressional Research Service, Merida Initiative: Background and Funding, CRS Report for Congress (Mar. 18, 2008), assets.opencrs.

FY2008 supplemental request, currently pending in Congress, integrated with the Iraq and Pakistan supplemental request.[48] The balance would come in the ordinary fiscal year 2009 and 2010 budgets.[49] All of the funding comes from the foreign assistance budget — there is no military or domestic Mérida program funding. While Mexico and the Central American governments are attacking crime with their domestic budgets and funding, and the U.S. is doing the same with its domestic law enforcement budget, Mérida represents only the foreign assistance portion from the U.S. to Mexico and Central America.[50]

The three year Mexican component of the Mérida Initiative, at the proposed $1.4 billion level, is based on a proposal presented to the U.S. back in May of 2007.[51] On August 21, the heads of state of Canada, the U.S., and Mexico met in Montebello, where President Bush noted:

> The United States is committed to this joint strategy to deal with a joint problem. I would not be committed to dealing with this if I wasn't convinced that President Calderón had the will and the desire to protect his people from narco-traffickers. He has shown great leadership and great strength of character, which gives me good confidence that the plan we'll develop will be effective.[52]

Following the Montebello Summit, the Mexican proposal was further refined in September and validated in December through on-site inspections and consultations between officials from both the U.S. and Mexico. All of the Central American funding and sixty percent of the Mexican funding requested in the FY2008 supplemental bill was allotted to aid civilian agencies in those countries.[53] Approximately forty percent of the funding would be used for military purposes.[54] That percentage splits in FY2009 and FY2010, with monies shifting to the civilian side.

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com/rpts/RS22837_20080318.pdf; *see also The Mexico/Central America Security Cooperation Package On-The-Record Briefing via Conference Call*, U.S. DEP'T OF STATE, Oct. 22, 2007, *available at* http://www.state.gov/p/wha/rls/rm/07/q4/93955.htm (Remarks of Thomas A. Shannon, Assistant Sec'y for Western Hemisphere Affairs).

[48] *Id.*

[49] *Id.*

[50] The U.S. has been making gains in its domestic efforts to reduce the demand for drugs and attack its own organized crime problem. *See*, for example, Testimony of John P. Walters, Director of National Drug Control Policy, Before the House Committee on Oversight and Government Reform, Subcommittee on Domestic Policy, Chairman Dennis Kucinich, 110th Congress, March 12, 2008, *available at* http://www.whitehousedrugpolicy.gov/NEWS/testimony08/031208/031208.pdf

[51] The proposal followed from discussions in Washington, D.C. between U.S. and Mexican foreign ministries in May 2007. *See* REPORT TO THE S. COMM. ON FOREIGN RELATIONS, 110th Cong., THE MERIDA INITIATIVE: "GUNS, DRUGS AND FRIENDS" 5 n.3 (Comm. Print 2007).

[52] President's News Conference With Prime Minister Stephen Harper of Canada and President Felipe de Jesus Calderon Hinojosa of Mexico in Montebello, Canada, 43 WEEKLY COMP. PRES. DOC 1095 (Aug. 21, 2007).

[53] *Merida Initiative Hearings, supra* note 46 at 10 (testimony of Thomas A. Shannon, Assistant Sec'y for Western Hemisphere Affairs).

[54] *See also Round Table of Deputy Secretary with Journalists*, U.S. DEP'T OF STATE, Oct. 30, 2007, *available at* www.state.gov/s/d/2007/94671.htm (Remarks of Thomas A. Shannon, Assistant Sec'y for Western Hemisphere Affairs).

Why is there funding to help the Mexican military? Unfortunately, right now, Mexican organized crime is very well-armed.[55] Only the military has the resources to identify and ferret out criminal enterprises from where it has metastasized. Furthermore, while President Calderón readily admits he would prefer to use civilian law enforcement and police, they are not simply ready or adequate.[56] The Mérida funding proposal would allow time for the civilian police capacity to upgrade, while still standing up to the immediate challenge.[57] This process is time consuming since the Calderón administration is inspecting and reviewing the current federal police first in order to root out corruption.[58] Before we give them more equipment and training, we want to ensure that we're not training the wrong side.

If approved, the Mérida Initiative will provide funding for:

- Non-intrusive inspection equipment, ion scanners, canine units for Mexican customs, for the new federal police and for the military to interdict trafficked drugs, arms, cash and persons;[59]
- Technologies to improve and secure communication systems to support collecting information as well as ensuring that vital information is accessible for criminal law enforcement;
- Technical advice and training to strengthen the institutions of justice — vetting for the new police force, case management software to track investigations through the system to trial, new offices of citizen complaints and professional responsibility, and establishing witness protection programs;
- Helicopters and surveillance aircraft to support interdiction activities and rapid operational response of law enforcement agencies in Mexico;
- Initial funding for security cooperation with Central America that responds directly to Central American leaders' concerns over gangs, drugs, and arms articulated during July SICA meetings and the SICA Security Strategy; and

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55 Corchado, *supra* note 6.

56 Tuckerman, *supra* note 34 (noting that local law enforcement has been reduced in size to merely "symbolic" and local and state police hold a reputation as corrupt and unprofessional).

57 While supporting the Merida Initiative generally, U.S. Rep. Ileana Ros-Lehtinen, the ranking Republican on the House Foreign Affairs Committee, called on the plan to provide adequate assurances to support and assist civilian police and prosecutors "because fighting illicit drugs is a traditional law enforcement mission, not a military one." House Foreign Affairs Committee, U.S. House of Representatives, Statement by Rep. Ileana ros-Lehtinen, "Ros-Lehtinen Urges Congress to OK Supplemental Funds for U.S. Mexico Initiative to Battle Drugs, Organized Crime," (Jan. 3, 2008).

58 Patrick Corcoran, *Corruption Could Be Undoing of Mexico's Judicial Reforms*, MEXIDATA.INFO, Mar. 17, 2008, http://www.mexidata.info/id1754.html (discussing how the Mexicans are tackling corruption with this program).

59 *See* Marc Lacey, *Mexico: U.S. Vows Tougher Controls on Guns*, N.Y. TIMES, Jan. 17, 2008, *available at* www.nytimes.com/2008/01/17/world/americas (discussing Attorney General Michael B. Mukasey's plan to crackdown on the illegal flow of firearms from the U.S. to Mexico); *see also* Press Release, U.S. Embassy in Mexico (highlighting Ambassador Antonio O. Garza's comments: "Our Continued Efforts Will Deny Firearms to Criminal Organizations and Reduce Gun Violence), (Jan. 16, 2008).

- Equipment and assets to support counterpart security agencies inspecting and interdicting drugs, trafficked goods, people and other contraband as well as equipment, training and community action programs in Central American countries to implement anti-gang measures and expand the reach of these measures in the region.[60]

One concern about any program in rule of law is making sure we don't help the criminals themselves. We have had extensive discussions on these issues with human rights and transparency groups, including a session led directly by Deputy Secretary John Negroponte in Mexico City in November 2007.[61] If the Mexican law enforcement entities are infiltrated with criminals and leaks, how can we be sure we are not training the criminals? We have heard this not just from American NGOs, but from the Mexican NGOs too, and we have listened.

First, to assure accountability and anticorruption, we are vetting the police recruits with lie detector tests. We are also vetting the people doing the vetting. Second, we are not proposing any cash transfers to Mexican ministries.[62] If the program requires equipment to be purchased, the U.S. government will do that. We are not writing any checks. Third, we are establishing information technology systems so that investigative and law enforcement agencies can share data and talk to each other. Amazingly, we did not do this in the past. Fourth, we will secure communications. Previously the criminals could simply listen in on law enforcement planning. That will now be stopped. Even better, we are working toward inter-operability among Mexican and American agencies, should that be necessary for successful missions. Fifth, human rights and anticorruption training will be integrated into the police academy curricula. Finally, the Calderón administration has accepted all recommendations from the Mexican Human Rights Commission concerning military involvement with the police.

Mexico's Program to Address Organized Crime

Crime and violence diminish the security and well being of all who live in Mexico. They undermine confidence in democratic government within the country and also tarnish Mexico's international image.

Widespread public concern about crime and violence can help to forge a national consensus in favor of a coherent response. Such a response could effectively confront the immediate threat and also build the institutional base needed to preserve security and protect the rights of all on a sustainable basis.

In Mexico, the public demand for security is coupled with a demand for the fair and timely administration of justice.[63] It should be possible to design a strat-

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[60] *The Merida Initiative: Guns, Drugs and Friends Report Before the S. Comm. on Foreign Relations*, 3-4 (Dec. 21, 2007).

[61] *See* John Negroponte, Deputy U.S. Sec'y of State, Round Table of Deputy Secretary with Journalists (Oct. 30, 2007), www.state.gov/s/d/2007/94671.htm.

[62] Corchado & Connolly, *supra note 29*; *The Merida Initiative: Guns, Drugs and Friends Report Before the S. Comm. on Foreign Relations*, 4 (Dec. 21, 2007).

[63] *See* Sara Howard, Editorial, "*Partnership Will Jeopardize Mexican rights*," THE ITHACAN ONLINE, Mar. 20, 2008, *available at* http://theithacan.org/am/publish/opinioncommentary/200803_Partnership_

egy that combines elements of combating crime, safeguarding rights, and contributing to a culture of lawfulness.

Some countries have enhanced the capacities for repressive measures through their police or other security forces. They have done so while deferring the reform of the justice system which is capable of holding all persons equally accountable under the law, including the security forces themselves. In those cases, strengthened security forces operating without strong guarantees of legal protection have often become obstacles to broad institutional change.

On the other hand, efforts to strengthen the institutional capacities of the justice system that have not addressed immediate and powerful threats from criminal elements will inevitably fail. Effects that ignore the pervasive criminal element will likely fail because the public is unable to see direct and long-term benefits from the reforms while crime continues unabated.

Mexico does not need to choose between the priorities of security and justice. The issues of both components of the rule of law have been studied exhaustively. The government has developed sound policies for addressing these inseparable issues, as reflected in the National Development Plan. It has the capacity to implement those strategies. What is needed is to build a critical mass of support — in federal and state governments, the judiciary, the Congress, and civil society — that will sustain the legal, institutional and enforcement reforms that are all necessary to achieve the desired results.

President Calderón's administration is committed to implementing justice reform as part of his program to restore public security. All three branches of the Mexican government are working to transform the criminal justice system from a written inquisitorial to an oral, adversarial system.[64]

With help from a coalition of civil society organizations, ProDerecho, supported by USAID,[65] the national Mexican Congress passed the required constitutional amendments by the end of 2007 to change the legislative framework, and in March 2008, passed a new federal Criminal Procedure Code.[66] Ten Mexican states are even further along, having already begun the reform process, with Chihuahua and Oaxaca at the most advanced stage — that of actually conducting oral trials on a pilot basis, again with help from the USAID-assisted ProDerecho coalition.[67]

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will_jeopardize_Mexican_Rights (discussing the unease about investing in the security sector while human rights remain vulnerable).

[64] Arturo Alvarado, Remarks at the Woodrow Wilson Int'l Ctr. for Scholars: Reforming the Administration of Justice in Mexico (Feb. 25, 2008), *available at* http://www.wilsoncenter.org/index.cfm?topic_id=5949&fuseaction=topics.event_summary&event_id=372275.

[65] John Moody, *Reforming Justice: USAID Assists Mexican Judicial Reform Campaign*, ENTREPRENEUR, May 2005, *available at* http://www.entrepreneur.com/tradejournals/article/132870635.html.

[66] Olga R. Rodriguez, *Mexico Senate Approves Judicial Reform*, ABC NEWS, Mar. 7, 2008, *available at* http://abcnews.go.com/International/wireStory?id=4405673.

[67] *See generally* Steven E. Hendrix, *Innovation in Criminal Procedure in Latin America: Guatemala's Conversion to the Adversarial System*, 5 SW. J. L. & TRADE AM 365 (1998) (discussing how the USAID helped Guatemala with similar reforms a decade earlier).

Mexico and the U.S. have agreed that they must fight international organized crime together as full partners.[68] What role does justice reform play in this fight against international crime? How can the U.S. Government support this reform process?

International experience has demonstrated that public security is best achieved when tougher law enforcement is combined with a justice system that can more quickly and broadly prosecute and punish criminals. As law enforcement increases the arrests of criminal suspects, the justice system must cope with increased case loads to avoid the appearance of criminal impunity or other failures in judicial procedures.

In Mexico's first week of experience in implementing oral trials in the State of Chihuahua, seventy percent of forty-eight reviewed cases were resolved through one of the seven case resolution alternatives permitted by the reformed criminal codes of procedure.[69] Previously these same cases would have taken anywhere from a couple of months to a few years to resolve. This expedited case processing permitted the Public Ministry to re-direct its resources to prosecuting more serious crimes. Mexico's success mirrors other Latin American experiences. Colombia reduced time-to-trial by ninety percent, with seventy percent of cases being plea-bargained and adjudicated within weeks rather than the customary wait of several years under the old system. Bolivia reduced trial times significantly and cut average case costs from $2400 to $600.[70]

Justice Reform — Mexico's Own Investment

President Calderón enjoys a high public approval of his fight to restore public security.[71] Public understanding and support is essential as the Government enacts and implements judicial reforms that might include alternative dispute resolution, new types of courts, and new alternatives for case disposition and sentencing.

President Calderón has demonstrated his commitment to fight organized crime by using police and military resources to frontally attack criminals.[72] His top

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[68] Sean McCormack, Spokesman, U.S. Dep't of State, Remarks at the U.S. Department of State's Daily Press Briefing (Jan. 16, 2008) *available at* www.state.gov/r/pa/prs/2008/jan/99389.htm.

[69] *See U.S. Embassy in Mexico: Oral Trials in Chihuahua Advance*, USAID Weekly Report, July 26, 2006, http://www.fs.fed.us/pnw/fera/research/targeted/international/July_2026.pdf; *see also* Sean Mattson, *Chihuahua pioneers judicial reform*, EXPRESS NEWS, Mar. 8, 2008, *available at* http://www.mysanantonio.com/news/metro/stories/MYSA030908.22A.judicialreform.36ff271.html.

[70] *Criminal Justice & Legal Reform*, USAID Report on Latin America and the Caribbean, Mar. 31, 2005, http://www.usaid.gov/locations/latin_america_caribbean/democracy/rule/dg_rule4.html; *see also* Steven E. Hendrix, *New Approaches to Addressing Corruption in the Context of U.S. Foreign Assistance with Examples from Latin America and the Caribbean*, 12 SW. J. L. & TRADE AM.1 (2005), *and* Steven E. Hendrix, *Current Legal Trends in the Americas: USAID Promoting Democracy and the Rule of Law in Latin America and the Caribbean*, 9 SW. J. L. & TRADE AM. 277 (2003).

[71] "Politics and Government," Frontera Norte-Sur (Mar. 2008), *available at* http://www.nmsu.edu/~frontera/poli.html.

[72] Ray Walser & James M. Roberts, WebMemo, *The U.S. and Mexico: Taking the "Mérida Initiative" Against Narco-Terror*, THE HERITAGE FOUNDATION, Nov. 16, 2007, http://www.heritage.org/Research/Crime/wm1705.cfm.

priority is restoring security and fighting crime, as evidenced in his speeches, most notably his state of union address. While the U.S. has proposed $1.4 billion for Mexico over three fiscal years, subject to U.S. Congressional approval, President Calderón is seeking seven billion dollars from his legislature, again over three years, to address the security sector at the federal level. In FY2007, Mexico set aside three billion dollars for the program to address counter-narcotics and organized crime.[73]

The partnership is already producing tangible, measurable results, with unfortunately, at times, very real sacrifices. This past year, there were a record seventy-three extraditions from Mexico to the United States.[74] Twenty three and a half tons of cocaine were seized in one case alone in Manzanillo, Mexico.[75]

But before things get better, the Mérida Initiative is likely to change the current strategy of organized crime of avoiding confrontation, to one of trying to corrupt government, and where that does not work, to armed confrontation. We are already at that stage in Nuevo Laredo, Tijuana, Sinaloa, Michoacán, Guerrero, Baja California, and Tamaulipas, where the Mexican military is engaged in non-conventional operations to re-take territory. In the process, in 2007, over 250 Mexican security officials died in the line of duty trying to stop organized crime, with over 2600 Mexicans dying as a result of organized crime, a murder rate over twice that of 2005.[76]

The Mexican government has not relieved any pressure on the criminal organizations, with the arrest of Alfredo Beltran, a major figure in the Sinaloa Cartel, multiple arrests in Mexico City of associates of the Gulf Cartel, and purges of state police in six different border towns. The Mexican authorities also moved quickly to track and arrest the individuals responsible for the death of a U.S. border patrol agent within days of the crime.

In May of 2007, Jose Nemecio Lugo Felix, the Director de Trafico y Trata with CENAPI (Mexico's intelligence agency) was gunned down in Mexico City while he was on his way to work.[77] He is the highest ranking official within the Mexican federal prosecutors' office (PGR) to be killed.[78]

During one week in September of 2007, five officials were killed. Omar Ramirez Aguilar, the Director of an anti-organized crime unit from CENAPI was killed as he left work in Polanco, which is considered the safest neighborhood in

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[73] Thomas A. Shannon, Assistant Sec'y for Western Hemisphere Affairs in U.S. Department of State, Remarks at "On-the-Record: On the Mexico/Central America Security Cooperation Package," (Oct. 23, 2007) 5; *see also The Merida Initiative: Guns, Drugs and Friends Report Before the S. Comm. on Foreign Relations* (Dec. 21, 2007).

[74] Traci Carl, *US Embassy: Mexico Seeks Missing Marine*, WTOP NEWS, Jan. 29, 2008 http://www.wtopnews.com/?nid=105&sid=1331200.

[75] Roberta Jacobson, Deputy Assistant Sec'y of State for North American Affaire, Remarks at Enterprise Institute for Pub. Policy Research (Nov. 8, 2007).

[76] Manuel Roig-Franzia, *Drug Trade Tyranny on the Border*, WASH. POST, Mar. 16, 2008, at A01, *available at* http://www.star-telegram.com/279/story/546133.html.

[77] Alejandro Gutierrez, *Ejecutan a Funcionario de Combate a la Delincuencia de la PGR*, PROCESO, May 14, 2007, http://www.proceso.com.mx/noticia.html?sec=0&nta=50629.

[78] *Id.*

Mexico City.[79] Jamie Flores Escamilla, the Director of Security for the State of San Luis Potosi was stopped by armed men who pulled his wife and two year old son from the car, then shot him over fifty times.[80] Two Mexican security agents who had been fighting narcos in Nueva Leon were also killed. In the State of Guerrero, a municipal policeman was beheaded. An anonymous caller told the police that the head was found wrapped in a newspaper near the police station.[81] In February 2008, the Chihuahua Deputy Commander for Investigations was assassinated right in front of the prosecution offices, he was the victim of a professional hit.[82] As if this was not enough, on May 8, 2008, Edgar Millán Gómez, the acting chief of Mexico's federal police, was assassinated.[83] These are gruesome examples of the sacrifices Mexican officials are making to fight organized crime, just a few of the 2000 stories being told each year now of Mexican sacrifice.

Mariclaire Acosta with the Organization of American States, formerly a government minister in the Fox administration (October 23, 2007 at the Inter-American Dialogue), noted Mexico has become one of the most dangerous countries on earth to be a journalist.[84] At ninety-two percent, high impunity rates for journalist crimes remain a problem. The majority of deaths relate to coverage of the drug trade, but there has also been an upsurge in political violence, and journalists portray government vulnerabilities.[85] For example, journalists report on topics such as corruption; linkages between law enforcement and drug traffickers; and political conflicts, such as the one in Oaxaca where a U.S. journalist was killed.[86] Reporters without Borders, an organization dedicated to defending and ensuring the safety of journalists, states that Mexico had the worst record in the Americas in 2006 and was second only to Iraq for the number of journalists killed.[87]

Mexico is committed to removing the cancer of organized crime and corruption. Their law enforcement officers are pledging their lives for this fight. The

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[79] Karen P. Tandy, Administrator, Drug Enforcement Agency, address at the IACP Second General Assembly, (Oct. 16, 2007) (transcript *available at* http://www.usdoj.gov/dea/speeches/s101607.html).

[80] *Cop, Neighbor Gunned Down in Northwest Mexico*, NOTIEMAIL NEWS, Sept. 23, 2007, http://news.notiemail.com/noticia.asp?nt=11458810&cty=200.

[81] *Mexican Drug Gang Attacks Government Intelligence Network*, INT'L HERALD TRIB., Sept. 17, 2007, *available at* http://www.iht.com/articles/ap/2007/09/18/america/LA-GEN-Mexico-Drugs.php?WT.mc_id=rssap_news.

[82] Edgar Prado, *Ejecutan a Comandante de la Policia Ministerial Afuera de la Subprocuraduria Zona Centro*, ENTRE LINEAS, Feb. 26, 2008.

[83] James C. McKinley, *Gunmen Kill Chief of Mexico's Police*, N.Y. TIMES, May 9, 2008, *available at* http://www.nytimes.com/2008/05/09/world/americas/09mexico.html?partner=rssnyt&emc=rss.

[84] Mariclaire Acosta, Director of the Organization of American States (OAS) Universal Civil Identity Program and former Deputy Sec'y for Hum. Rights and Democracy at Mexico's Ministry of Foreign Affairs, Remarks at the Inter-American Dialogue: Violence, Democracy and Press Freedom in Mexico and Colombia, (Oct. 23, 2007).

[85] *Id.*

[86] *Id.*

[87] *Mexico - Annual Report 2007*, REPORTERS WITHOUT BORDERS, http://www.rsf.org/country-47.php3?id_mot=248&Valider=OK, (last visited April 4, 2008).

Mexican government is committing its own resources.[88] They ask for our help and collaboration, as neighbors, in this struggle which will benefit us both.

Institutional Cooperation — Working Together for the Same Goals

The greatest benefit we have seen in other cooperative programs is that Mexican and U.S. professionals learn how to work together to solve common problems. As professionals share their experiences with one another, a trusting relationship quickly evolves into greater cooperation on current cases. For example, with USAID help, as the forensic experts from New Mexico worked with Chihuahua's new forensic laboratory officials, they saw that evidence collected on one side of the border could solve cases on the other side.[89] Again with USAID help, the Association of U.S. States' Attorney Generals have already begun discussions with their Mexican counterparts on how they can more actively work together on criminal and commercial cases. Through a USAID education program, law schools on both sides of the border have requested support in curriculum development and for expanded opportunities for students and professionals from both countries to study on the other side of the border.[90] U.S. funds can support these types of nontraditional bilateral partnerships.

The criminals have well developed networks and organizations that work seamlessly across the border. Both of our law enforcement and judicial systems need the same smooth working relationships to arrest, prosecute and punish these well organized criminals. Both countries will benefit by encouraging a high degree of professional bilateral cooperation as we invest in our joint capacity to stop these international criminals on both sides of our shared border. With roughly ninety-three percent of all crime in Mexico being done at the state rather than the federal level, improved coordination within Mexico between states and the federal government, and similar upgrades on our own side, are critical to the success of the package.[91] USAID has engaged the Association of U.S. State Attorneys General to coordinate closely with their Mexican federal and state counterparts to improve and integrate efforts.

Central America

It would be unjust of us to consider the organized crime phenomena solely as a border problem between the U.S. and Mexico. Anyone who lives in either Tijuana or San Diego can tell you that the border is already fully bi-national.

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[88] Colleen W. Cook, Rebecca G. Rush, & Clare Ribando Seelke, Congressional Research Service Report, Merida Initiative: Background and Funding at 2 (Mar. 18, 2008).

[89] Press Release, Argentine Forensic Anthropology Team (Feb. 23, 2006), *available at* http://eaaf.typepad.com/pressrelease2.23.06.pdf; Press Release, U.S. Embassy in Mexico: Ambassador Garza Announces $5 Million For Justice In Chihuahua (Feb. 3, 2005), *available at* http://www.usembassy-mexico.gov/eng/releases/ep050203reforma.html.

[90] Steven E. Hendrix, *Restructuring Legal Education in Guatemala: A Model for Law School Reform in Latin America?* 54 J. LEGAL EDUC. 597 (2004), *available at* http://www.law.georgetown.edu/jle/ (discussing how USAID addressed legal education reform in Guatemala).

[91] Leo Zuckerman, Remarks at Grupo Imagen, Washington, D.C. (Nov. 30, 2007).

Moreover, cartels are very resourceful and do not stop at borders, whether that is Mexico's northern border with the U.S., or its southern one with Guatemala and Belize. We would be ignoring fundamental realities of our domestic crime and narcotics problem if we believed that we could solve this problem through helping only Mexico.[92] For example, three Maryland MS-13 members where convicted in April 2007 on racketeering charges and with direct linkages to gang "hits" in El Salvador.[93] A more systemic approach, reaching all the way down to Colombia, is required. That means including Central America in the equation.[94]

The Secretariat for Central American Integration — SICA as it is known by its acronym in Spanish — has articulated a strategy for addressing organized crime.[95] And as in Mexico, the SICA Plan offers the U.S. a unique opportunity for collaboration in the struggle against corruption.[96] While the package obviously contains equipment and aircraft among other law enforcement tools, I would like to highlight how the Mérida Initiative also strikes a balance in Central America with four important so-called "soft side" components.

The first component addresses court management. Here the Initiative will expand the Guatemala Clerk of Court pilot experience[97] and adapt it, as appropriate, across Guatemala to other courts, such as civil or commercial courts that may hear complex fraud cases, and to expand it to El Salvador, Honduras, and Nicaragua.

Second, the U.S. government plans to improve prosecutor capacity. Here we intend to work with the Public Ministries in the region to address high profile, high impact crime with complex litigation strategies. This will be done by taking advantage of the new tools in the package to streamline criminal prosecution and get the cases into the system.[98]

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[92] *See* Steven E. Hendrix, *Lessons from Guatemala: US Foreign Policy and the Rule of Law*, 23:4 HARV. INT'L REV. 14 (2002) (discussing the Guatemalan situation).

[93] Ruben Castaneda, *3 MS-13 Leaders Convicted In Killings*, WASH. POST, Apr. 28, 2007, at B02, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/04/27/AR2007042702108.html?nav=emailpagel.

[94] *See* Steven E. Hendrix, *Importancia de la Reforma del Sistema Penal Nicaragüense*, EL NUEVO DIARIO (Managua, Nov. 17, 2006) *available at* http://www.elnuevodiario.com.ni/2006/11/17/opinion/34103 (discussing the needs of justice sector reform for Nicaragua); *see also* Steven E. Hendrix, *Eliminar la Podredumbre de la Corrupción*, EL NUEVO DIARIO (Managua, Dec. 9, 2006), *available at* http://www.elnuevodiario.com.ni/2006/12/09/opinion/35949.

[95] Secretariat for Central American Integration – SICA, "Estrategia de Seguridad de Centroamérica y México" (Aug. 14, 2007).

[96] *See More Aid Sought in C. America to Head off Drug Fueled Crime*, ARIZ. DAILY STAR, Jan. 12, 2008, *available at* www.azstar.com.sn.printDS-220235; *see also* Thomas A. Shannon, Assistant Sec'y of State, Bureau of Western Hemisphere Affairs for U.S. Department of State, Testimony before the Committee on Foreign Affairs, U.S. House of Representatives (Nov. 14, 2007).

[97] Steven E. Hendrix, *Helping Guatemalans Get Their Day in Court*, 40:6 FRONT LINES 14 (2000) (discussing the Guatemalan Clerk of Court model, as assisted by USAID).

[98] Steven E. Hendrix, *Guatemalan "Justice Centers": The Centerpiece for Advancing Transparency, Efficiency, Due Process and Justice Access*, 15:4 AM. U. INT'L L. REV. 101 (2000) (discussing how USAID and other U.S. government agencies help with institutionalization of the rule of law and improving criminal prosecution), *available at* http://www.wcl.american.edu/journal/ilr/15/hendrix.pdf?rd=1).

The third component deals with gang prevention.[99] About fifty block grants will go to at-risk communities for integrated programs to address gangs and prevent violence. Grants are anticipated for Guatemala, Honduras and El Salvador — the places identified as most urgent under the inter-agency anti-gang strategy.

Finally, the Initiative envisions support for Community Policing.[100] This funding will allow the USG to continue support for the Villa Nueva community policing program in Guatemala, and expand that program to new communities in that country.

What About the Economy

Economic growth is essential for Mexico. The reason we have so much illegal immigration to the U.S. has to do with the lack of economic opportunity in Mexico. There are more than forty million people in poverty in Mexico, more than all of Central America combined.[101] Mexico ranks Seventy-Third in the world in terms of Gross National Income per Capita at $7870 per capita, compared to the US at $44,970, per capita.[102] You might ask why we are not proposing to do more on the economy instead of the security sector.[103]

There are two basic reasons for this. First, President Calderón already has a national development strategy to reduce poverty.[104] Those efforts are underway. Topics like alternative development that you find in Plan Colombia, for example, are not being requested by the Mexican government. Mexico does all of its own illicit crop eradication, and has on-going programs with schools to educate children about the dangers of drugs.[105] Second, the Mexicans have just enacted comprehensive fiscal reform to increase tax revenue to support their own modernization efforts.[106] If successful, this should provide Mexican resources to address their own problems on a more sustainable basis.

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[99] *See* U.S. Agency for International Development, Central America and Mexico Gang Assessment (Apr. 2006) (discussing how USAID is addressing gang issues), *available at* http://www.usaid.gov/locations/latin_america_caribbean/democracy/gangs_assessment.pdf.

[100] *See* USAID's Franco Advocates Community Policing As a Growing Component of Development, *available at* http://www.usaid.gov/locations/latin_america_caribbean/franco_csis.html.

[101] *See* The World Bank, *Mexico Country Brief*, 2007, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/MEXICOEXTN/0,,contentMDK:20185184~pagePK:141137~piPK:141127~theSitePK:338397,00.html (showing a full range of economic statistics on Mexico).

[102] *Id.*

[103] *See* Steven E. Hendrix, *Implementation of the Santiago Summit Plan of Action in the field: A Look at USAID's Programs in Education, Democracy, Trade Integration, Economic Growth and Poverty Reduction in Guatemala*, 7 CURRENTS: INT'L TRADE L.J. 44 (1998) (discussing the USAID's robust programs for social sector development in the hemisphere); Steven E. Hendrix, *Advancing Toward Privatization, Education Reform, Popular Participation and Decentralization: Bolivia's Innovation in Legal and Economic Reform, 1993-1997*, 14 ARIZ. J. INT'L & COMP. L. 679 (1997).

[104] Government of Mexico, *El Plan Nacional de Desarrollo* 2007-2012, 2007, http://pnd.presidencia.gob.mx/.

[105] *See Politics and Government*, FRONTERA NORTE-SUR, Mar. 2008, http://www.nmsu.edu/~frontera/poli.html.

[106] *Standard & Poor's Upgrades Mexico after Passage of Fiscal Reform*, INT'L HERALD TRIB., Oct. 8, 2007, *available at* http://www.iht.com/articles/ap/2007/10/08/america/LA-FIN-Mexico-Upgrade.php.

By way of background, as a member of the North American Free Trade Agreement (NAFTA), Mexico is the world's fourteenth largest economy and the U.S.'s third largest trading partner.[107] The U.S. traded over one billion dollars per day of trade in goods and services with Mexico in 2007.[108] Remittances are also critical. They totaled twenty-four billion dollars in 2007, which is much less than the value of trade between the two countries.[109] In contrast, USAID budget request for Mexico is $16.5 million for FY2009, reduced from $37.5 million in FY2005. Markets work best to promote economic growth and jobs. But they need a firm basis in an environment that provides security. We hope that the Mexican government will be able to provide that environment with the increased help from the Mérida Initiative.

Mexico and Central America: Integrating Justice Reform with Public Security

It is clear that public security and an effective justice system are inseparable aspects of a single concept. History has demonstrated that efforts to increase security are made sustainable by the rule of law, and that the rule of law flourishes in a climate of security. It is equally clear that Mexico's policy recognizes the intimate linkage between security and justice. Implementing that policy will require careful choices about priorities and sequencing of strategies and actions.

The experience of other reforming countries suggests that the risk of proceeding in a linear fashion with too narrow an agenda may be greater than a broad approach that confronts related issues simultaneously. The challenge is to take that experience into account in designing a reform program that will meet the region's needs for security within the rule of law. The Mérida Initiative proposes just such a balance for both Mexico and Central America.

No one is under any illusion that a $1.4 billion program for Mexico or a $150,000 program with Central America[110] — split over three fiscal years and seven countries — will solve the problem. It is not a silver bullet.[111] But it will certainly increase our chances so that twenty years from now we are not still facing this scourge. Democracy and the rule of law in the region mean we must stand with our neighbors and link our interests and our strengths to begin to tackle issues that affect us all. We see in the Mérida Initiative a new paradigm for collaboration and cooperation, and a new spirit to begin to address what are

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[107] *Id.*

[108] U.S. Department of Commerce, Mexico's Country Commercial Guide (Mar. 3, 2008), http://www.buyusa.gov/mexico/en/mexico_commercial_guide.html.

[109] Krissah Williams, *Immigrants Sending $45 Billion Home*, WASH. POST, Oct. 19, 2007, at A09, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/10/18/AR2006101801756.html.

[110] *See* Thomas A. Shannon, Assistant Sec'y for Western Hemisphere Affairs in U.S. Department of State, Remarks at "On-the-Record: On the Mexico/Central America security Cooperation Package," 5 (Oct. 23, 2007) (noting that "We are still in the midst of talking with the Centrals about the parameters of that larger package so we can't give you a larger number, but it's our hope that that also would be a multiyear program").

[111] Peschard-Sverdrup, *supra* note 32.

real life and death issues, whether in an American school or on the streets of Ciudad Juarez or Tegucigalpa.

What Is USAID's Portion of the Mérida Initiative

One of the recurring questions in our discussions on the Mérida Initiative is how much is each agency going to receive? How much will go to the Department of Defense? How much for the Justice Department? Homeland Security? Those are important questions, especially for oversight committees in Congress. In the past, the answer was much easier since the programs were designed in stovepipes along institutional lines.

The design of the Mérida Initiative, however, is very different. We began with a needs assessment and request produced by Mexico and SICA. We then validated those through site visits, consultations, and negotiations. We then proposed integrated packages that would achieve the objectives. There was certainly more work to be done than any single U.S. government department or agency could handle, and no single department or agency had the competency or capacity to do it all. In other words, there was room enough for everyone.

In participating on the design, we were guided not by what was best for this agency or that, but rather what would be the best integrated program to respond to the challenge. The budget and program were submitted that way to Congress. Since then, we have been asked by Congress to itemize what each U.S. government department or agency would receive under Mérida, and we have provided our best estimates. However, much depends on what Congress' recommendations to the administration. In appropriating the funds, Congress has its chance to contribute to the discussion. There is still no final word on funding allocations among U.S. government entities.

In Central America, we are asked how much a particular country will get under Mérida. Again, we have provided itemized lists to Congress for its consideration, but the final figures will depend on what Congress instructs. So that too remains a bit fluid for the moment.

Conclusion

In the short run, the Mérida Initiative may actually increase levels of violence in Mexico as organized crime fights back.[112] The performance measurement tools and indicators are currently being negotiated with the Mexican government,[113] and then will be vetted via an inter-agency process within the U.S. government, and then shared with Congress before they are set in stone. That process is still underway, and we have not yet released that to the public since it is still in draft.

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[112] *See* Alfred Corchado, *Drug Czar Says U.S. Use Fueling Mexico Violence*, DALLAS MORNING NEWS, Feb. 22, 2008, (explaining that John P. Walters from the Office of National Drug Control Policy belief in the possibility of increased levels of violence in the months ahead), *available at* http://www.dallasnews.com/sharedcontent/dws/news/world/mexico/stories/022208dnintdrugs.3a98bb0.html.

[113] Alfredo Corchado & Tim Connolly, *Q&A: Merida Initiative*, DALLAS MORNING NEWS, Jan. 16, 2008, *available at* www.dallasnews.com/sharedcontent/dws/news/world/mexico/stories.

So what will be the benefits of Mérida? We have to look longer-term, beyond a one year supplemental budget or even a three year effort. But I think it is realistic to expect, first and foremost, improved stabilization of our borders in the region, including our own, as countries improve their rule of law and decrease the dangers from narcotics. If we fail to act, we are more likely to see narco-states in the region, kleptocratic regimes interested in lining their own pockets while turning a blind eye to drugs flowing northward toward American schools. Second, with the Mérida Initiative, we have an opportunity to engage improved political will, both in our own country as well as in Mexico, Central America and Colombia. We need to nurture this and reward it. And the Mérida Initiative represents positive regional, collaborative leadership on this issue to do just that.

LEGAL RESPONSES TO DISCRIMINATORY ACTIONS: A COMPARATIVE ANALYSIS

Hugo Rojas†

I. Introduction

Comparison is, at its core, an odious device. However, comparative analyses provide us with the opportunity to learn from others' experiences. The purpose of this essay is to evaluate and analyze the different variables that exist in the treatment of discrimination across divergent legal cultures. Within each of the defined variables, it is possible to detect levels of normative intensity, with some countries focusing more on the victim's ability to glean monetary compensation and others focusing on the punishment and/or sanctioning of the discriminator and still others focusing on variables in between. Ultimately, it is not my intention to assert that any one model is more suitable or effective in its treatment of discrimination than another. Instead, the intricacies of a variety of legal cultures are laid out like a map, providing an overview of the diverse geography that exists in the legal treatment of discrimination and simplifying the task of navigating this ever-changing terrain.

First, this essay emphasizes that the law can and should assume an active role in the prevention, sanctioning and reparation of discrimination. Furthermore, the law can and should be used to affect social change. Second, it analyzes the regulation of discriminatory conduct at the constitutional level (variable 1) through the incorporation of international law into the domestic legal system (variable 2) and through the specific recognition of discrimination within the domestic legislative setting (variable 3).

Next, this essay discusses the legal consequences of committing a discriminatory act. In most instances, anti-discrimination enforcement measures (variable 4) exist. For example, in some countries, the discriminating actor is forced to modify his behavior. Other countries have gone a little further and prescribed criminal sanctions against such violators (variable 5) of anti-discrimination laws. In addition, damages are often awarded to the victims of discrimination (variable 6).

The fourth section provides a description of the ways in which states have organized themselves to facilitate appropriate legal responses to discriminatory acts. In addition, this section examines reliance on the court system (variable 7) and the creation of specialized agencies designed to prevent, combat and develop appropriate and sensible public policies to address discrimination (variable 8).

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Finally, the essay concludes with my commentary regarding the eight aforementioned variables. However, before delving into such a complex web of comparative analysis, it seems imperative to point out the sheer importance of the subject. To illustrate its significance, I ask the reader to imagine him or herself as a victim of arbitrary discrimination. First, the reader will wonder why he or she has been discriminated against and soon thereafter, the desire to protest such discrimination will emanate from the very core of his or her being. For the most wealthy and privileged of society, understanding and identifying such discrimination may prove to be an insurmountable task. However, for those who are permanent victims of discrimination, due to their physical appearance, age, socioeconomic status, religious beliefs, sex, gender, sexual orientation, political opinions, cultural identity, or a variety of characteristics, imagining and understanding such a situation is easy. For these individuals, the permanent victims of discrimination, the law can prove to change the course of their lives, by recognizing their personal dignity, securing them equal opportunity, and by helping them to fully achieve the complex goals of individual and collective development.

II. Law As an Instrument in the Prevention of Discrimination

In general, law has many different functions as it has developed in society. Some of these functions are: 1) to maintain social control by establishing guidelines of appropriate conduct and legal norms to be respected under threat of criminal sanctions if breached (e.g., Penal Code); 2) to facilitate social harmony and agreement between individuals by ensuring cooperation in the processes of attaining one's particular interests (e.g., through contracts); 3) to establish methods of conflict resolution by determining the standards, procedures, and methods to be followed in resolving conflicts, (e.g., resorting to the courts); 4) to promote certain behaviors by obtaining socially desirable objectives and recognizing rewards, benefits, and compensation for demonstrating correct behavior, (e.g., tributary incentives); 5) to organize political power by using the law to guarantee the separation of powers (e.g. defining the jurisdiction of the courts, etc.); 6) to reflect social reality by stimulating or preventing social change, in harmony with the necessities, requirements, and values of a society at any given time.[1]

In order to achieve these functions, the law must find a way to treat all people as equals and how to deal with those who violate the law. Discrimination is a subject that has been addressed by the overwhelming majority of the world's legal systems. One of the most contentious points in the ongoing dialogue concerning discrimination has been the act of defining what "discrimination" actually is at any given moment in any specific place.[2] Even more delicate is the act of defining what "discrimination" is understood to mean within the context of the

[1] AGUSTÍN SQUELLA, INTRODUCCIÓN AL DERECHO, 9 (Editorial Jurídica de Chile 2000).

[2] I would like to thank Domingo Lovera and Martín Saavedra for a meaningful conversation on the essence of the word "discrimination", as well as the participants of the "Anti-Discrimination Policy Workshop", organized by Fundación Chile 21, in Santiago, Chile, 2005.

legal system.[3] This latter question is a loaded one because any answer serves as a declaration of the role that law will play in the prevention and sanctioning of discriminatory conduct.[4] When human rights issues first entered the public discourse in the second half of the 20th century, nations were principally concerned with the vertical relationship between the state as actor and the individual as victim. Later, however, as human rights issues gained more widespread awareness and recognition, this thinking expanded to include the horizontal relationship between one individual and another. Currently, both vertical and horizontal relationships are recognized in the promotion of human rights, with countries such as Germany and Spain paying more attention to the former by limiting and controlling the state, while other countries concentrate more on the latter. Yet, it is far more advantageous to those who are being discriminated against for a nation's laws to address both relationships, so that the victim of discrimination, at the hands of either the state or a private citizen, may seek appropriate legal recourse.

Therefore, the first point to consider concerns the will of those who control and define what is "right" within a legal system; that is to say, whether the political-legal system provides recourse against discriminatory actions carried out by the State or an individual. Moreover, it is necessary to question the type of discriminatory action, because a judicial response cannot necessarily promote the fundamental rights of the discriminated person.[5]

The law can be used as an effective tool to promote the recognition of people's fundamental rights. When the conduct that affects equality and that deserves legal reaction can be established with clarity, this permits the State or the person affected to utilize legal mechanisms to put an end to the discriminatory action,

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[3] For example, the Supreme Court of Canada has defined discrimination as a "distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group which has the effect of imposing burdens. . . not imposed upon others or which withholds or limits access to opportunities. . .available to other members of society." Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143. Concerning discrimination in the workplace, Canada has acknowledged discrimination occurring during the hiring process and termination. Discrimination is also understood to occur when any individual is humiliated or frightened because of a particular perceivable or known characteristic, whether it be race, religion, economic status, or any other such characteristics. Discrimination can also encompass those acts that are purely physical or verbal and designed to humiliate or degrade a person or group. Such physical acts can take the form of a punch or a push. Even jokes or poster and television commercials may qualify as discriminatory verbal acts. If such acts are directed against a specific person or group protected under Canadian Human Rights Act, then they are deemed to be discriminatory.

[4] In the United States, discrimination occurs when the civil rights of a group or individual are affected or denied on the basis of race, gender, religion, color, national origin, legitimacy, disability, and in some states, sexual orientation. Both federal and state statutory legislation has been enacted to prevent discrimination based on the above-mentioned factors. The transgression of civil rights, recognized in the Constitution and its amendments, generate causes of action. Discrimination is prohibited in the areas of employment, education, housing, voting rights, public places, federally funded programs, and in urban transport. In some, those who have not yet obtained American citizenship are also permitted to put forth civil rights claims, as is the case when a non-American citizen is the victim of a hate crime. Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000).

[5] It should be remembered that, historically, the law has also been used to exclude, marginalize, and eliminate nations, towns, groups, and individuals. For that reason the first variable to consider in an analysis must be the attitude of the normative creator.

and to request that competent public agencies apply a sanction.[6] We must also keep in mind that legislation is not the determinative factor. The remedy that legislation offers will enjoy greater effectiveness and legitimacy if society is aware of the reproach that the discriminatory conduct deserves.

III. The Regulation of Discriminatory Conduct

From the viewpoint of public perception, the degree to which a state regulates discriminatory conduct necessarily reflects how it views that conduct. For example, when a law unambiguously prohibits employers from instituting maximum age requirements in hiring, the act of imposing a maximum age requirement is thus deemed to be discriminatory. However, the law can also implicitly indicate that certain conduct is politically incorrect and socially inappropriate, without plainly articulating which conduct is prohibited.

However, it is important to note that the definition of what constitutes a discriminatory act varies from country to country. Some countries demand that the victim meet a high burden of proof to demonstrate that discrimination did in fact occur, while other countries require much less substantiation on the part of the victim. It is also crucial to note that variations will most certainly occur depending on the political power of the judiciary and its discretion in rendering judgment.[7]

In addition, while some legal systems focus on the discriminatory action and its consequences, others emphasize discovering of the true intention of the discriminatory actor. Finally, it is also possible that a legal system may not distinguish between the fact, the intention, and the result of discrimination.

A. Constitutional Recognition of the Principle of Nondiscrimination

The general inclination of many countries has been to hold the principle of nondiscrimination at the highest level within the normative hierarchy of their respective legal orderings. Thus, the principle of nondiscrimination has been included in the constitutions of Germany[8], Canada[9], Brazil[10], Colombia[11], Spain[12],

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[6] *See generally* Hugo Rojas, *Cambios Sociales y Cambios Jurídicos en Chile: Construyendo Nuevos Puentes entre Sociología y Derecho en la Promoción del Realismo Jurídico Latinoamericano*, 13 BERKELEY LA RAZA L.J. 453 (2002). An intense correlation between social change and legal change exists. A legal change can cause a social change and vice versa. In this case, it is important that we reiterate the following:

> . . . in many instances, the people who retain the political power use it to create social change: (1) improving the quality of life of the citizens, (2) creating greater equality of distribution of accounts/fees and of property or (3) pursuing geopolitical goals. However, during the 20th century, real experience has demonstrated that one cannot be too generous or too willing to offer great power or responsibility to judicial and legislative actors, as they may use it to pursue their own measured and calculated ends . . . *Id.* at 475.

[7] *See generally* HERBERT JACOB, ET AL., COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE (1996).

[8] Article 3(1) states that, "[a]ll persons shall be equal before the law." GRUNDGESETZ FUR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Constitution] art. 3(1). Article 3(2) details that, "[m]en and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist." *Id.* art. 3(2). Article 3(3) provides that, "[n]o person shall be favored or disfavored because of sex, parentage, race, language,

France[13], Italy[14], Mexico[15], Portugal[16], Puerto Rico[17], South Africa[18], and Vene-

homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability." *Id.* art. 3(3).

[9] Section 15 recognizes that, "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability . . . does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, color, religion, sex, age or mental or physical disability." PART I OF THE CONSTITUTION ACT, 1982, being Schedule B to the Canada Act 1982, ch. 11, §15 (U.K.).

[10] Article 3 states that the fundamental objectives of the Federative Republic of Brazil are: to build a free, just, and unified society; to guarantee national development; to eradicate poverty and marginal living conditions and to reduce social and regional inequalities; to promote the well being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination. CONSTITUIÇÃO FEDERAL [C.F.] art. 3. In addition, Article 5 declares that, "all persons are equal before the law, without any distinction whatsoever, and Brazilians and foreigners resident in Brazil are assured of inviolability of the right of life, liberty, equality, security and property, on the following terms: I. Men and women have equal rights and duties under the terms of this Constitution; . . . VI. Freedom of conscience and of belief is inviolable, ensuring the free exercise of religious cults and guaranteeing, as set forth in the law, the protection of places of worship and their rites; VII. Under the terms of the law, the rendering of religious assistance in civil and military establishments of collective confinement is guaranteed; VIII. No one shall be deprived of any rights by reason of religious belief or philosophical or political conviction, unless he invokes it to exempt himself from a legal obligation required of all and refuses to perform an alternative obligation established by law; . . . XLI. The law shall punish any discrimination which may attempt against fundamental rights and liberties; XLII. The practice of racism is a non-bailable crime, with no limitation, subject to the penalty of confinement, under the terms of the law. *Id.* art. 5.

[11] Article 13 of the Colombian Constitution holds that rights, liberties, and opportunities are guaranteed, without discrimination by reason of sex, race, national or familial origin, language, religion, political or philosophical opinion. CONSTITUCIÓN DE 1991 art. 33 (Colum.).

[12] Section 14 of the Spanish Constitution declares that, "Spaniards are equal before the law, and cannot be discriminated against on account of birth, race, sex, religion, opinion, or any other personal or social condition or circumstance." CONSTITUCIÓN [C.E.] §14 (Spain).

[13] Article 1 of the French Constitution states that, "France shall be an indivisible, secular, democratic, and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race, or religion. It shall respect all beliefs." 1958 CONST. art. 1 (Fr.).

[14] Article 3.1 of the Italian Constitution affirms that, "[a]ll citizens have equal social status and are equal before the law, without regard to their sex, race, language, religion, political opinions, and personal or social conditions", while Article 3.2 states that, "[i]t is the duty of the republic to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic, and social organization of the country." COST. art 3 (Italy). The Constitution also ensures that the Republic must protect linguistic minorities by adequate norms. *Id.* art. 6.

[15] Article 1.3 of the Mexican Constitution declares that, "[a]ll discrimination motivated by ethnic or national origin, gender, age, differing abilities, social conditions, health conditions, religion, opinions, preferences, marital status, or anything else that may be against human dignity and have as its object to restrict or reduce the rights and liberties of persons, remains prohibited." CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS [Const.], as amended, Art. 1.3 (Mex.).

[16] Article 13 of the Portuguese Constitution holds that, "1. Every citizen shall possess the same social dignity and shall be equal before the law. 2. No one shall be privileged, favoured, prejudiced, deprived of any right or exempted from any duty on the basis of ancestry, sex, race, language, place of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation." CONSTITUIÇÃO [Constitution] art. 13 (Port.)

[17] Article 2, Section 1 of the Puerto Rican Constitution states that, "[t]he dignity of the human being is inviolable. All men are equal before the law. No discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political or religious ideas. Both the laws and the system of public education shall embody these principles of essential human equality." CONST. OF THE COMMONWEALTH OF PUERTO RICO art. II § 1 (P.R.).

zuela[19], among others. Other countries, however, have been less willing to recognize the principle of nondiscrimination, as happens to be the situation in Chile.[20] Although the Chilean Constitution recognizes equality under the law in articles 1 and 19,[21] further doctrinal development would heed a greater level of protection to those victimized by discrimination.

The principle of discrimination, when recognized in a Constitution, cannot be understood as separate and distinct from the rest of the Constitutional text, as if it were independent of the ideological groundwork of the Constitution itself. Thus, the Constitutional text concerning discrimination can only truly be understood within the context of a nation's belief system. For example, to fully appreciate the Canadian anti-discrimination law, one must understand it as it exists in concert with the expressly recognized principle of multiculturalism, central to Canadian society.[22]

Secondly, one cannot forget that the constitutional provisions pertaining to nondiscrimination may or may not require an approach that heeds the historical and political context within which the provisions were created. For example, while the 13th Amendment of the Constitution of the United States was adopted to formally end slavery, judicial interpretation throughout the years has undeniably expanded it to include the guarantees of equal rights and personal liberty, which in principle, was what the 14th Amendment was designed to do.[23]

In Mexico, an interesting debate has taken place in the last few years concerning the Constitutional Reform of 2001. As a result of this debate, a clause that

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[18] While Article 9.1 of the South African Constitution guarantees that, "[e]veryone is equal before the law and has the right to equal protection and benefit of the law", Article 9.3 adds that, "[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." S. AFR. CONST. 1996 art. 9.1, 9.3.

[19] Article 21 of the Venezuelan Constitution states that, "[n]o discrimination based on race, sex, creed or social standing shall be permitted." CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA art. 21.

[20] Article 1.1 of the Chilean Constitution details that, "[p]ersons are born free and equal, in dignity and rights". CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [CONSTITUTION], Art.1. Article 19, section 2 states, "[t]he Constitution guarantees all persons equality before the law. Neither the law nor any authority may establish arbitrary differences", also stating in Section 16.3 that, "[a]ny discrimination which is not based on personal skills or capability is prohibited, although the law may require Chilean citizenship or age limits in certain cases." *Id.* art. 19(2), art. 19(16).

[21] *Id.* art. 1, art. 19.

[22] Multiculturalism is a fundamental characteristic of Canadian identity and heritage. Canada works hard to support and to encourage not only respect for each and all of its diverse cultures, but also to actively promote cultural expression. It furthermore recognizes the freedom of its citizens to maintain, enjoy, and share in its celebrated diversity while total, equal, and collective participation by all individuals is encouraged regardless of origin or cultural background. Canada's policy of multiculturalism maintains, for example, that all Canadians have an equal opportunity to obtain employment and to introduce policies, programs, or measures that support both individual and collective contributions from all cultural backgrounds. These are designed to stimulate the understanding and respect of Canada's diverse society and integrate the linguistic and cultural knowledge of all individuals and ultimately guide Canada toward appropriate responses to its multicultural reality. *See* HUGO ROJAS, EL PRINCIPIO DE LA MULTICULTURALIDAD: UNA PROPUESTA JURIDICA PARA PROMOVER Y PROTEGER NUESTRA DIVERSIDAD CULTURAL, 83-84 (Arzobispado de Santiago 2002).

[23] U.S. CONST. amend. XIII, XIV.

provides protection to victims of discrimination was included in the Mexican Constitution on August 14, 2001.[24]

The 1853 Constitution of Argentina, which has survived vast changes and numerous policy modifications[25], is also an interesting case. Presently, the Constitution recognizes the relevance of inverse discrimination, underscoring the necessity of adopting measures to allow the ongoing evaluation of the opportunities provided to those who, because of their race, sex, religion, social condition, etc., are subject to unequal treatment. Section 75(23) of the Constitution authorizes the legislature to pass laws and to promote affirmative action measures that guarantee genuine equality of opportunity and treatment and total enjoyment and exercise of rights recognized by the Constitution and by international treaties on human rights, particularly with respect to children, women, the elderly and those with disabilities.[26] This Constitution would not exist if not for the favorable political happenstance sparked by the discussion to improve the condition of minority groups.

In South Africa, the system of apartheid ended in 1994 and was replaced by the African National Congress (ANC). Within this political process of change, a new Constitution was enacted that recognized the equality of all citizens and placed value in the diversity of South Africa. Article 1 of the Constitution of 1996 declares that South Africa fundamentally holds true to the idea of human dignity, the striving for equality and the advancement of the human rights and liberties, and anti-racism and anti-sexism, among other values.[27] While keeping in mind the historical oppression suffered by South Africa's cultural minorities, it is important to note that the spirit of its new Constitution has raised public awareness of discrimination and helped the nation aspire to achieve genuine equality under the law among all its citizens.[28]

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[24] CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS [Const.], as amended, Art. 1.3 (Mex.).

[25] The Constitution was amended in 1860, 1866, 1898, 1949, 1956, 1957, 1972, and 1994.

[26] CONST. ARG. 1996 § 75(23) (Arg.)

[27] S. AFR. CONST. 1996 art. 1

[28] Article 16 of the South African Constitution addresses freedom of expression, stating that every individual has the right to freedom of expression, which includes: freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity, academic freedom and freedom of scientific research. S. AFR. CONST. 1996 art. 16. However, such freedom of expression does not extend to propaganda for war, incitement of imminent violence, or advocacy of hatred that is based on race, ethnicity, gender, or religion and that constitutes incitement to cause harm. While recognizing the relevance of egalitarian access to mass media, the South African legal system restricts journalistic work used to cause hatred or to discriminate. *Id.* art. 16.2. Article 9, of the Bill of Rights, declares that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth, and further prohibits any person from unfairly discriminating directly or indirectly against anyone on one or more of the like grounds. *Id.* art. 9.3. It is emphasized here that this is one of the first instances of constitutional protection against discrimination for gays and lesbians in the world. Such an unambiguous articulation of these protections creates a new standard as concerns substantiating discrimination and obtaining appropriate remedies. This extensive list legitimizes South Africa's commitment to defeat social and political inequalities. Article 9 is reinforced by other related guarantees, such as Articles 10, 11, and 15, which guarantee the right to human dignity, life and freedom of religion, and belief and opinion, respectively. *Id.* arts. 10, 11, & 15. In the end, the constitutional acknowledgment, with great emphasis on the deliberate ordering and

This objective has been reinforced by the jurisprudence of the Constitutional Court.[29]

There are two additional aspects of the above debate, namely 1) the possibility of using international law in local courts to extend the protection against discrimination; and 2) if a non-discriminatory principle is recognized in the Constitution, which legal mechanisms in each system are most appropriate to be used by the victims.

B. Discrimination in International Law

Some legal systems have not yet incorporated any or all "fundamental rights", as defined under international law, into their own domestic law. This section offers a brief review of the relevant international law which contributes to the prevention and sanctioning of discrimination. For various reasons, international norms and standards are becoming increasingly more influential on domestic law.

The multitude of international multilateral agreements regarding the protection of individuals against discrimination is one of the most important legal developments resulting from the period of reconstruction following the end of World War II. The international standards concerning these agreements were established in the International Covenant on Civil and Political Rights[30] and the International Covenant on Economic, Social, and Cultural Rights[31], as well as complemented by many more documents.[32] [33]

specificity, inculcates the absolute and genuine constitutional and societal importance of anti-discriminatory values. In fact, it is very difficult to find an instance of discrimination which would not be protected under the South African Constitution. Yet this anti-discriminatory sentiment extends far beyond the above-mentioned protections. South Africa created penal legislation sanctioning discriminatory and racist conduct and adopted affirmative actions to secure much delayed benefits for those social groups historically discriminated against and those who continue to suffer inequalities as a result of apartheid.

[29] For example, in *Harksen v. Lane*, the Constitutional Court held that to completely understand a discrimination case, it is necessary to fully appreciate the social standing of a victim in South African society, which includes understanding that they most likely suffered discrimination under apartheid as well. *Harksen v Lane & Others* 1998 (1) SA 300 (CC) (S. Afr.).

[30] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 2.1, U.N. Doc. A/6316 (Dec. 16, 1966).

[31] International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) art. 2.2, U.N. Doc. A/6316 (Dec. 16, 1966).

[32] American Convention on Human Rights, "Pact of San Jose, Costa Rica," Nov. 22, 1969, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36; International Convention on the Elimination of all Forms of Racial Discrimination, G.A. Res. 2106 (XX) U.N. Doc. A/6014 (Dec. 21, 1965); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984); Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. Doc. A/34/46 (Dec. 18, 1979); Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES 44/736 (Nov. 20, 1989); Inter-American Convention for the Elimination of All Forms of Discrimination Against Persons with Disabilities, Organization of American States, June 7, 1999, AG/Res. 1608 (XXIX-0/99); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, "Convention of Belem Do Para", Organization of American States, June 9, 1994, AG/Res. 1740 (XXX-O/00), reprinted in 33 I.L.M. 1049 (1994); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador", Organization of American States, Nov. 17, 1988, O.A.S.T.S. No. 69, reprinted in 28 I.L.M. 161 (1989); Convention Against Discrimination in Education, 429 U.N.T.S. 93, (May 22, 1960); Equal Remuneration Convention, June 29, 1951, 165 U.N.T.S. 303; Discrimination (Employment and

Whether these documents are able to effectuate any real change remains to be seen, as their level of efficacy depends wholly on the will of the signatory states to fulfill the declarations found within them.

C) The Incorporation of International Law into Domestic Law

The relationship between international law and domestic law is one plagued with controversy in many legal systems. For example, when faced with a conflict between an international treaty and a statute, the determination of which law will prevail is dependant on the legal system in question, as each system has its own answer. Yet, a tendency to promote domestic law as an instrument in the application of international norms exists.

The incorporation of international law into the 1994 Constitutional Reform of Argentina's Constitution, for instance, presents an interesting case. This reform granted constitutional rank to several instruments of international law.[34] Thus, by incorporating international standards of equality and nondiscrimination, the Argentine Constitution is able to protect its citizens from unfavorable distinction

Occupation) Convention, June 25, 1958, 362 U.N.T.S.31; Employment Policy Convention, July 9, 1964, 569 U.N.T.S. 65; Convention Concerning Vocational Rehabilitation and Employment (Disabled Persons), June 20, 1983, 236 U.N.T.S. 1985; Convention concerning Indigenous and Tribal Peoples in Independent Countries, ILO No. 169, 72 Official Bull. 59, Sept. 5, 1991; ILO Convention Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour Convention, June 17, 1999, 38 I.L.M. 1207; United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. Doc. A/36/51 (Nov. 25, 1981); Declaration on Race and Racial Prejudice, UN Doc. E/CN.4/Sub.2/1982/2/Add.1, annex V (Nov. 27, 1978); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. Doc. A/Res/45/158 (Dec. 18, 1990); Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, G.A. Res. 47/135, U.N. Doc. A/47/49 (Dec. 18, 1992; Declaration on Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racism, Apartheid and Incitement to War, UNESCO Gen. Conf. Res. 4/9.3/2, 20th Sess., Doc. 20c/20 Rev. (1978); Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71-77 (1948); and the Compilation of International Norms and Standards Relating to Disability, Oct. 2003, *available at* http://www.un.org/esa/socdev/enable/comp00.htm.

[33] For example, Argentina, Brazil, Canada, Chile, Columbia, Ecuador, Mexico, Peru and Uruguay, amongst others, have ratified the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of all Forms of Racial Discrimination, the International Convention on the Elimination of all Forms of Discrimination Against Women, Convention No. 100 of OIT on Equality and Convention No. 111 of OIT on employment discrimination. However, Argentina, Brazil and Peru have yet to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

[34] These documents include: the American Declaration of the Rights and Duties of the Man, O.A.S. Res. XXX, (1948); Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71-77 (1948); Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 A (III); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) art. 2.2, U.N. Doc. A/6316 (Dec. 16, 1966); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 2.1, U.N. Doc. A/6316 (Dec. 16, 1966); International Convention on the Elimination of all Forms of Racial Discrimination, G.A. Res. 2106 (XX) U.N. Doc. A/6014 (Dec. 21, 1965); the American Convention on Human Rights, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36.; Convention on the Elimination of all Forms of Discrimination against Women, G.A. Res. 34/180, U.N. Doc. A/34/46 (Dec. 18, 1979); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (1984); and the Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES 44/736 (Nov. 20, 1989).

due to his or her race, religion, nationality, sex, social orientation, physical features, language, or other defining characteristics.[35]

On the other hand, the situation in Chile is quite different. The 1980 Pinochet Constitution does not fully embrace the principle of nondiscrimination. Yet Article 5 of the Chilean Constitution has extended the constitutional guarantee to specific fundamental rights found in the international treaties that Chile has ratified.[36] Chileans are guaranteed both the human rights established in international treaties ratified by the Congress and the guarantees provided in Article 19 of the Constitution.[37] Consequently, Chilean judges and lawyers engage in a vigorous debate concerning where exactly international treaties fall in the hierarchical list of sources of the law. The prevailing opinion holds that, once a treaty has been ratified by the Congress, any treaty specifically referencing human rights has constitutional rank, and all laws must be in conformity with the treaty.[38] However, if the treaty discusses other matters outside of human rights, it is not given constitutional rank and instead is given the same weight as a statute.

D) Anti-Discrimination Statutes

Having briefly discussed constitutional inclusion of the principle of nondiscrimination and outlined the domestic inclusion of international law concerning this principle, the third variable I will discuss is the anti-discrimination legislation that exists in each country.

Legal actors are faced with the challenge of deciding which legal instruments are most pertinent to ensure that victims of discrimination can exercise their rights unerringly and without delay, obtain the appropriate reparations, and apply the appropriate legal sanctions to the discriminatory actor. Some countries have been able to move beyond the simple declarations of broad principles of good intentions and have approved specialized laws, which outline prohibited behaviors and actions.[39] An example of such a law is Brazil's Anti-Racism Law which

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[35] If a person is discriminated against, they may file a summary proceeding regarding constitutional guarantees. CONST. ARG. ch. II § 43. Here, both the Public Defender and the Ombudsman retain the ability to file such a summary proceedings. *Id.* ch. VII § 86. Where the action is initiated by the Ombudsman, such action is deemed to be a class action.

[36] "Sovereignty rests essentially with the Nation. It is exercised by the people through the plebiscites and periodic elections, as well as by the authorities established by this Constitution. No group of people nor any individual may assume its exercise. The exercise of sovereignty recognizes as a limitation the respect for the essential rights originating from human nature." CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE art. 5.2. This text was incorporated in the Pinochet-era Constitution after approval by voting plebiscite, in the months preceding the presidential election of December of 1989. Law No. 18,825, Aug. 17, 1989. The text, along with 54 other modifications to the 1980 Constitution, came as a result of intense negotiation that occurred after Pinochet *lost the popular vote*. This Constitution continues to be effective in Chile, even though it has been subject to continuing modification. Chile's right-wing political parties have been opposed to the recognition of the principle of non-discrimination in the Constitution.

[37] *Id.* art. 19.

[38] *See* MARIO VERDUGO, EMILIO PFEFFER, HUMBERTO NOGUEIRA, DERECHO CONSTITUCIONAL, I, 123 (Editorial Jurídica de Chile 1994).

[39] For example, Canada's Employment Equity Act of 1995. Employment Equity Act 1995 S.C., ch. 44. Article 5 states that, "[e]very employer shall implement employment equity by (a) identifying and

sets forth a detailed list of prohibitions and their corresponding criminal sanctions.[40]

A victim of discrimination in Chile, however, does not have access to such protective mechanisms as those set forth by other countries. While this certainly does not bar Chilean citizens from seeking recourse for discrimination,[41] they are unable to pursue a case of discrimination *per se* because discrimination is not specifically included in any general list of prohibited conduct.[42]

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eliminating employment barriers against persons in designated groups that result from the employer's employment systems, policies and practices that are not authorized by law; and (b) instituting such positive policies and practices and making such reasonable accommodations as will ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer's workforce that reflects their representations in (i) the Canadian workforce, or (ii) those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw employees." *Id.* In Article 9 of Mexico's Federal Law on the Prevention and Elimination of Discrimination, however, discriminatory conduct is found to include the following: 1) prevention or deprivation of public access to education, scholarships and incentives to stay in centers of learning; 2) prohibiting the free election of employment or restriction of opportunities to access, duration or upward movement within employment, establishing differences in payment, prestige and labor conditions for similar jobs; 3) limiting access to professional development programs; 4) denial or restriction of access to available information on reproductive rights and the prevention of individual determination regarding the number or spacing of children; 5) denial or restrictions to medical services and attention, and the prevention of participation in decisions regarding medical or therapeutic treatment; 6) prevention of equal participation in civil and political organizations, or of any other nature; 7) preventing the free exercise of property rights and the administration and disposition of goods of any other type; 8) limitation on or prevention of the freedoms of expression, thought, conscience, religion or religious practices or customs, whenever these are not adverse to public order; 9) restriction of access to social security and its benefits or the establishment of limitations, creating restricted access to medical insurances; 10) limitations on the right to food, housing, recreation and medical services and attention; 11) prevention of access to institutions, public or private, which serve the public, so as to limit access to and free enjoyment of public places; 12) exploitation or abuse of any person or social group; 13) restrictions on participation in any sports, recreational or cultural activities; 14) the encouragement or incitement of hatred, violence, rejection, deceit, defamation, injury, persecution or exclusion; 15) the act or promotion of psychological or physical mistreatment based on physical appearance, manner of dress, manner of speech, or sexual preference; etc. Ley Federal para Prevenir y Eliminar la Discriminacion, Última Reforma DOF 27-11-2007.

[40] Law no. 7,716 (Anti-Racism Law, 1989, modified by laws no. 8,081, of 1990, and no. 9,459, of 1997).

[41] In instances where the integral principle of equality before the law is attacked, a victim of discrimination may resort to the respective Court of Appeals, which shall immediately take the necessary steps to re-establish the rule of law and ensure due process protection to the victim. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [CONSTITUTION], art. 20 (Chile). With regard to employment law, a victim of discrimination is able to invoke Article 19, number 16 of the Constitution and Article 2 inc. 2 of the Labor Code. Article 2 inc. 2 of the Labor Code specifically prohibits discrimination in all labor relations by asserting that discrimination, exclusion or preferences based on race, color, sex, union affiliation or membership, religion, political opinion, nationality or social origin are contrary to the most basic principles of labor law and consequently declares that no employer shall condition the hiring or firing of workers on any of the above-mentioned factors. *See* CÓDIGO DEL TRABAJO, Art. 2.

[42] My position with respect to Chilean legislation is critical, because victims of discrimination are not able to find adequate means to solve their problems, and this happens partly because, any like list of prohibitions, it is lacking. However, the situation is not completely dire. Rather, norms created in the past ten years to benefit women, the indigenous population, and the disabled, as well as other norms which secure even greater levels of equality among the people, have established a stable foundation on which such a catalogue may take its roots. Further, advancements in public policy relating to tolerance and antidiscrimination (e.g., Programa Tolerancia y No Discriminación, Plan por la Igualdad y la No Discriminación, etc.) work to steady the same foundation. However, any legislative change is yet to come. And, while diverse parliamentary motions have failed in the last ten years, Congress is now discussing a law on the prevention and sanctioning of discrimination.

In contrast, something very different occurs in the United States. Using the Equal Protection Clause of the 14th Amendment, the United States Congress has expanded the reach of the Constitution to include many previously unprotected classes.[43] Furthermore, the Civil Rights Act of 1964 had the greatest impact in the promotion of civil rights, prohibiting discrimination on the basis of race, sex, religion, and national origin in the public forum (e.g., restaurants, hotels, places of leisure and diversion, etc.).[44] For example, Title IV of the Civil Rights Act prohibits discrimination in all federally funded programs and activities including the public education system,[45] while Title VII prohibits discrimination in the workplace.[46] In addition, the Congress has subsequently expanded the umbrella of civil rights through the enactment of additional statutes.[47]

Furthermore, another point that bears mentioning is the tendency of agencies or courts to broadly interpret such regulations, thereby expanding the types of conduct that fall under the regulation. For example, imagine a sign that prohibits dogs posted on the entrance of a restaurant. While the average person would probably not interpret the sign to mean that dogs are the only animals prohibited and then subsequently attempt to enter the establishment with a pet monkey, others may understand this sign to mean that their pet alligator is welcome. The average person's reading of this situation follows the Roman interpretation of law, whereby one basic rule served as an example of a whole category of conduct it was meant to encompass.[48] With regard to discrimination, it is interesting to observe how administrative authorities and courts of justice react to the same phenomena, and either choose to expand or limit their understanding of what constitutes discrimination when unanticipated situations arise. Argentine legislation is a good example of a working system which does not provide a detailed list of prohibited acts, instead granting ample authority to the courts to define discrimination in each instance. In effect, Law 23592 was created to establish mea-

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[43] U.S. CONST. amend. XIV.

[44] Civil Rights Act of 1964, 42 U.S.C. § 2000a (2000).

[45] *Id.* § 2000d.

[46] 42 U.S.C. § 2000e-2.

[47] See The Voting Rights Act, 42 U.S.C. § 1973–1973aa-6 (1965); the Equal Credit Opportunity Act, 15 U.S.C. § 1691 (1974); the Americans with Disabilities Act, 42 U.S.C. § 12101 (1990); the National Voter Registration Act, 42 U.S.C. § 1973gg (1993); the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff-6 (1986); the Voting for Accessibility the Elderly and Handicapped Act, 42 U.S.C. § 1973ee (1984); the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 (1980); the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (1994); the Police Misconduct Provision of the Violent Crime Control and Law Enforcement Act, 42 U.S.C. § 14141 (1994); and section 102 of the Immigration Reform and Act Control (IRCA), 8 U.S.C. § 1101 (1986). Of course there are some areas that remain unregulated i.e., discrimination in private clubs is permissible in some states.

[48] For example, the Canadian courts have interpreted the Canadian Human Rights Act extensively, incorporating even those discriminatory "*acts*" not explicitly cited in the text, like sexual orientation. The Canadian Human Rights Act is reinforced by Part I of the Canadian Bill of Rights which protects Canadians against discriminatory acts based on ethnicity or national origin. Canadian Bill of Rights, 1960. S.C., ch. 44 (Can.).

sures to be taken against those who arbitrarily prevent the implementation of any individual's fundamental rights, as guaranteed by the National Constitution.[49]

In addition, the procedural development of the law must be efficient and expedient. The administrative system facilitating the initiation of such laws should function without the need for a lawyer or the tedious and time-consuming task of sending emails, faxes, and posts. These are problems which beleaguer many administrative agencies like the Canadian Human Rights Commission, the South African Human Rights Commission, the National Council for the Prevention of Discrimination, as well as the United States Department of Justice, Civil Rights Division.[50]

IV. Legal Responses to Discriminatory Actions

It is one thing to examine the variety of ways in which the law defines discriminatory actions and quite another to explore the divergent legal mechanisms and remedies made available to the victims of discrimination. This section will explain the significance and function of these legal mechanisms.

A) Correction of the Discriminatory Practice

If my children are not accepted to a school because of the color of their skin, if I am not hired by an employer due to my religious beliefs or my DNA,[51] if I am not allowed to live in the apartment of my choice because of my sexual orientation or the clothes that I wear, or any range of other discriminatory actions, the first thing I would do is employ the law to address my specific problem and attempt to get the result I originally intended to achieve. While such a reaction seems overly simplified, such a reaction is optimal even though worldwide strug-

[49] Law No. 23592, July 23, 1988, [26458] B.O. 1. *See also* Law No. 24782, 25608, and 28618 which provides a more complete understanding of Argentine legislation as concerns this topic. With respect to the definition and dynamic amalgamation of normative adjustments, one of the most notable Canadian remedies is The Legal Commission of Canada. Created by the Ministry of Justice and made up of experts in various disciplines, its purpose is to promote those normative changes necessary to ensure the reinforcement of rights and guarantees.

[50] When discussing applicable procedures and remedies in the case of the United States, it becomes necessary to distinguish the various types of discrimination. If a civil rights violation is deemed to be criminal, perhaps because it encompassed a threat or use of force, police abuse, unlawful arrest, property damage or religious discrimination, etc., the victim or a state agency, such as the FBI, the Immigration and Nationalization Service (INS), or the Department of Housing, can file a complaint with the Criminal Section of the Civil Rights Division of the Department of Justice. The facts of the case will then be investigated by the office of the public prosecutor, whereupon a grand jury will be given the task of determining if the evidence is sufficient enough to warrant a trial. The burden of proof rests on the prosecutor, who must prove that the defendant is guilty beyond a reasonable doubt. If the defendant is found guilty, the applicable sanctions vary, depending on the severity of the crime, ranging from community service to financial compensation for damages to imprisonment. If a civil rights violation is not classified as criminal, a victim may file a complaint with the appropriate federal agency. Where no federal agency is equipped to handle the specific complaint, the complaint can be submitted to the Civil Rights Division of the Department of Justice which retains the ability to act as an auxiliary in such cases. Generally, possible remedies include the indemnification of damages, injunctive relief and other civil sanctions.

[51] *See generally* Hugo Rojas, *Labor Law and Genetic Discrimination in Chile*, 16 FLA. J. INT'L L. 561 (2004).

gles to combat discrimination demonstrate the difficulty of obtaining a legal remedy, especially one that is affordable to the masses. In Argentina, people subjected to discrimination or deprivations of their guaranteed rights under the Constitution have the right to demand that the discrimination or deprivation cease.[52] If the discrimination or the deprivation of rights continues, the citizen can bring the matter to the police or the appropriate civil court. These institutions are then obligated to acknowledge the accusation and to initiate legal actions that allow the citizen to receive compensation for both direct and indirect damages.

The capacity of the law to respond to discrimination depends both on the will and the interest of lawmakers as they identify norms that determine prohibited discriminatory behaviors. The law's ability to respond also depends on the way in which the judiciary and the government, in considering human rights violations, understand what constitutes discrimination.

B) The Right to Compensation

When a person is discriminated against, he/she will seek to put an end to the discrimination by employing the applicable laws. However, in many cases, the victim of discrimination will not be satisfied by the simple cessation of such discrimination and will want to be compensated for all the damages he has suffered.

In general, most legal systems recognize the right to compensatory damages. Familiarity with the divergent legal mechanisms available to ensure that the victim is compensated is absolutely imperative in the study of comparative antidiscrimination law. In terms of legal proceedings, it is interesting to observe how legal systems choose to format and organize the legal mechanisms available to the victim to obtain compensation. In some cases, a victim must first obtain a criminal judgment in his/her favor in order to receive compensation. In other cases, both the criminal and civil proceeding can advance simultaneously and independently of one another.[53] Moreover, it is equally fascinating to delve into the varying costs of initiating a lawsuit for damages, the amount of time it takes

[52] Law No. 23592, July 23, 1988, [26458] B.O. 1.

[53] For example, Brazilian civil legislation recognizes the right of a victim of discrimination to file a civil action for moral damages. From a procedural point of view, it is necessary to make a distinction between the different amounts of requested indemnification. If the plaintiff seeks damages of less of US $4,800, the procedural rules of "expedited civil judgment" apply. However, if a larger amount is sought, general procedural rules are followed. A victim who has obtained a favorable penal sentence will consequently remain in favor in the civil forum, because the extent of the damage suffered has already been demonstrated. When the judiciary holds that a crime has indeed been committed, and the defendant is declared guilty, it is not necessary to demonstrate the same facts again in civil court. Instead, a copy of the criminal sentence may be given to the court along with a request for indemnification. Where a condemnatory penal sentence is absent, the burden of proof rests on the plaintiff, who must then plead his case and identify all damages. Victims of employment discrimination may also rely on civil legislation to secure their rights, in using the Constitution of 1988 which declares that civil legislation is applicable to "employment/labor law," which strengthens the force of antidiscrimination mechanisms in the private sector. In the event that the victim of discrimination is a public servant and the discriminatory actor is the victim's superior, the victim can use the 1988 Constitution as well as the administrative laws. (I owe these explanations to Humberto Dalla (Rio de Janeiro, 2005)).

to resolve the matter, the variances in the judgments of such cases, and the standard compensation awarded to the victim.[54] It is also interesting to examine whether legal systems tend to encourage settlement negotiation before proceeding to trial.

C) The Application of Criminal Sanctions

Many different legal systems have employed criminal sanctions to control discrimination. For example, Brazil's Anti-Racism Law,[55] paragraph 130 of the German Penal Code[56], (sanctions the instigation of racial hatred and other forms of discrimination), Articles 90 and 137 of the Dutch Penal Code[57] (after defining discrimination, it reflects on the diversity of discriminatory conduct and the incitation of hatred and discrimination), Article 225 of the French Penal Code[58], sections 318 to 320 of the Canadian Penal Code[59], Article 154 of the Puerto Rican Penal Code[60], and Articles 22, 510 to 512 of the Spanish Penal Code.[61]

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[54] A highlight of the American model is the possibility of alleging the "extra-contractual responsibility" of the discriminating agent in a tort suit. Here, the victim of discrimination has the option to demand compensation for damages in the civil courts of the respective state. Depending on the circumstances, a plaintiff might reference the strict liability, negligence, or intentional conduct of the other party. In these cases the victim is responsible for providing her own legal representation, as the Department of Justice is not authorized to initiate such a suit. The legal standard of proof here differs from a criminal case in that the standard is lowered from "beyond a reasonable doubt" to a "preponderance of evidence".

[55] Código Penal [CP], Lei no. 7716, 1989. Brazilian legislation both prevents and sanctions discrimination in its 1988 Constitution. A victim of discrimination may cite discrimination on the basis of sex, sexual orientation, gender, race, ethnicity, age, religion, political opinion, etc. Brazilian law further distinguishes discrimination as having criminal and/or civil consequences.

[56] Strafgesetzbuch [StGB] [Penal Code] ¶130, Nov. 13, 1998.

[57] Wetboek van Koophandel [SR] [Penal Code] Art. 90, 137, 1881, amended 1994.

[58] Code pénal [C.PÉN] Art. 225, 1994.

[59] Canada Criminal Code, R.S.C. 1985 ch. C-46, § 318 (2008). Section 318 establishes the crime of genocide, understood as the support or promotion of the commission of homicide of persons who belong to a clearly identifiable group based on their color, race, religion or ethnic origin. The intention or motivation of the aggressor is the destruction of members of the target group. If the accused is found guilty, (s)he is sentenced to less than five years of incarceration. Section 319 prohibits the promotion of hatred through the media and in public places against a particular group or the incitement of social unrest. *Id.* § 319. The penalty for such acts is less than two years of incarceration. The Anti-Terrorism Act of 2001 added the diffusion of aggressive messages or discriminatory propaganda on the internet to the list of hate crimes. Section 320.1 provides that a tribunal can order the archives on the server or original computer erased. The penal legislation will also consider hate or prejudice to be an aggravating factor in the commission of other crimes. Canada Criminal Code, R.S.C. 1985 ch. C-46 § 718.2(a)(i) (2008).

[60] Código Penal, 33 L.P.R.A. §§. 4171-4195 (1974). The Penal Code of 1974 includes a range of crimes against civil rights and explicitly sanctions illegal threats and discrimination on the basis of political beliefs, religion, race, color, sex, social status or national origin. Discriminatory acts are prohibited in the public sphere and means of transportation, in all advertisements, on the premises of private clubs, and in any sale of or transaction involving property *Id.* § 4194. One of the most controversial topics in recent times concerns the contents of Article 103 of the Puerto Rican Penal Code (1902), which penalizes sexual relations between persons of the same sex or acts against human nature. 33 L.P.R.A. § 4065. The penalty for such crimes is ten years of incarceration. In 1974, revisions to the Penal Code distinguished between homosexual conduct and bestiality. In 1999, the constitutionality of the law was called into question, the resolution of which is still pending.

[61] Código Penal [C.P.] Art. 510-512. The Spanish Penal Code contains a variety of sanctions for the provocation of discrimination as well as discriminatory insults. In addition, racist motives, anti-Semitism or discrimination on the basis of ideology, religion, ethnicity, race, national origin, sex, sexual orienta-

In general, criminal anti-discrimination legislation can be classified as follows:

1. Legislation that defines specific discriminatory acts or omissions that greatly offend human dignity and fundamental rights and thus merit criminal sanctions.[62]

2. Legislation that, standing alone, does not address discrimination through any provision or series of provisions, but nonetheless is applied by courts to acts of discrimination and which often results in stiffer penalties for the wrongdoer than if discriminatory intent was not present. For example, if a crime (e.g. robbery) is committed with the intent to discriminate, the court may choose a higher penalty than if such discriminatory intent was absent. Some legislatures forgo establishing special crimes and instead increase the applicable punishment to the case at hand. They consider discrimination only an aggravating factor in the overall crime.

3. Legislation that combines the two previous alternatives and defines special discriminatory crimes while also providing a higher sentencing penalty when an individual commits a crime with the intent to discriminate.[63]

V. Institutions in Charge of the Prevention and Punishment of Discriminatory Conduct

In order to authentically engage in a comparative study of discrimination law, one must be able not only to identify the divergent definitions of discrimination and the legal reactions to it, but also to understand who or what puts these legal reactions into play. This section will address the role of the courts in the sanctioning of discriminatory actions and the role of governmental agencies in the promotion of diversity.

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tion, health, or disability will be considered an aggravating factor in the commission of other crimes. C.P. Art. 22(4).

62 On September 2, 1999, the Legislative Assembly of the Federal District of Mexico reformed Article 281 of the Penal Code, incorporating discrimination on the basis of sexual orientation as a crime. Código Penal Federal [C.P,F.], *as amended*, Art. 281, 14 de Agosto de 1931. However, on July 16, 2002 a new version of the Penal Code of the Federal District was published, with Article 260 establishing a prison sentence one to three years of prison and of 52 to 200 days in fines for discrimination on the basis of "age, sex, pregnancy, civil status, race, ethnic origin, language, religion, ideology, sexual orientation, skin color, nationality, origin or social status, work or profession, economic position, physical characteristics, disability or state of health". C.P.F. Art. 260.

63 Argentina is an example of a country that combines both aspects. Article II of Law No. 23.592 states: "The minimum punishment is raised by one third and the maximum by one half for any crime prohibited by the Penal Code or complementary laws when the crime is committed because of hatred for a race, religion or nationality, or the object of the crime is to destroy all or part of a national, ethnic, racial or religious group. Under no circumstances can the penalty exceed the maximum penalty for that type of crime." Article 3 states that: "Those who participate in an organization or distribute propaganda based on ideas or theories of superiority of one race or religious group, origin or color, with the goal of justifying or promoting racial or religious discrimination in any form shall be sentenced to one month to three years in prison." In addition, "those who support or incite, in whatever form, persecution or hatred of a person or group of persons because of race, religion, nationality or political ideas are subject to the same penalties."

A. Courts

The courts of justice are imperative in levying sanctions for discriminatory actions. Each country must not only determine the treatment that will be accorded to discriminatory actors, but also establish the institutions that are given jurisdiction over human rights violations.

One of the most interesting points to discuss in comparative law is citizens' access to justice in various countries. If the victims of discrimination cannot, or choose not to resort to the courts when they are discriminated against, in spite of the fact that discriminatory conduct is prohibited by law, then something is awry in the judicial system. An effective and inclusive legal system must pay attention to the people who believe they have access to justice through the court system, and even more importantly, to the people who believe they do not. In addition, an effective and inclusive legal system not only concerns itself with ensuring access to justice, but also endeavors to provide access that is consistently of high quality.[64]

A second point worth investigating is the nature of the procedures to which the courts adhere. If the probative rules are too demanding, the judgments too long and drawn out, the proceedings too bureaucratic, the language used too technical, or the trials written instead of oral, it is quite possible that the victims of the discrimination will choose to keep silent rather than resort to such unwelcoming and intimidating tribunals.[65]

It is also essential to understand the particulars of the processes. If one is accused of a crime, it is necessary to understand whether the accusation is formulated by the public prosecutor, directly by the victim, or if the system allows for both options. However, if financial compensation is sought, the victim often has an economic stake in the action and is in a better position to formulate a demand. In addition, one should also inquire into whether the legal system allows class actions, since discrimination unquestionably affects groups of people as well as individuals.

I maintain, however, that an efficient model of conflict resolution, when discrimination is at the nucleus of the conflict, cannot rest solely on the capacity of the courts to apply the respective law and institute criminal sanctions. The parties must also have the opportunity to negotiate and to find a proper solution to the conflict, when possible, as the cessation of discriminatory action is the ultimate goal.

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[64] A good example of access to justice is The Court Challenges Program in Canada. Public funds are used to support NGOs that represent minority groups, academic centers, lawyers' associations, etc., so that these groups can provide legal assistance to individuals or groups whose rights have been violated. This program is interesting because, in this case, the state has given civil society the complex task of protecting the rights of its citizens against acts of discrimination whether on the part of individuals or the state itself. *See also* Court Challenges Program of Canada, http://www.ccppcj.ca (last visited June 17, 2008).

[65] The National Commission for the Prevention of Discrimination in Mexico: 1) contributes to cultural, social and democratic development in the country; 2) brings about actions that prevent and eliminate discrimination; 3) creates public policies that favor equality of opportunity; and 4) coordinates the effort on the part of entities within the executive branch of the government to prevent and eliminate discrimination. *See also* Ley Federal para Prevenir y Eliminar la Discriminación (2003).

B. Governmental Agencies

If one reviews the role of the executive branches in the prevention and sanctioning of discrimination across the globe, he will observe very diverse models of governmental organization. In some cases, a governmental body is charged with the task of overseeing the prevention and prohibition of discrimination, while at other times the task is assigned to specialized organizations. In some cases, it is impossible to identify which organization is in charge of enforcement, as the job has been diffused amongst a number of them.

A typical example of moderate dispersion is the United States. The Equal Employment Opportunity Commission enforces Title VII of the Civil Rights Acts of 1964 and 1991[66], Titles I and V of the Americans with Disabilities Act[67], the Age Discrimination in Employment Act of 1967[68], the Equal Pay Act of 1963[69], and Sections 501 and 505 of the Rehabilitation Act of 1973.[70] The Education Opportunities Section of the Civil Rights Division enforces federal statutes which prohibit public school officials from engaging in discriminatory practices involving both elementary and secondary schools and institutions of higher education.[71] The Housing and Civil Enforcement Section of the Civil Rights Division has the multifaceted function of enforcing the Fair Housing Act[72], the Equal Credit Opportunity Act[73], Title II of the Civil Rights Act of 1964[74], and the Religious Land Use and Institutionalized Persons Act.[75] The Special Litigation Section of the Civil Rights Division is entrusted with enforcing the Civil Rights of Institutionalized Persons Act[76], the police misconduct provision of the Violent Crime Control and Law Enforcement Act of 1994[77], Title III of the Civil Rights Act of 1964[78], the Omnibus Crime Control and Safe Streets Act of 1968[79], the Freedom of Access to Clinic Entrances Act of 1994[80], and the Religious Land Use and Institutionalized Persons Act[81]. The Voting Section of the Civil Rights Division of the Department of Justice oversees and supports effective enforcement of the Voting

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66 42 U.S.C. § 2000(e) (2000), *amended by* 42 U.S.C. § 1981 (1991).

67 42 U.S.C. §§ 12111 & 12201 (2000).

68 29 U.S.C. §§ 621-634 (2000).

69 29 U.S.C. § 206(d) (2000).

70 29 U.S.C. §§ 791 & 794(a) (2000).

71 These statutes include: Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (2000); the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703 (2000); the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12231 (2000); and various other federal laws.

72 42 U.S.C. §§ 3601-3631 (2000).

73 15 U.S.C. § 1691 (2000).

74 42 U.S.C. § 2000(a) (2000).

75 42 U.S.C. § 2000(cc) (2000).

76 42 U.S.C. § 1997 (2000).

77 18 U.S.C. §§ 1033-1034 (2000).

78 42 U.S.C. § 2000(b) (2000).

79 42 U.S.C. § 3701 (2000).

80 18 U.S.C. § 248 (2000).

81 42 U.S.C. § 2000(cc) (2000).

Rights Act of 1965[82], the National Voter Registration Act of 1993[83], the Uniformed and Overseas Citizens Absentee Voting Act of 1986[84], the Voting for Accessibility the Elderly and Handicapped Act[85], and the Help America Vote Act of 2002[86].

The American system is characterized by: a) detailed legislation on behaviors that are considered discriminatory, distinguished according to the nature of the discrimination; b) specialized agencies designed to defend the rights of those who have been victims of discrimination; c) determination of whether a mandatory agency proceeding is required and evaluation as to whether the petition has merit; d) access to the criminal courts, depending of the severity of the discriminatory act, in order to sanction the violator and afford the victim of the discrimination the appropriate remedies; and e) opportunity for the victim to also demand civil reparations. It should also be noted that, due to the application of *stare decisis* and the subsequent binding force of precedent, jurisprudential development in the United States has greater political-legal weight than in other legal systems.

Argentina represents a more concentrated model. In 1995, the government created the National Institute to Combat Discrimination, Xenophobia, and Racism (Instituto Nacional contra la Discriminacion, Xenophobia y Racismo, INADI).[87] A decentralized organization, falling under the umbrella of the Ministry of Justice and Human Rights, INADI is responsible for preparing and approving national policies, developing distinct methods to combat discrimination, xenophobia, and racism, putting those methods into action, and engaging in campaigns and investigations to reach these objectives. These responsibilities correspond to the principles established under law number 23,592 which defines the valuable nature of social and cultural pluralism and the elimination of discriminatory attitudes in general.[88] Concerning complaints of discrimination, xenophobia, and racism, the victim is able to receive free legal advice and assistance in filing a claim against any person or institution, which can then be presented at INADI or in court. In cases where the Public Ministry or the courts require specialized knowledge on matters related to the phenomenon of discrimination, INADI can serve as an expert.

The Mexican model is one of moderate concentration. The National Council for the Prevention of Discrimination (CONAPRED) is primarily responsible for combating discrimination.[89] However, the National Commission of Human

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[82] 42 U.S.C. § 1973 (2000).

[83] 42 U.S.C. § 1973(gg) (2000).

[84] 42 U.S.C. § 1973(ff) (2000).

[85] 42 U.S.C. § 1973(ee) (2000).

[86] 42 U.S.C. §§ 15301-15545 (2000).

[87] Instituto Nacional contra la Discriminacion, Xenophobia y Racismo, http://www.inadi.gov.ar/ (last visited June 17, 2008).

[88] Anti-discrimination Act, Act No. 23592 of 23 August 1988.

[89] CONARED, http://www.conapred.org.mx (last visited June 17, 2008).

Rights also plays a significant role.[90] If a person's fundamental rights, as recognized by Mexican law, have been violated, he is then able to go to any of the Commission's offices, either personally or via a representative, to file a complaint.

Canada offers quite an encouraging view. The state not only affords citizens the possibility of going to an agency specializing in the promotion of human rights, but also gives the agency the role of mediator when possible, allowing the agency to represent general interests in court.[91] The main advantage of the Canadian model is that it is based on legitimacy, or societal support of government action. Other distinguishing features of this model include the steadfast commitment of the government to fulfill the basic principles of the Canadian state, the dedication of resources to the discussion and implementation of anti-discriminatory programs, and the monitoring of the results of such programs. This model has positively influenced countries like Australia and New Zealand.[92]

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90 Victims of discrimination can also bring their claims to the National Commission on Human Rights which was created in 1990. In 1992, pursuant to the Law of the Commission on Human Rights, the Commission was given constitutional rank. As a result of the constitutional reform of September 13, 1999, the Commission gained even greater autonomy. For additional information, *see* Comisión Nacional Derechos Humanos Mexico, http://www.cndh.org.mx/ (last visited June 17, 2008).

91 With respect to concrete mechanisms that can be used by Canadian citizens in the event of discrimination or a violation of rights guaranteed by the Human Rights Act, the victim of discrimination can go to the Canadian Human Rights Commission, the organization in charge of the administration and supervision of the Human Rights Act and the Employment Equity Act. Human Rights Act R.S.C., ch. 33 (1977). The Human Rights Act protects workers and consumers tied to organizations that are federally regulated including, but not limited to, the departments and agencies of the federal government, telephone companies, banks, airlines, buses, trains, television and radio stations, and the postal service. On the other hand, the Employment Equity Act protects women, indigenous groups, people with disabilities and other minority groups, assuring their proportional representation in the workforce. Employment Equity Act R.S.C. c. 44 (1995). The Human Rights Commission uses knowledge gained from allegations and/or complaints to set up mediation between the affected groups with the goal of vindicating the victim's rights. The Canadian Human Rights Act also confers upon the Commission the power to combat discrimination through other means such as studies, public opinion surveys, approval of special programs, revision of federal legislation and special reports to Parliament, to name a few. In addition, the Commission receives and investigates accusations and complaints. Formal complaints can then proceed to mediation or be heard by the Human Rights Court. The Human Rights Court will hear the complaint and the evidence and will render a decision providing a remedy to the victim of discrimination. Decisions of the Human Rights Court can be appealed to the Federal Court of Canada and the Supreme Court. The guarantees recognized by the Bill of Rights are as follows: dignity, equality and the prohibition of discrimination, the right to life, the right to security of person, the right to privacy, freedom of culture, belief and opinion, freedom of expression, the right of assembly, freedom of association, political rights, citizenship, the right to freedom of movement, economic, occupational and professional freedom, the right to freely associate with labor unions, the right to strike, right to health, property rights, social security, health, food and water, special rights and protections for minors, the right to a basic education in your native language, cultural, religious and linguistic rights, freedom of information, a just government, access to justice, and freedom from slavery or indentured servitude. Canadian Bill of Rights, S.C., ch. 44 (1960).

92 A similar situation is found in the New Zealand model. A citizen can go before the Human Rights Commission. The Commission can hear cases involving violations of fundamental rights and provide remedies for those whose rights have been violated. If agreement cannot be reached, the case can be appealed to the Human Rights Review Tribunal. A citizen also has the option of taking his case to the Office of Human Rights Proceedings (created in 2001 as part of a reform of the Human Rights Act), who will represent him and defend his fundamental rights. *See generally,* New Zealand Ministry of Justice, http://www.justice.govt.nz/ (last visited on April 17, 2008) and Human Rights Commission, http://www.hrc.co.nz/home/default.php (last visited June 17, 2008).

South Africa also embraces a similar approach. In addition to the important role that the Constitutional Court of South Africa has played in the transitional process towards democracy, its diffusion and expansion into specialized courts and other independent organizations (as indicated in Chapter 9 of the Constitution),[93] also contributes to the promotion and protection of human rights. Created in 1995, the South African Human Rights Commission contributes to the promotion, respect, observance, and protection of citizens' rights, as well as the strengthening of the constitutional democracy and the rule of law.[94] The Commission is authorized by the Constitution and the Human Rights Commission Act to: 1) monitor the observance of human rights; 2) express its concerns as per the reality of the observance of its citizens' fundamental rights; and 3) promote a respect for human rights as well as a culture of human rights.[95] It is also authorized to work with the government, the public and individuals, conduct investigations and reports on the observance of the human rights, take concrete actions to respond to violations of human rights and educate and inform the citizens. The Secretariat of the Commission is placed in charge of carrying out the policies of the Commission. Under the Secretariat are a series of directors: Chairperson, Chief, and Executive Officer, and specialized departments and committees, who all work together to accomplish the goals of the Commission. Any person who feels that his or her human rights, as recognized by South African law, have been violated, is able to go before the Commission and fill out a form explaining the incident.

VI. Conclusions

In comparing the anti-discrimination laws of Argentina, Brazil, Canada, Chile, Mexico, South Africa, and United States, I have put forth eight variables that provide normative guidelines, useful in the prevention and sanction of discriminatory actions to those individuals involved in the creation of law. The variables contemplated in this comparative work have been: (1) the recognition of the principle of nondiscrimination in the Constitution; (2) the incorporation of international law into domestic law which allows victims of discrimination to invoke relevant international treaties to redress their discrimination claims at the national level; (3) the identification of discriminatory conduct in domestic law; (4) the determination of suitable mechanisms to address such discriminatory conduct; (5) a description of the criminal consequences of such discriminatory acts; (6) the possibility of obtaining compensation for damages caused by such discrimination under civil law; (7) the roll of the judiciary in the resolution of such conflicts;

[93] S. AFR. CONST. 1996 § 181. "These institutions are independent, and subject only to the Constitution and the law. They must be impartial and must exercise their powers and perform their functions without fear, favor or prejudice. Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure their independence, impartiality, dignity and effectiveness. No person or organ of state may interfere with the functioning of these institutions. These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year." *Id.*

[94] South African Human Rights Commission, http://www.sahrc.org.za (last visited June 17, 2008).

[95] S. AFR. CONST. 1996 § 184(1); Human Rights Commission Act 54 of 1994 s. 9.

and (8) the processes by which governments have created specialized agencies designed to both prevent and combat discrimination. The main conclusions that can here be drawn are summarized in the following.

A. Law As an Instrument in the Prevention of Discrimination

As history has shown us, the law can both contribute to the prevention of discriminatory conduct and exacerbate discrimination. However, when effective, it can play a leading role in ending the propensity of individuals and societies to discriminate, sanction discriminatory conduct, and finally, serve to secure the liberties and fundamental rights of all citizens. For these reasons, it is crucial that we comprehend the substance of diverse legal systems in order to better understand how to assist the victims of discrimination in using the law as a tool to facilitate justice. Although it is important to recognize that the law can be used as an instrument to promote social changes and prevent and sanction discriminatory actions, it is equally important to acknowledge the significance of the will of lawmakers.

B. The Regulation of Discriminatory Conduct

In comparative law, it is possible to find examples of specificity in the legal mechanisms that individuals may invoke to protect themselves against discriminatory actions or omissions. The general inclination of the observed countries and of the international community in general, is to hold the principle of non-discrimination at the highest level within the normative hierarchy of their respective legal orderings, thus placing it on par with the Constitution (e.g., South Africa, Canada, Brazil, Mexico, Colombia, Spain, and Italy, among others). When a country chooses to recognize the principle of non-discrimination in the constitution, it sends a clear sign to society that discrimination of any sort will not be tolerated. Furthermore, this recognition can have a great influence on the rest of the legal system because of the fact that all statutes must respect the constitution, leading to imminent changes to any statute incongruent with the principle of non-discrimination.

In addition, one must consider how receptive a legal system is to the incorporation of international law into its domestic law. For example, Argentina has readily embraced international law and incorporated it into its domestic law, an eagerness exhibited in the various debates that have taken place in its courts.[96] Although certainly with more caution, Chile seems to be moving in the same direction.

Another important aspect to consider is the level of detail and coordination a country displays in establishing a list of prohibited conduct. In some countries, it is possible to observe a diffusion of norms related to discrimination into different statutes or legal bodies (e.g., United States and Puerto Rico). Such diffusion

[96] My position is that if one truly wants to condemn acts committed against human dignity and public order, then it is necessary to have corresponding penalties that sanction serious acts or omissions. It is also necessary to consider discrimination an aggravating factor when the motivation of any crime is discrimination or hatred.

should not be interpreted as a weakness of the legal system. It should instead be understood as a possible specialization in previously-regulated subjects (e.g. anti discrimination laws in labor relations in Chile, USA, and Brazil, among others). In other countries, there has been a push to concentrate regulation in a smaller number of statutes (e.g., Argentina and Mexico), the advantage of such an approach being easier dissemination of information to the people.

Furthermore, it is essential to analyze the flexibility of those laws which regulate discrimination, as well as the level of discretion the judiciary has when interpreting those laws. Some countries are more formalistic, disallowing the court to sanction conduct not explicitly prohibited by the law. Other countries are more open to using the Roman method of interpretation, using analogy to expand the list of prohibitions to other related actions (e.g., Canada). The advantage of this model is that it allows a legal system to easily update itself to manage a changing society, which will undeniably provide an ever-changing variety of unanticipated conduct and actions which should be understood as discriminatory.

It is important to take note of the differences between the legal mechanisms made available to victims of discrimination that allow them to obtain appropriate remedies. Of course, it is best to have simple, efficient legal mechanisms in place which allow the victim to activate the legal system, present a complaint, and have their claim addressed quickly. If the legal system does not provide this to its citizens, then the most genuine intentions of the legislature are in vain.[97]

C. Legal Responses to Discriminatory Actions

In this comparative study, I have analyzed different mechanisms meant to put an end to discriminatory action. In evaluating the quality of such legal reactions, it is necessary to know whether the law provides a mechanism to stop the discriminatory action. Additionally, it is important to understand the intensity with which the legal system acts in terms of giving the victim the right to be compensated. While some legal systems consider certain discriminatory actions crimes themselves (e.g., Brazil and Canada), other countries consider the intent to discriminate an aggravating factor of a pre-existing crime. Other countries combine both models.

D. Institutions in Charge of the Prevention and Punishment of Discriminatory Conduct

I have analyzed the role of two important governmental organizations: the courts of justice and the agencies of government. In addition to emphasizing the competence and the awareness of the courts of accusations of discriminatory con-

[97] Constitutional norms not only must have obligatory force and general applicability but also must be effective. The effectiveness of these norms is understood through observation of the judicial system and how it reacts and responds to discriminatory acts. In order for these norms to be effective, proceedings that are just, impartial, objective, transparent and of little cost are a necessary. However, at the same time, comparative experience has demonstrated that the judicial system is not the only means of resolving a problem involving discrimination, in fact, empirical studies have shown that it is possible, often with better results, to resolve such problems through extrajudicial channels (e.g. mediation and restorative justice in Canada, etc.).

duct, it is also important to evaluate the access to formal justice, the procedures to follow, the system of activation of judicial actions, the possibility of expanding the case to a greater number of people, and the settings of negotiation between the parties.

Within each government, it is interesting to see the degrees of concentration of attribution and responsibility inside the Executive apparatus. In some countries a greater concentration is appreciated (e.g., Argentina), while in others, there is greater dispersion (e.g., United States), normally associated with a high degree of specialization.[98]

Finally, one must consider the intervention of the government in the design and evaluation of anti-discrimination public policy (in this area, Canada and South Africa are noteworthy).[99]

In this essay I have provided an overview of the many ways that diverse legal cultures use a variety of norms and standards to shape and develop laws that prevent and sanction discrimination. Although the intricacies and complexities of each country create a tangled web of standards and guidelines, as this essay demonstrates, the variables set forth above can be used in a number of different ways to secure the liberties and fundamental rights of all citizens.[100]

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[98] Here, I would like to thank Martín Saavedra for his insightful explanation of Argentina's recent Constitutional shift toward a more expansive acceptance of international law.

[99] A large majority of the aforementioned legal systems contemplate the various mechanisms a victim of discrimination might use to remedy the effects of his maltreatment, thereby identifying competent organizations to denounce, support, or solve the respective legal controversies (e.g., the United States, Argentina, Canada, Puerto Rico, Mexico). Additionally, some countries have chosen to leave space within laws of general applicability, particularly when discussing indemnification (e.g., the United States and Brazil). South Africa has put into effect the South African Human Rights Commission, comprised in part of representatives of civil society who are responsible for investigating complaints and creating legal projects, among other activities. In Argentina, the modification of the 1994 Constitution and the creation of the National Institute to Combat Discrimination, Xenophobia and Racism, put discrimination more properly into focus.

[100] The role assumed by the government is another important factor regarding the ultimate efficacy of norms. It is evident that the state does not have to have an implicit or explicit policy to address those acts or omissions which contribute to inequality. As simple as this seems, it is quite complex, because while western democracies provide formal declarations of equality and fundamental fairness, these declarations may not in turn lead to effective public policies that create equality in any real sense. Here, I would like to reiterate two central queries in my argument: a) what are the recognized remedies? and b) what are the methods adopted or permitted by the state to assure the effective attainment of guaranteed rights?

BRIGHT FUTURE FOR MARINE GENETIC RESOURCES, BLEAK FUTURE FOR SETTLEMENT OF OWNERSHIP RIGHTS: REFLECTIONS ON THE UNITED NATIONS LAW OF THE SEA CONSULTATIVE PROCESS ON MARINE GENETIC RESOURCES

Kirsten E. Zewers†

As the possibility for ocean exploration increases, so do infinite cures to deadly human diseases through the development and cultivation of unique marine life. Several questions exist, however, regarding organisms found within the ocean's seabed, floor, and subsoil beyond national jurisdictions. Such organisms, called marine genetic resources ("MGRs"), were the topic of discussion and concern at the recent United Nations Informal Consultative Process on the Oceans and the Law of the Sea ("UNICPOLOS") held in New York from June 25-29, 2007 and are presently being addressed within the sixty-second session of the United Nations General Assembly. This article expands on the discussions of the UNICPOLOS meeting by exploring the substance and patentability of MGRs in international intellectual property law and by evaluating the current ownership debate within maritime law between developed and developing countries. Further, this article proposes a pragmatic solution through compulsory licensing mechanisms within international intellectual property law in order to promote research and development of essential pharmaceuticals and to provide benefits to both developed and developing countries.

Recent interest in MGRs has stemmed from the invention of new oceanographic technology, allowing scientists and researchers to collect MGR samples from deeper and more remote areas of the ocean than ever before. After minimal study, scientists have found that these areas, specifically areas surrounding hydrothermal vents, breed organisms whose unique genetic structures have the potential to counter deadly human diseases such as several kinds of cancer and HIV/AIDS. MGRs have shown 100% more potential than terrestrial organisms in curing cancers and are believed by many scientists to provide future cures, thereby generating substantial revenue to pharmaceutical companies.

Unfortunately, due to the high cost of oceanographic excavation, estimated at one billion dollars per episode, developed countries have held a monopoly on such excavation technologies and the MGRs collected there from. As many valuable MGRs have been harvested from areas beyond national jurisdictions, however, developing countries also seek ownership rights in MGRs. This article articulates the arguments of both developed and developing countries regarding

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the ownership debate and examines whether the United Nations Convention on the Law of the Sea is the proper authority to regulate MGR ownership.

Significant challenges also exist regarding patentability of MGR genetic derivatives within international and national intellectual property laws. Several national legislatures and courts, including those within the United States, have recently revised and refined the limits of gene patenting, making it more difficult to receive monopolistic rights over fragments and strands of genetic material. This article explores the depths of gene patent reform, specifically within the United States and the European Union, and suggests practical solutions to ensure patentability of MGRs.

At this moment, the settlement of MGR ownership rights is being debated in formal and informal consultations in the 62nd session of the United Nations General Assembly. Currently, a proposal is under consideration in the General Assembly, requesting that ownership of MGRs be placed beyond national jurisdictions and be shared among all countries. If this proposal is adopted however, it could severely discourage excavation of MGRs. Instead, this article proposes an alternative solution through compulsory licensing mechanisms within international intellectual property law in order to promote research and development of essential pharmaceuticals and to provide benefits to both developed and developing countries.[1]

I. Introduction

Within the last thirty years, oceanographers and biologists have been able to explore the ocean and its organisms through the help of advanced oceanographic technologies. Specifically, J. Craig Venter, a pioneer in the field of bioprospecting,[2] recently launched the Sorcerer II Expedition to collect and culture microorganisms in hopes of discovering useful genetic materials.[3] Such explorations have resulted in the discovery of several new kinds of MGRs, from which valuable genetic material has been extracted and adapted for use in the pharmaceutical, cosmetic, and bioremediation (chemical waste treatment) industries. As of 2007, more than 15,000 molecules have been isolated and described as a result of MGR exploration and collection.[4] Due to their unique characteristics, MGRs have al-

[1] Although the following article was inspired from the World Intellectual Property Organization's role in the debate on marine genetic resources in the United Nations Informal Consultative Process on Oceans and the Law of the Sea, the ideas reflected in this paper are solely that of the author, not the World Intellectual Property Organization. Creation of this Article article began through my internship with the World Intellectual Property Organization under the supervision of Mr. S. Rama Rao.

[2] Implementing Rules and Regulations of Republic Act 9147, Rep. Act No. 7611, § 5(a) (May 18, 2004) (Phil.) (defining "Bioprospecting" as the research, collection and utilization of biological and genetic resources for purposes of applying the knowledge derived there from solely for commercial purposes).

[3] J. Craig Venter Institute, Sorcerer II Expedition, http://www.sorcerer2expedition.org/version1/HTML/main.htm (last visited June 16, 2008).

[4] The Secretary-General, *Report of the Secretary-General on Oceans and the Law of the Sea, ¶* 127, *delivered to the General Assembly* at the sixty-second session, U.N. Doc. A/62/66 (Mar. 12, 2007) [hereinafter *Oceans and the Law of the Sea*].

ready shown great potential as anti-cancer and anti-HIV/AIDS drugs and are viewed by many as organisms of significant future value.

However, obtaining the oceanographic technology, scientific expertise, and lab capacity makes extraction and cultivation of MGRs a lengthy and expensive process. Accordingly, very few countries have, thus far, produced the necessary capital, technology, and scientific expertise to obtain MGRs.

Moreover, intellectual property rights laws can create monopoly rights within countries, for companies, and scientists with extensive monetary and scientific resources. The resulting lopsided situation creates a division between developed countries and developing countries (including the least developed countries) as to who can afford to retrieve, and thus benefit from, MGR extraction.

The main point of contention between developed countries and developing countries relates to the legal ownership rights of MGRs beyond national jurisdictions. This debate was the paramount and insurmountable issue in the eighth meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea. Interpretation of relevant provisions of the United Nations Convention on the Law of the Sea (the Convention) was a mainstay of the UNICPOLOS proceedings. More specifically, the point of disagreement among Convention participants is whether the Convention governs MGRs, even though the term MGR is not specifically enumerated nor described within the Convention.

On one hand, developing countries adopt a broad view, stating that the Convention includes, and thus regulates, MGRs. Following such interpretation, the extraction of MGRs and the subsequent benefit from extraction would belong to the Common Heritage of Mankind ("CHM") and would be regulated by the International Seabed Authority ("ISA"). In contrast, developed countries hold a narrow view, stating that the Convention excludes MGRs from its domain. They wish to adopt a first come, first served system; open to all countries, organizations, scientists, etc., with the technology and skill to extract and cultivate MGRs.

Despite recent negotiations in the UNICPOLOS, the MGR debate remains an unsettled, yet vital legal issue with respect to potential future pharmaceutical and monetary benefits derived from MGRs. While there appears to be a need to share the benefits derived from MGRs, the greater need is to cultivate life-saving pharmaceuticals. Thus, within the confines of international law and intellectual property law, perhaps the best solution for developed and developing countries is to focus on cultivating the pharmaceutical benefits of MGRs, and then to create compulsory licensing and benefit sharing regimes so as to maximize global profit from MGRs.

II. The Basics of Marine Genetic Resources

A. Definition of Marine Genetic Resources

Neither the Convention, nor any other international source of law has defined MGRs. However, the Convention on Biological Diversity ("CBD") offers a definition that provides some guidance. The CBD defines "genetic resources" as,

"genetic material of actual or potential value."[5] It further defines "genetic material" as, "any material of plant, animal, microbial or other origin containing functional units of heredity."[6] This broad definition is meant to encompass the vast potential of undiscovered MGRs.

In the recent UNICPOLOS meeting, various scientists presented their views about MGRs to aid in furthering a more specific MGR definition. Panelists represented institutions such as the Smithsonian Institute, the Woods Hole Oceanographic Institution in the United States, the Australian Institute of Marine Science, the Queensland Museum & Natural Products Discovery, Griffith University in Australia, and the French Research Institute for Exploitation of the Sea, as well as PharmaMar, a pharmaceutical company.

Panelists explained that the importance of MGRs result from the unique DNA or RNA strands that are extracted, cultured, and replicated in the laboratory. Once simplified in a laboratory, the replicated strands are then likened to other organisms to determine specific uses for the MGR derivatives. Research indicates that MGR organisms containing such valuable DNA or RNA can consist of both macro-organisms and micro-organisms, including bacteria,[7] algae, fungi, yeasts, and viruses.[8] Mammals, fish, invertebrates, and plants are also being considered MGRs.[9]

B. Location of Marine Genetic Resources

Although discovery of MGRs is in its infancy, several UNICPOLOS panelists reported that MGRs have been most commonly found near hydrothermal vents on the deep sea bed.[10] Deep sea hydrothermal vents are also predicted to yield the majority of future MGRs.[11] As reported by the International Cooperation in Ridge-Crest Studies ("InterRidge"), hydrothermal vents are areas associated with

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[5] Convention on Biological Diversity, art. 2, June 5, 1992, 1760 U.N.T.S. 146, 31 I.L.M. 818 (1992).

[6] *Id.*

[7] Although, bacteria that are incapable of replication outside of their natural environment are not considered MGRs by some scientists.

[8] *Oceans and Law of the Sea, supra* note 4, at ¶ 132.

[9] Harlan K. Cohen, Advisor, for Ocean Governance and International Institutions at the International Union for Conservation of Nature and Natural Resources to the United Nations, statement presented at the United Nations Informal Consultative Process on Oceans and Law of the Sea: Ensuring Conservation and Sustainable Use of Marine Genetic Resources: Current and Future Challenges (June 27, 2007), abstract and presentation *available at* http://www.un.org/Depts/los/consultative_process/documents/8_abstract_cohen.pdf.

[10] Margaret K. Tivey, Assoc. Scientist Marine Chemistry & Geochemistry of Woods Hole Oceanographic Inst., presenting work of Professor Colin Devey of InterRidge at the United Nations Informal Consultative Process on Oceans and Law of the Sea: InterRidge statement of commitment to responsible research practices at deep-sea hydrothermal vents (June 27, 2007), abstract *available at* http://www.un.org/Depts/los/consultative_process/documents/8_abstract%20_tivey_interridge.pdf, full-text of statement *available at* http://www.interridge.org/irstatement [hereinafter Devey].

[11] Libby Evans-Illidge, Manager Bioresources Library, Austl. Inst. of Marine Sci., statement at the United Nations Informal Consultative Process on Oceans and Law of the Sea: Towards a Practical Knowledgebase for Marine Genetic Resources (June 25, 2007), abstract *available at* http://www.un.org/Depts/los/consultative_process/documents/8_abstract_evans_illidge.pdf.

tectonic and/or volcanic activity spouting from the earth's core, and are mostly found on the deep sea bed where the plates of the earth's surface continuously reform the sea-floor.[12] There are currently six main biogeographic areas within the Pacific, Atlantic, and Indian Oceans that are recognized by hydrothermal vent biologists.[13] InterRidge predicts more hydrothermal vents will be found, specifically in the Arctic Ocean, as greater exploration progresses.[14] While the possibility of hydrothermal vents shifting from inactive to active, and active to inactive, could threaten MGR life in these regions, such shifts are more likely to increase the opportunity for hydrothermal vent discovery over time across a wider geographical span.[15]

Due to their tectonic nature, areas of hydrothermal vents are very volatile and subject to extreme geological events such as tsunamis, volcanic eruptions and earthquakes.[16] Extreme changes in temperature, pressure and hydrothermal fluid create difficult environments for sustainable life.[17] Nevertheless, the majority of macro and micro-organisms living in hydrothermal vents have been able to convert hydrothermal vent fluid into useful chemical energy.[18]

Although many scientists do not understand how, MGRs have developed specific protectionist features to shield themselves from their harsh surroundings. Promisingly, scientists have proven that such adaptations can uniquely resist fatal human diseases.[19] Genetic material extracted from MGRs have been tested for potential uses as anti-cancer drugs, anti-inflammatory drugs, anti-viral drugs, anti-leukemia drugs, anti-melanoma drugs, and many more.[20]

C. Bioprospecting versus Biopiracy

While no definition of bioprospecting has been universally agreed upon[21], it was defined by the Convention as, "research and development related to marine genetic resources."[22] Practically speaking, bioprospecting is a search for MGRs, within or beyond the confines of national jurisdictions, of actual or potential value, often conducted by scientists (or scientific institutions) who add value to the process through their vast knowledge of general oceanographic research and marine genetic resources. At present, more than 15,000 molecules, including

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[12] Devey, *supra* note 10.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Oceans and the Law of the Sea, supra* note 4, at ¶ 164.

[21] *Id.* at ¶ 150.

[22] *Id.*

algae and marine microbes, have been described and isolated from different marine resources.[23]

Alternatively, biopiracy is bioprospecting within a foreign country's national jurisdiction without seeking permission for bioprospecting from that country's government.[24] Although biopiracy is a growing concern among many developing countries, this paper centers mainly on bioprospecting of MGRs beyond national jurisdictions. Even though the technology to collect MGRs exists, such technology is very expensive, estimated by UNICPOLOS panelists to cost around $1 billion per expedition. As a result, bioprospecting occurs mostly in developed countries.

D. Multiple Uses of Marine Genetic Resources

1. Pharmaceuticals

The DNA and RNA derivatives extracted from MGRs have many uses such as antioxidant, antiviral, anti-inflammatory, anti-fungal, anti-HIV, antibiotic, anti-cancer, anti-tuberculosis, and anti-malarial purposes.[25] However, developing MGRs into patented pharmaceutical products, thus granting the patent owner temporary monopoly rights, requires that the genetic material derived from MGRs be synthesized in a lab and subjected to various testing procedures.

Before MGR derivatives are produced and sold as pharmaceuticals, they must complete preclinical testing, medicinal chemistry testing, and three phases of clinical trials: Phase I to measure safety, dose, and pharmacokinetics; Phase II to measure efficacy and tumor type; and Phase III encompassing large-scale and comparative studies.[26] If the test drug passes all three phases, the pharmaceutical company, through the scientist, typically applies for a patent (and/or trademark) with their national patent and trademark office. If intellectual property rights are granted, the product is then marketed by the pharmaceutical company to the public. The timeline to develop and market a new drug generally spans between fifteen and twenty years and can cost up to $800 million dollars.[27] Unfortunately, after completing the entire process, the percentage of MGR derivatives that succeed to final clinical trials is less than 1%.[28] Overall, however, MGR

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[23] *Id.* at ¶ 127.

[24] United Nations Univ. Inst. of Advanced Sci., *Tapping the Oceans' Treasures: Bioprospecting in the Deep Seabed, available at* http://www.ony.unu.edu/seminars/2005/Bioprospectingoceans/Summary.doc.

[25] *Oceans and the Law of the Sea, supra* note 4, at ¶ 164.

[26] Simon Munt, Medicinal Chemistry Manager, PharmaMar, presentation at the United Nations Informal Consultative Process on Oceans and the Law of the Sea: From Marine Expeditions to New Drugs in Oncology (June 26, 2007), abstract *available at* http://www.un.org/Depts/los/consultative_process/documents/8_abstract_munt.pdf.

[27] United Nations Univ. Intst. of Advanced Sci. and the United Nations Educ., Sci. and Cultural Org., report presented at the United Nations Informal Consultative Process on Oceans and the Law of the Sea: An Update on Marine Genetic Resources: Scientific Research, Commercial Uses and a Database on Marine Bioprospecting, § 4.2, (June 25, 2007), *available at* http://www.ias.unu.edu/resource_centre/Marine%20Genetic%20Resources%20UNU-IAS%20Report.pdf.

[28] Munt, *supra* note 26.

samples show 100% greater potential, specifically as anti-cancer agents, than terrestrial samples.[29]

Conotoxins are the most prominent MGRs to date that have been adapted into a pharmaceutical drug called Prialt.[30] Snail-like in form, the Conotoxin has the specific ability to kill prey using paralyzing peptides that act as potent calcium channel blockers.[31] The Conotoxin's venom has been developed and adapted as drug treatment for intractable pain.[32] Through Conotoxin's ability to target and block specific neuron channels, the drug Prialt has been adapted by scientists and pharmacists to pinpoint and suppress specific pain without altering the functions of the rest of the nervous system.[33] Thus, Prialt is used specifically by cancer patients.

In the shadow of Prialt, on the pharmaceutical horizon is an anti-cancer agent called Salinosporamide which is undergoing Phase I trials in the United States after highly successful preclinical evaluations.[34] Salinosporamide, derived from a species of streptomycete bacterium, called Salinospora, that produces small bioactive molecules, is a proven inhibitor of the human proteasome.[35] These molecules are able to break down the protein within cells and successfully kill cancer cells, making Salinosporamide of infinite value should it succeed past the three phases of clinical trials.

Also in the MGR pipeline are Cyanovirin and Dolastatin 10 and 15. Cyanovirin is an isolated protein from cyanobacteria, which is highly active in blocking cell entry of pathogenic viruses such as HIV and Hepatitis-C.[36] Dolastatin 10 and 15 are specific antitubulin molecules with great potential as anti-cancer agents, and are currently in Phase II clinical trials in the United States.[37]

2. *Cosmetics*

Within the cosmetic industry, pigments, also derived from cyanobacteria, called Scytonemin, have been developed.[38] These pigments provide protection against Ultra Violet irradiation and have been considered for use, specifically in sunscreen and anti-inflammatory products.[39] Additionally, Pseudopterosin, de-

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[29] *Id.* (quoting statistics from the U.S. Nat'l Cancer Inst. Estimates).

[30] David Rowley, Dep't. of Biomed. & Pharm. Sci., Univ. of R.I., presentation at the United Nations Informal Consultative Process on Oceans and the Law of the Sea: Services Provided by Marine Genetic Resources (June 25, 2007), abstract *available at* http://www.un.org/Depts/los/consultative_process/documents/8_abstract_rowley.pdf.

[31] *Id.*

[32] *Id.*

[33] Marinebiotech.org, Drugs from the Sea Index, *Ziconotide*, http://www.marinebiotech.org/ziconotide.html (last visited June 16, 2008).

[34] Rowley, *supra* note 30.

[35] *Oceans and the Law of the Sea, supra* note 4, at ¶ 164.

[36] *Id.*

[37] *Id.*

[38] *Id.* at ¶ 127.

[39] *Id.*

rived from the MGR Pseudopterogorgia elisabethae, commonly known as the "sea whip" plant, has been used in Estée Lauder skin care products to prevent skin irritation.[40] Psudopterosin has also been used in the pharmaceutical arena where it has passed preclinical tests and awaits approval from the U.S. Food and Drug Administration.[41]

3. Bioremediation

Additionally, MGRs have been used in bioremediation.[42] This concept is defined by the United Nations division to the Law of the Sea Report as "using living organisms, usually micro-organisms, for many applications in hazardous waste treatment and pollution control."[43] Previously, MGRs used as industrial microbes have successfully removed dangerous chemical substances such as phenol, calcium, and chloride from the wastewater of industrial factories.[44] While industrial microbes continue to be developed from MGRs, they are currently developed at a slower rate than pharmaceutical and cosmetic developments.[45]

III. The Connection between Intellectual Property and Marine Genetic Resources

International intellectual property is connected to the controversy over MGRs in several ways. Patents are the most common form of intellectual property protection discussed with regard to MGRs and will therefore be the focus of this article, however intellectual property rights conferred through trademarks could also be relevant.

With regard to MGRs, intellectual property protection provides a tool for defensive protection (strategies to prevent the acquisition of intellectual property rights by parties other than the customary custodians of the MGR DNA derivatives)[46] and positive protection of scientific and pharmacological inventions (active assertion of rights necessary to prevent undesirable use of MGR DNA derivatives by third parties).[47] According to one available source, products based on deep sea organisms have attained at least thirty-seven patents to date.[48] The

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[40] Marinebiotech.org, Drugs from the Sea Index, *Pseudopterosins*, http://www.marinebiotech.org/pseudopterosins.html (last visited June 16, 2008).

[41] *Id.*

[42] *Diamond v. Chakrabartry*, 447 U.S. 303 (1980).

[43] *Oceans and the Law of the Sea, supra* note 4, at ¶ 168.

[44] *Id.*

[45] *Id.*

[46] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 11th Sess., July 3-12, 2007, *Reproduction of Document WIPO/GRTKF/IC/9/4 "The Protection of Traditional Cultural Expressions/Expressions of Folklore: Collation of Written Comments on the List of Issues"*, WIPO Doc. WIPO/GRTKF/IC/11/4(c) (Apr. 26, 2007), *available at* http://www.wipo.int/meetings/en/details.jsp?meeting_id=12522.

[47] *Id.*

[48] United Nations Environment Programme, Ecosystems and Biodiversity in Deep Waters and High Seas Report and Studies, No. 178, 21 (2006), http://www.iucn.org/themes/marine/pdf/unep_high_seas130606_screen.pdf (last visited June 16, 2008).

following sections illustrate the specific challenges of MGR DNA derivatives within current national patent regimes and within The Agreement on Trade-Related Aspects of Intellectual Property Rights, ("TRIPS").[49]

A. Patentable Subject Matter within the TRIPS Agreement

The TRIPS agreement is an international agreement administered by the World Trade Organization ("WTO") for the protection of intellectual property rights.[50] The purpose of the TRIPS agreement is to unify national intellectual property laws to "reduce distortions and impediments to trade."[51] All members of the WTO are members of, and must comply with, the TRIPS agreement.[52] The TRIPS agreement does not grant international patent protection, but seeks to align member states' laws to provide clarity for inventors.

Under the TRIPS agreement, patent protection is granted for "inventions. . .in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application."[53] As such, mere discovery of a living organism as it exists in nature does not grant the discoverer patent protection over the organism. Thus, MGR organisms themselves cannot be patented. Additionally, it is questionable whether multi-cellular plants, or animals, or isolated and refined versions of naturally occurring DNA are patentable. Within national laws, in line with TRIPS, countries have taken various approaches to defining the patentability limits of genetic material.

1. The United States

Within the United States, "[w]hoever invents or discovers any new and useful . . . composition of matter, or . . . improvement thereof, may obtain a patent."[54] The United States Supreme Court's landmark case setting the standard for patentability of genetic material is *Diamond v. Chakrabartry*.[55] In *Chakrabartry*, a patent for a new form of microbacteria manufactured through gene combination was challenged on the grounds that microbacteria are nature, and nature is not patentable.[56] However, the Court held that the combination of naturally occurring genes into isolated and purified non-naturally occurring genes constituted a novel, useful, and non-obvious invention that met all patent require-

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[49] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr.15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 [hereinafter *TRIPS Agreement*].

[50] *Id.* at 1197. pmbl.

[51] *Id.*

[52] There are 151 WTO members, including the United States, as of July 27, 2007. Understanding the World Trade Organization, Members, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited June 18, 2008).

[53] *TRIPS Agreement, supra* note 49, art. 27(1) at 1208.

[54] Patent Act of 1953, 35 U.S.C. §101 (West 2000).

[55] *Diamond, supra* note 42.

[56] *Id.* at 306.

ments.[57] Thus, the patent in *Chakrabartry* was upheld within the meaning of §101 of the United States Patent Act.[58]

Through this case, the Court also defined "utility" by requiring that invention uses be specifically stated or described, not just hypothesized.[59] Because the *Chakrabartry* microbacteria served specific bioremediation functions, it met the Court's expanded definition of utility.[60]

As *Chakrabartry* applies to MGRs, new and synthetic forms of MGR DNA are likely patentable within the United States, as long as they exist in an isolated and purified form that does not exist in nature,[61] and as long as they meet the United States' patent requirements of novelty, non-obviousness, utility, and disclosure.[62] Further, uses of isolated and purified MGR DNA forms must be specific to receive patent protection. If granted, the patent would confer ownership rights over the new form of non-naturally occurring genetic material, however it would not confer any rights over the MGR from which the DNA was derived.

Within the United States, multi-cellular animals are also patentable providing that they do not occur in nature and that they meet all other patent requirements. A specific example is the Harvard OncoMouse, invented as a model for cancer research and study.[63] By inserting an "oncogene" into the genetic material of a mouse, scientists can test and identify suspected carcinogens at a faster rate than other such studies.[64] The United States Patent and Trademark office granted patent protection for the OncoMouse in 1988[65] and, to date, there have been no legal challenges regarding this patent within the United States. Thus, should scientists create a new form of multi-cellular organism derived from MGRs, this new form should receive patent protection within the United States, providing that it complies with all other patent requirements.

However, despite the many existing biotechnology and gene patents within the United States,[66] there is still substantial debate surrounding whether patents granted for isolated and refined DNA fragments actually meet all patent requirements. Before *Chakrabartry*, the United States Second Circuit upheld a patent in *Parke-Davis & Co v. H.K. Mulford & Co.* claiming protection for the naturally occurring hormone adrenaline.[67] In Parke-Davis, the court held that the isolated

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[57] *Id.* at 309-10.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] 35 U.S.C.A. §§ 101, 103, 112 (West 2000).

[63] Case T 0315/03 – 3.3.8, *President & Fellows of Harvard College v. British Union for the Abolition of Vivisection*, Bds. of Appeal of the European Patent Office [EPO] (July 6, 2004), *available at* http://legal.european-patent-office.org/dg3/pdf/t030315ex1.pdf [hereinafter *OncoMouse*].

[64] *Id.*

[65] Leslie G. Restaino et al., Patenting DNA-Related Inventions in the European Union, United States and Japan: A Trilateral Approach or a Study in Contrast?, 2003 UCLA J.L. & TECH. 2 (2003).

[66] DNA patents can be researched in the DNA Patent Database. DNA Patent Database, http://dnapatents.georgetown.edu/ (last visited on Feb. 16, 2008).

[67] *Parke-Davis & Co. v. H.K. Mulford & Co.*, 196 F. 496 (2d Cir. 1912).

and refined version of adrenaline created a form not occurring in nature that could be used for specific medical treatments.[68] Citing *Parke-Davis* the United States Fourth Circuit also upheld a gene patent in *Merck & Co. v. Olin Mathieson Chemical Corp.* on similar grounds.[69] In *Merck*, the court upheld a patent for an isolated and purified strand of vitamin B12 stating, "[t]he fact. . . that a new and useful product is the result of processes of extraction, concentration and purification of natural materials does not defeat its patentability."[70] While *Parke-Davis* and *Merck* are similar to *Chakrabartry* in their analysis regarding patent law interpretation, they differ in subject matter. *Parke-Davis* upheld a patent for a refined form of a naturally occurring hormone and *Merck* upheld a patent for an isolated form of a naturally occurring vitamin, whereas *Chakrabartry* involved combining genes to form a new invention of bacteria that did not occur in nature.[71]

As naturally occurring genetic material, isolated and purified strands and fragments of MGR DNA are most similar to the adrenaline or vitamin B12 cases. Thus, under *Parke-Davis*, *Merck,* and *Chakrabartry*, such MGR DNA derivative patents should be upheld, provided they meet all other patent requirements.

In a more recent case, however, a United States Federal Circuit Court held that substantially purified DNA fragments and strands of a naturally occurring maize protein did not satisfy the utility requirement necessary for patentability.[72] Citing the Supreme Court's definition of utility in *Brenner v. Manson*,[73] the Federal Circuit court in *In re Fisher* required that an invention have "substantial utility," stating that, "[u]nless and until a process is refined and developed to the point – where specific[74] benefit exists in currently available form – there is insufficient justification for permitting an applicant to engross what may prove to be a broad field."[75] The *In re Fisher* court agreed with the patent examiner who concluded that the seven disclosed uses of purified DNA strands were generally applicable to any DNA strand or fragment, and not to these specific strands.[76] The court held that the substantially purified DNA fragments and strands of maize "act as no more than research intermediates" that may help in further experimentation, but that do not constitute specific and substantial uses and are therefore not patentable.

It is uncertain to what extent *In re Fisher* will affect patentability of isolated and purified DNA fragments and strands regarding MGRs. If applied narrowly,

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[68] *Id.*

[69] *Merck & Co. v. Olin Mathieson Chemical Corp.*, 253 F.2d 156, 162 (4th Cir. 1958).

[70] *Id.* at 163.

[71] Lori B. Andrews & Jordan Paradise, *Gene Patents: The Need for Bioethics Scrutiny and Change,* 5 YALE J. HEALTH POL'Y L. & ETHICS 403, 405 (2005).

[72] *In re* Fisher, 421 F.3d 1365, 1379 (Fed. Cir. 2005).

[73] *Brenner v. Manson,* 383 U.S. 519 (1966).

[74] The terms "specific" and "substantial" are not further defined by the courts in *Brenner* or *In re Fisher.*

[75] *In re Fisher*, 421 F.3d at 1371.

[76] *Id.* at 1368.

scientists might only need to distinguish specific uses of new isolated and purified MGR DNA forms from the specific uses of new maize forms to fall outside the ambit of *In re Fisher*. If applied broadly, however, the holding of *In re Fisher* could place a much greater burden of proof on scientists, requiring substantially more research and development before allowing patentability of new isolated and purified MGR DNA strands and fragments.

In a similar vein, the United States Congress addressed patentability of genetic material in the "Genomic Research and Accessibility Act."[77] This bill was introduced to the House of Representatives in February 2007, and is currently before the House Judiciary Committee.[78] The Act seeks to abolish patentability for whole or partial strands of isolated and purified DNA, although it would "grandfather-in" all existing gene patents including those not meeting the bill's new standards.[79] This legislation, like *In re Fisher*, creates uncertainty surrounding the patentability of strands and fragments of isolated and purified genetic material within the United States, suggesting a trend toward stricter patentability standards for genetic material.

However, *Chakrabartry* is still the landmark case in this field. Despite the proposed Act and *In re Fisher*, scientists who follow the *Chakrabartry* standard of gene invention, and who include a substantial and specific use for their invention, are more likely to ensure the patentability of their products over new isolated and purified MGR DNA derivatives.

2. *The European Union*

Although patentability within the European Union is similar to the United States system, important distinctions exist regarding patentability of genetic material. The Convention on the Grant of European Patents, commonly referred to as the European Patent Convention ("EPC"), is a multilateral treaty that establishes a system of law common to the Contracting States[80] for granting patents.[81] While most signatories of the EPC are members of the European Union ("EU"),[82] the EPC and EU are separate entities.

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77 A Bill to Amend title 35, United States Code, to prohibit the patenting of genetic material, H.R. 977, 110th Cong. (1st Sess. 2007).

78 *Id.*

79 *Id.*

80 Under EPC Article 165, there are currently sixteen signatory states: Austria, Belgium, Switzerland, Germany, Denmark, France, United Kingdom, Greece, France, Ireland, Italy, Liechtenstein, Luxembourg, Monaco, Netherlands, Norway, and Sweden. Conference participants: signatory states plus Spain, Finland, Portugal, Turkey and Serbia. Invited states: conference participants plus Cyprus and Iceland. European Patent Convention, art. 165, Oct. 5, 1973, 1065 U.N.T.S. 303, art. 165 [hereinafter *EPC*]; European Patent Convention, art. 165, n.116, http://www.european-patent-office.org/legal/epc/e/ar165.html (last visited June 16, 2008) [hereinafter *EPC Online*].

81 *EPC Online, supra* note 80, art. 1.

82 For a map of the countries in the EU, *see* http://europa.eu/abc/european_countries/index_en.htm. The EU is a political institution of democratic European countries working together for greater international trade and cooperation. Panorama of the European Union, http://europa.eu/abc/panorama/index_en.htm (last visited June 16, 2008).

Article 4 of the EPC establishes that the European Patent Office is responsible for granting European patents.[83] Similar to the United States Patent Act, "European patents shall be granted for any inventions which are susceptible of industrial application,[84] which are new,[85] and which involve an inventive step."[86]

However, unlike the United States, the EPC has strict guidelines regarding inventions contrary to societal morality. Through EPC Article 53, inventions contrary to "ordre public" are not eligible for patentability.[87] However, this Article excludes "microbiological processes or the products thereof" from the ordre public restrictions.[88] Furthermore, in 1998, the European Parliament adopted the Biotechnology Invention Directive. The Directive allows for patentability of biological material[89] that is isolated from its environment, provided that it meets all patent requirements, "even if it previously occurred in nature."[90] The Directive requires that the inventor state specific functions of the biological material to qualify for patent protection.[91] Thus, MGR DNA strands or fragments which qualify as biological material are patentable if they meet all other patent requirements of the EPC and Biotechnology Invention Directive.

The issue becomes more complex, however, regarding patentability of multicellular organisms. Article 4 of the Biotechnology Invention Directive specifically excludes plant and animal varieties from patentability.[92] Article 6(2)(d) of the Directive also excludes from patentability any "processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit to man or animal."[93]

The landmark case defining "animal varieties" is the Harvard OncoMouse case[94] decided by the Boards of Appeal of the European Patent Office which upheld patentability of the OncoMouse under the EPC.[95] The reasoning, however, differs from that in the United States. Here, the European Patent Office Boards of Appeal draw a patentability distinction between genus and species, stating that a plant and animal genus may be patentable, while a plant and animal species is not patentable.[96] As this case applies to MGRs, where scientists seek

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[83] *EPC Online, supra* note 80, art. 4.

[84] *Id.* art 57.

[85] *Id.* art. 54.

[86] *Id.* art. 52(1).

[87] *Id.* art. 53.

[88] *Id.*

[89] Biological material is defined by Article 2 of the EC Biotechnology Invention Directive as "any material containing genetic information and capable of reproducing itself or being reproduced in a biological system." Council Directive 98/44/EC, art 2, 1998 O.J. (L 213) 13 (EN).

[90] *Id.* art. 3(2).

[91] *Id.* art. 3(1).

[92] *Id.* art. 4.

[93] *Id.* art. 6.

[94] The facts of this case are identical to the Harvard OncoMouse case stated above for the United States. *OncoMouse, supra* note 63.

[95] *Id.*

[96] *Id.*

to patent multi-cellular inventions derived from MGRs, patentability is limited to the specific genus of that plant or animal within the confines of the OncoMouse case and Article 6(2)(d) of the Directive.

Thus, within the EU, the broad difference under the EPC and Biotechnology Invention Directive, is the additional burden of ordre public that inventors must meet. However, unlike mounting complications and uncertainties within the United States patent reform, inventors under the EPC need only follow the specific and relatively liberal exceptions described above to meet patent requirements.

B. Exclusions from Patentability under the TRIPS Agreement

Similar to exclusions in the EPC, Article 27(3) of the TRIPS agreement states that members may exclude from patentability inventions that are contrary to morality, including the protection of human, animal or plant life or health, as well as patentability of plants and animals other than "microbiological processes or the products thereof."[97] While it is permitted under the TRIPS agreement for Members to exclude inventions contrary to morality, this provision is not required. Thus, the TRIPS agreement generally grants each member sovereignty in determining which inventions, other than microorganisms, are contrary to morality.

Although most MGRs likely fall within the "microbiological process or the products thereof"[98] category, if MGR DNA derivatives exist in larger forms, they could be excluded from patentability by a country's national laws in conformity with Article 27(3) of the TRIPS agreement.

C. Taxonomy

The issue of taxonomy has been raised regarding MGRs in connection with patentable subject matter and use requirements of the TRIPS agreement.[99] Article 29 of the TRIPS agreement requires that a patent applicant disclose the invention "in a manner sufficiently clear and complete."[100] Generally, this requires that inventors name their creation, often by stating the proper family name, including the genus and species of the organism.

Not only does taxonomy allot a proper name to a previously unknown organism, but it also suggests the various uses of the organism, similar within each organism's familial structure.[101] However, because MGRs are new and provide novel uses in the field, accurate taxonomy can be problematic.[102] Additionally,

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97 *TRIPS Agreement, supra* note 49, art. 27(3).

98 *EPC Online, supra* note 80, art. 53

99 John N.A. Hooper, Head Biodiversity & Geosciences Programs, Queensland Museum, statement presented at the United Nations Informal Consultative Process on Oceans and Law of the Sea: Maximizing benefits from 'biodiscovery': a Costal State resource providers perspective (June 26, 2007), abstract *available at* http://www.un.org/Depts/los/consultative_process/documents/8_abstract_hooper.pdf.

100 *TRIPS Agreement, supra* note 49, art. 29(1).

101 Hooper, *supra* note 99.

102 *Id.*

the lack of trained taxonomists to adequately classify new organisms found in the deep sea and international sea bed can hinder and possibly delay patent protection.[103] Although the issue of taxonomy is not insurmountable, it is a concern to be taken into account for MGR patentability purposes.

D. Capable of Industrial Application

Another TRIPS requirement for patent protection is that the invention is useful, or capable of industrial application.[104] Under many national laws, including that of the United States, utility must be specifically stated and described for the inventor to qualify for protection; a hypothetical use does not meet patent requirements.[105] As a way of identifying uses for newly found MGRs, scientists often test the scientific names and isolated DNA of new MGRs against previously collected and tested MGRs.[106] Just as in taxonomy searches, the likening of one MGR to another attempts to liken their uses as well, allowing for a more directed utility study.

For example, the Australian Institute of Marine Science uses such data-mining as a technological time-saver to predict future results of MGR clinical screenings.[107] Elaborate databases use regional and taxonomic patterns in anti-microbial activity to show naturally occurring analogies and to identify other material with similar taxonomy, ecology, screening profile, and chemical structure.[108] Such databases lead to an integrated system of biodiversity data. This system helps scientists and bioprospectors to liken uses of new MGR DNA derivatives to currently existing organisms and uses, and allows for specific utility focus.

Although many MGRs have dual or multiple uses, at present, Article 27(1) of TRIPS requires that the invention be useful, but does not require disclosure of all uses.[109] Furthermore, as multiple uses are found through adaptations of synthesized strands and fragments of MGR DNA, scientists can obtain additional patents on such inventions so long as they meet all other patent requirements.

E. Novelty

Under the TRIPS agreement, the invention must also be novel or new.[110] However, similar to general arguments that have been made in international opposition of patent protection for traditional knowledge and genetic resources, it is questionable whether inventions derived from marine genetic materials are novel and thus within the jurisdiction of patent protection under the TRIPS agreement.

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[103] *Id.*

[104] *TRIPS Agreement, supra* note 49, art. 27(1).

[105] *Diamond, supra* note 42.

[106] Evans-Illidge, *supra* note 11.

[107] *Id.*

[108] *Id.*

[109] *TRIPS Agreement, supra* note 49, art. 27(1).

[110] *Id.*

The traditional knowledge/genetic resources argument states that the traditional knowledge process with which genetic resources are used is indigenous to the culture from which it came. They say the traditional knowledge of the genetic resources has been used throughout several generations as part of tribal culture, and it is therefore not novel. This argument is similar to the argument that nature cannot be patented, as nature has existed for many years and is not new regardless of its discovery date.

However, this argument is not analogous here. Unlike traditional knowledge and genetic resources, the following debate regarding MGRs is about ownership rights in the MGRs themselves. Countries also seek ownership rights in MGR derived materials to the extent that part of the original MGR is represented in derivative materials. However, countries cannot claim ownership rights over the process of MGR cultivation. Instead, the scientists who collect and cultivate MGRs own the process by which they isolate and refine genetic material into new, useful pharmaceuticals. Therefore, if anything, countries can try to claim ownership in the specific MGR and parts of the MGR as used in derivative materials, but they cannot claim ownership over the processes used in MGR cultivation, isolation, and refinement. As such, the only issue for novelty purposes is whether the MGR derivative material is novel under the TRIPS agreement. The burden to show novelty is on the scientists and is separate from the question of MGR ownership rights, as MGRs themselves are not patentable subject matter.

F. Inventive Step

The TRIPS agreement also requires that patents are non-obvious, or include an inventive step from the viewpoint of a person skilled in the relevant art.[111] Despite current debate within several national patent offices regarding whether the "viewpoint of a person skilled in the relevant art"[112] is sufficient language to be used in the inventive step requirement of the TRIPS agreement, no conclusion has been reached thus far to override the current law.[113]

Specific to MGRs, DNA derivatives must include an inventive step[114] in the synthetic DNA sequence, not the process of synthetic DNA construction, to be patentable.[115] The current patent requirements also state that MGR DNA derivatives must be nonobvious to a scientist, biologist, pharmacist or any other person skilled in the relevant art[116] of gene sequencing and drug manufacturing.

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111 *Id.* art. 29(1).

112 *Id.*

113 Restaino, *supra* note 655.

114 *TRIPS Agreement, supra* note 4949, art. 27(1), n.5.

115 Restaino, *supra* note 65.

116 *TRIPS Agreement, supra* note 49, art. 29(1).

G. Disclosure

The final requirement for patent protection under the TRIPS agreement is that the invention be disclosed in a publication so as to enable a person skilled in the relevant art to reproduce the invention.[117] Additionally, under the TRIPS agreement, Members may require the applicant to indicate the best mode for carrying out the invention; however, this is not a mandatory requirement.[118] This requirement could also include specific written descriptions, but this is at the discretion of each Member State.[119]

It is also questionable as to how far back disclosure is required. There is a current debate among the World Intellectual Property Organization's ("WIPO") Intergovernmental Committee on Genetic Resources, Traditional Knowledge, and Traditional Cultural Expressions/Folklore ("IGC") and the Standing Committee on Patents ("SCP") as well as the WTO, as to whether inventors must disclose the original source of traditional knowledge and genetic resource discoveries. This debate also addresses equitable remuneration, transfer of technology, and benefit sharing, as it stems from concerns over exploitation of indigenous peoples' traditional knowledge used in genetic resources, and ways of life.

Recently, the Convention on Biological Diversity held a conference in Canada to further establish benefit sharing procedures regarding traditional knowledge, genetic resources, and expressions of folklore of indigenous peoples. This proposal will be submitted to the 62nd session of the United Nations General Assembly. WIPO's IGC has also established a voluntary fund to address issues of benefit sharing. However, as of yet, there has been no concrete link between MGRs and traditional knowledge/genetic resources. Thus, only basic disclosure requirements must be met for patentability purposes under the TRIPS agreement.

To assist in patent disclosure, regional and national patent databases exist in several countries and are often accessible over the Internet.[120] They assist patent owners by allowing them to retain maximum protection of their invention while giving adequate notice to other inventors of relevant prior art.[121] WIPO has established additional databases to assist all countries in their patent filings, through the help of the internet and several regional offices.[122]

H. Other Intellectual Property Issues

After meeting all above requirements, if the invention is not defeated by prior art or any justifiable challenges, the inventor may receive patent protection on an

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[117] *Id.*

[118] *Id.*

[119] *See e.g.*, Section 112 of the United States Patent Act requires enablement, best mode and written description requirements. 35 U.S.C.A. §112 (1965) (West 2000).

[120] Rama Rao, Deputy Dir., World Intellectual Property Org. Office, statement at the United Nations Informal Consultative Process on Oceans and the Law of the Sea: Current Activities of WIPO (June 27, 2007).

[121] *Oceans and the Law of the Sea, supra* note 4, at ¶ 143.

[122] *Rao, supra* note 120.

invention through national patent laws, and in accordance with the TRIPS agreement for WTO Member States.[123]

Although there is currently no international intellectual property regime for international patent protection due to the important role of national sovereignty in intellectual property laws, WIPO has made efforts towards making the patent process easier and more accessible through the use of the Patent Cooperation Treaty ("PCT"). The PCT "makes it possible (for any national or resident of a Contracting State) to seek patent protection for an invention simultaneously in each of a large number of countries by filing an 'international' patent application."[124] The PCT is open to countries party to the Paris Convention for the Protection of Industrial Property (1883).[125] Therefore, it can be of use to developed countries and developing countries alike.[126]

IV. Basic Maritime Law as Related to Marine Genetic Resources

The United Nations Convention on the Law of the Sea was adopted in 1982 and came into force on November 16, 1994.[127] The Convention is an "unprecedented attempt" to regulate the law of the sea, which had previously been governed by a freedom-of-the-seas doctrine.[128] The Convention establishes guidelines in several applicable areas within and beyond areas of national jurisdiction such as guidelines for fishing on the high seas, extraction from the ocean's seabed, floor, and subsoil, and Marine Scientific Research. However, presently, the Convention is silent with regard to the current legal classification of MGRs beyond national jurisdiction. Thus, the current controversy within UNICPOLOS questions the breadth of the Convention's jurisdiction and whether or not the Convention should be interpreted to include and regulate MGRs.

A. Regulation within National Jurisdictions

Within a nation's maritime jurisdiction, including a nation's Exclusive Economic Zone ("EEZ"), a nation has control over its waters and the organisms found within them.[129] This necessarily includes all activities relating to excavation and extraction of MGRs. The Convention has clear regulations regarding national territory and a nation's EEZ allowing sovereign rights for purposes of

123 *TRIPS Agreement, supra* note 49, arts. 27-28.

124 Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231 [hereinafter *PCT*].

125 *Id.*

126 At the UNICPOLOS meeting, Deputy Director S. Rama Rao of WIPO encouraged all countries to utilize the PCT and its databases to pursue more expansive protection for MGR DNA derivative inventions and products.

127 United Nations Convention on the Law of the Sea, Historical Perspective, *available at* http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#Historical%20Perspective (last visited June 16, 2008) [hereinafter *Historical Perspective*].

128 *Id.*

129 *Oceans and the Law of the Sea, supra* note 4, at ¶ 192.

exploiting, conserving, and exploring its waters and continental shelf.[130] The continental shelf is defined as comprising of the seabed and subsoil that extend beyond the territorial sea throughout the natural prolongation of a nation's land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles.[131] No other country is allowed to explore or exploit another country's resources within their national jurisdiction without express permission from the costal state.[132] Any act contrary to this rule constitutes biopiracy.

Additionally, within areas of national jurisdiction, the CBD prevails. Its objectives are "the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources."[133] However, the CBD's mandate and scope, including the regulation of fair and equitable benefit sharing is limited only to areas within national jurisdiction, not beyond.[134]

B. Regulation beyond National Jurisdictions

Beyond national jurisdictions, regulation by the Convention, relating to MGRs is unclear and variable. However, the Convention does currently address specific parts of the sea beyond national jurisdictions to which some countries would like to analogize MGRs.

For example, the Convention regulates the high seas.[135] The high seas include all areas beyond each nation's EEZ and beyond the territorial sea, international waters, or archipelagic waters of a nation.[136] Here, all states have freedoms inter alia to resources therein. For example, under Article 116 of the Convention, all States' nationals have a right to fish for profit on the high seas.[137] In such scenarios, States do have exclusive jurisdiction and responsibility over ships flying their flags on the high seas.[138] Thus, in general, commercial fishing on the high seas is open to all States on a "first come, first serve basis"[139] provided that States cooperate with the conservation and management of living resources within the high seas.[140]

Separate from the "high seas," however, is the seabed, ocean floor, and subsoil. These regions, still beyond national jurisdiction, are referred to in the Convention as "the Area."[141] The Area also includes "all solid, liquid, and gaseous

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[130] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1933 U.N.T.S. 397, art. 77 [hereinafter *Convention on the Law of the Sea*].

[131] *Id.* art. 57.

[132] *Id.* art. 76.

[133] Convention on Biological Diversity, *supra* note 5, art. 1.

[134] *Id.* art. 4.

[135] *Convention on the Law of the Sea, supra* note 130, art. 86.

[136] *Id.*

[137] *Id.* art. 116.

[138] *Id.* art 92.

[139] *Id.* art. 87.

[140] *Id.* art. 118.

[141] *Id.* art. 1(1).

mineral resources in situ in the Area at or beneath the seabed."[142] Unlike the regulations for commercial fishing in the high seas, no nation may assert claims or sovereignty rights over any part of the Area or its resources.[143] The Convention has devised an elaborate regime for protection of the Area. As such, the Area is currently governed by the CHM.[144]

However, in an attempt to balance protection of the Area through the Convention and the concerns of major research States, the Convention outlines specific guidelines regarding Marine Scientific Research ("MSR") within the Area beyond national jurisdiction.[145] Although not specifically defined or mentioned in the Convention, MSR is understood to encompass the study of the marine environment and its resources.[146] MSR intends to increase the overall knowledge of humankind through research and exploitation of resources, and is allowed solely for peaceful purposes.[147] With MSR, all exploration or exploitation within the Area for purposes of scientific research must be carried out for benefit of the CHM, including equitable benefit sharing.[148] Further, MSR and equitable benefit sharing are regulated by the International Seabed Authority ("ISA"); "an autonomous international organization that administers mineral resources in the Area."[149] However, neither ISA's mandate nor its regulation of equitable benefit sharing extends beyond mineral resources to include MGRs.

V. The Debate

A. Position of Developing Countries

Developing countries suggest that the Convention analogize MGRs to MSR, allowing the Convention and the ISA to regulate bioprospecting of MGRs through equitable benefit sharing regimes for the CHM. This point was made at the UNICPOLOS meeting specifically through the statements of Pakistan on behalf of the Group of 77 and China.[150] Developing countries argue that, because the specific language of the Convention does not define MSR which it now clearly regulates, the Convention should also regulate MGRs in the same breadth, as MGRs are not defined by the Convention either.[151] Such States also noted a similarity between bioprospecting of MGRs and bioprospecting of MSR, further

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[142] *Id.* art 13.

[143] *Id.* art. 137.

[144] *Id.* pt. X.

[145] *Historical Perspective, supra* note 127.

[146] Devey, *supra* note 10.

[147] *Oceans and the Law of the Sea, supra* note 4, at ¶¶ 203, 205.

[148] *Convention on the Law of the Sea, supra* note 130, art. 140.

[149] G.A. Res. 48/263, Annex, U.N. Doc. A/RES/48/263/Annex (Aug. 17, 1994); *see also* International Seabed Authority Home Page, http://www.isa.org.jm/en/home (last visited June 16, 2008).

[150] Farukh Amil, Deputy Permanent Representative of Pakistan, on behalf of the Group of 77 and China to the United Nations, statement presented at the United Nations Informal Consultative Process on Oceans and Law of the Sea (June 25, 2007), *available at* http://www.g77.org/statement/getstatement.php?id=070625.

[151] *Id.*

likening MGRs and MSR and strengthening the argument for MGR regulation by Part XIII of the Convention.[152] Many other developing countries in the UNICPOLOS meeting supported the statement of the Group of 77 and China, supporting regulation of MGRs by the Convention.

In efforts to cement their position, developing countries urged the UNICPOLOS committee to adopt language supporting MGR regulation by the Convention in their proposal to the United Nations General Assembly. Should such language be adopted, MGRs would belong to the CHM; they would be included in the ISA's scope of regulation; and benefits resulting from bioprospecting, and possibly further cultivation, of MGRs would be shared. As part of the CHM, ownership rights of extracted MGRs would not belong to any one country or bioprospector, but to all the countries of the world. As such, developing countries liken MGRs to traditional knowledge and genetic resources and look to WIPO for guidance on how to obtain *sui generis*[153] intellectual property protection and equitable benefit sharing of resources.[154]

As addressed partially above, WIPO's IGC, currently in their eleventh session,[155] is focusing on developing an equitable benefit sharing system with regard to their mandate. The IGC's mandate is to discuss intellectual property issues relating to access to genetic resources and benefit sharing, traditional knowledge, and innovations; and traditional creativity and cultural expressions of folklore.[156] To the extent that benefit sharing of MGRs can be likened to benefit sharing of traditional knowledge or genetic resources, the IGC's progress in developing an equitable benefit sharing scheme can be useful and applicable to the MGR debate. However, no mandatory system of equitable benefit sharing currently exists through the IGC and it has never specifically addressed the issue of MGRs.

On another note, environmental groups such as the Deep Sea Conservation Coalition, Greenpeace International, the Shark Coalition and others align with the statements made by developing countries in pursuit of decreasing trafficking on the high seas. Due to the rarity of many species residing in the Area, environmental groups fear that increased boat trafficking will decrease survival rates of such MGRs through pollution.[157] They also fear that hasty bioprospectors will

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[152] *Id.*

[153] The Latin phrase *sui generis* is defined as meaning "of its own kind." A *sui generis* system is a system specifically designed to address the needs and concerns of a particular issue. World Intellectual Property Organization Glossary of Terms, http://www.wipo.int/tk/en/glossary (last visited June 16, 2008).

[154] *Id.*

[155] Intergovernmental Committee on Intellectual Prop. and Genetic Res., Traditional Knowledge and Folklore, 11th Sess., July 4-12, 2007, *Voluntary Fund for Accredited Indigenous and Local Communities,* WIPO Doc. WIPO/GRTKF/IC/11/INF/7 (July 6, 2007), *available at* http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=81733.

[156] WIPO General Assembly, 26th Sess., Sept. 25 – Oct. 3, 2000, *Matters Concerning Intellectual Property and Generic Resources, Traditional Knowledge and Folklore,* ¶ 20, WIPO Doc. WO/GA/26/6 (Aug. 25, 2000).

[157] Karen Sack, Oceans Policy Advisor for Greenpeace International, statement presented at the United Nations Informal Consultative Process on Ocean and the Law of the Sea: Statement on Deep Sea

destroy deep seabed and international seabed ecosystems while extracting MGRs from the Area, demolishing entire habitats of MGRs.[158] Therefore, environmental groups support MGR regulation by the Convention in hopes of promoting an integrated, precautionary and ecosystem-based approach to high seas biodiversity protection and conservation of MGRs found within the Area.[159]

B. Position of Developed Countries

Developed countries support the position that MGRs fall outside the scope of the Convention's regulation, and should be owned by the bioprospectors who take the initiative to collect MGRs. Developed countries support a scheme of MGR regulation analogous to the Convention's regulations regarding commercial fishing on the high seas beyond national jurisdiction: "first come, first served."

Developed countries, specifically Germany on behalf of the European Union, and the United States, argue that because MGRs are not specifically enumerated or defined in the Convention, they fall outside the scope of the Convention's jurisdiction.[160] In particular, the European Union added that MGRs in the Area beyond national jurisdiction cannot fall within the definition of the Area as defined by the Convention, because MGRs are not regarded as mineral resources. Thus, they argue, MGRs fall outside the mandate and equitable benefit sharing regulations of the ISA.[161]

Developed countries rely on human ingenuity and intellectual property protection, specifically patent and trademark protection, as tools in developing useful MGR DNA derivatives for pharmaceuticals, cosmetics and bioremediation products intended to have a substantial benefit for all humankind. Bioprospecting expeditions on the high seas and within the Area are difficult and expensive, as are lab technicians and other resources. However, such resources are needed to reproduce MGR DNA derivatives in a sustainable environment first, before such resources can be used and adapted for production and consumer consumption.[162]

To assist other countries in the initial exploration and excavation stages, the United States delegation offered to take on board its MGR research vessels, scientists from other countries, as a capacity-building and training exercise. However, despite their hospitable offer, the United States is specifically concerned that regulation of MGRs by the Convention would hamper research initiatives to develop MGRs, as the duration required for pharmaceutical development

Genetic Resources (June 25, 2007), statement *available at* http://www.greenpeace.org/usa/press-center/releases2/statement-on-deep-sea-genetic#.

158 *Id.*

159 *Id.*

160 Press Release, U.S. Mission to the United Nations, Statement by Constance C. Arvis, U.S. Head of Delegation, on Oceans and Law of the Sea, in the General Assembly, USUN Press Release # 163(07) (June 25, 2007) *available at* http://www.usunnewyork.usmission.gov/press_releases/20070625_163.html.

161 Verena Grafin von Roedern, European Union, statement at the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea: Statement on behalf of the European Union by the Representative of Germany (June 28, 2007).

162 *See* Press Release, U.S. Mission to the United Nations, *supra* note 160.

is long and the odds of success are slim.[163] Thus, the developed countries are strongly opposed to any proposed regime that might interfere with high seas freedoms such as the freedom of navigation.[164]

Regarding environmental concerns, there is clear agreement by both Germany on behalf of the European Union and the United States that the marine ecosystems of the high seas and within the Area be conserved and protected.[165] However, they argue that this is already being accomplished. The United States noted that scientists themselves have inherent incentives to protect the sites they study, thus conservation concerns of roughshod excavation and exploitation are misguided.[166] Additionally, further protection for MGRs in the high seas and the Area is controlled by bioprospectors, scientists, and scientific societies[167] who promulgate codes of conduct regulating responsible research practices, ensuring protection and conservation of marine ecosystems.[168]

C. Negotiations of the 2007 UNICPOLOS Meeting

The format of the UNICPOLOS meeting consisted of panel presentations from various organizations and scientific institutions, including question and answer sessions by delegates and an opportunity for delegates to express their countries' positions in turn. After the conclusion of the panel presentations, delegations commenced negotiations on a draft resolution to be submitted to the General Assembly for adoption. To this end, the UNICPOLOS co-chairs, presented a document titled "Possible Elements to be Suggested to the General Assembly."[169] The most controversial issues of the draft centered on paragraphs ten and three.

Paragraph ten "recognize(d) that there are several aspects of intellectual property regimes relating to [MGRs] that need to be better understood, especially in relation to disclosure of source of origin of [MGRs], links to traditional knowledge, impacts on the sharing of knowledge, and on implications for access and benefit sharing."[170] The representative from Australia strongly opposed the list and proposed concluding the sentence after "understood," however several developing countries, including Pakistan on behalf of the Group of 77, opposed Australia's suggestion. Despite the controversy over paragraph ten, developed and developing countries reached an agreement to this paragraph in informal consultations.

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163 *Id.*

164 *Id.*

165 von Roedern, *supra* note 161.

166 *See* Press Release, U.S. Mission to the United Nations, *supra* note 160.

167 Devey, *supra* note 10.

168 *See* Press Release, U.S. Mission to the United Nations, *supra* note 160.

169 Eighth Meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS), June 25-29, 2007, *Report on the work of the UNICPOLOS at its eighth meeting*, U.N. Doc. A/62/169/Annex (July 30, 2007).

170 *Id.*

Paragraph three was the other major issue of controversy that ultimately led to a stalemate of the negotiations. The paragraph addressed whether "the 1982 United Nations Convention on the Law of the Sea set out the legal framework within which all activities in the ocean and seas must be carried out."[171] As noted above, developed countries, such as the United States and Germany speaking on behalf of the European Union, strongly opposed this language while developing countries, specifically Pakistan, speaking on behalf of the Group of 77 and China, supported the language and further encouraged the language to identify MGRs as part of the CHM.

On midnight of June 29, 2007, the negotiations remained at a stalemate. Thus, the document was not accepted for submission to the General Assembly. However, the Co-Chairs have formed a new document, very similar to the first proposal, without attributing it in any manner to the delegates. At this point, this document has been presented in the General Assembly 62nd Regular Session but it has not been adopted. Delegations are also currently holding informal consultations, however the outcome of such consultations is unpredictable.

VI. Perceptions of the Debate

There is a need to balance the developing countries' interest in sharing the ownership rights of MGRs, including all monetary benefits derived from MGR development, and the developed countries' interest in overall extraction, exploitation and cultivation to develop MGRs into useful pharmaceuticals that have a greater potential for world-wide impact. To this end, perhaps the suggestion of the developed countries would be the best global solution, creating an incentive for bioprospecting while consciously protecting marine ecosystems within the high seas and the Area.

In this regard, even if MGRs are regulated categorically similar to commercial fishing on the high seas, developing countries would not be at a total loss. Article 31 of TRIPS regarding compulsory licensing provides an exception,[172] allowing WTO Member States to temporarily use a drug "in the case of a national emergency or other circumstances of extreme urgency" without obtaining authorization from a pharmaceutical company as is normally required by Article 31(b) of TRIPS.[173] Under section (h) of this article, compulsory licensing may occur and the pharmaceutical company must be paid adequate remuneration in each case.[174] However, with the recent implementation of paragraph six of the Doha Declaration on the TRIPS agreement and public health, "exceptional circumstances exist justifying waivers from the obligations set out in paragraphs (f)[175]

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171 *Id.*

172 Although TRIPS Article 31 need not always apply.

173 *TRIPS Agreement, supra* note 49, art. 31(b).

174 *Id.* art. 31(h).

175 *Id.* art. 31(f). (Paragraph (f) of TRIPS Article 31 restricts use of compulsory licensed materials to predominantly the domestic market of the Member authorizing the use).

and (h)[176] of Article 31 of the TRIPS agreement."[177] Paragraph six of the Doha Declaration also promulgates other specific requirements to be carried out in the event of national emergency or other circumstances of extreme urgency.[178]

While this would not give developing countries a blanket right to compulsory licensing of all MGR-derived drugs, it gives developing countries a means to benefit from MGRs through humanitarian compulsory licensing measures in national emergencies. As many MGRs have shown potential as HIV/AIDS and cancer medications, development and compulsory licensing of such pharmaceuticals could serve a great need in both the developed and the developing world.

In contrast, the CHM/equitable benefit sharing approach, while possibly beneficial in the short term, has potential to do more harm than good. Despite equitable benefit sharing strategies, whether through the CBD, ISA, or WIPO's IGC, it is not clear how much revenue developing countries will actually gain from such collection and distribution mechanisms. Low pharmaceutical success rates for MGR DNA derivatives in clinical trials might yield high returns from rare blockbuster drugs, however, this is far from a steady income stream for developing countries through equitable benefit sharing mechanisms. Equitable benefit sharing funds only receive a percentage of pharmaceutical revenues which are then divided among all countries of the world, leading to unstable and limited revenue. Additionally, any deterrent effect that equitable benefit sharing may have on bioprospectors defeats the quintessential purpose for collecting precious MGRs in the first place. As the bottom line is to cultivate MGRs into life-saving uses through environmentally safe methods of bioprospecting, the most direct means toward this end should be pursued.

However, another view is to keep the status quo. Negotiations between developing countries and developed countries are in their infancy, yet all parties involved have a clear working knowledge of the debate and the impact that MGRs can have on their particular countries. Perhaps the proper regime for all parties involved is to remain in the negotiation phase, where the best regulation is no regulation at all. Accordingly, resulting from the UNICPOLOS negotiations deadlock, no resolution regarding MGR legal ownership rights seems to be in sight and the current status quo is upheld. As the status quo includes a regime where intellectual property protection is possible, as applicable, to inventions of the kind derived from MGRs, cultivation and development of MGRs continues on a first-come, first-served basis without disclosure or monetary obligations to other nations.

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[176] *Id.* art 31(h). (Paragraph (h) of TRIPS Article 31 requires that the right holder be paid equitable remuneration in the circumstances of each case of compulsory licensing, taking into account the economic value of the authorization).

[177] General Council, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540 (Sept. 2, 2003), 43 I.L.M. 509 (2004).

[178] *Id.*

VII. Conclusion

Undoubtedly, regulation for MGRs, whether through intellectual property protection or maritime classification, is rapidly changing. Not only were MGRs the hot topic of the July 2007 UNICPOLOS meeting, but they continue to be discussed within the 62nd session of the United Nations General Assembly. With such heightened debate between developed and developing countries, it is unlikely that MGR ownership rights will be settled quickly. Even keeping with a status quo regime, however, both developed and developing countries can benefit from MGR derivative products through the expanded compulsory licensing mechanisms of the recent Doha Declaration. Perhaps other future solutions will include negotiations through multilateral or bilateral treaty agreements as discovery of MGRs and production of MGR DNA derivatives increases. However, given the recent stalemate during UNICPOLOS final negotiations, the certainty of ownership rights for MGRs seems to be as elusive as the organisms such rights intend to cover.

THE IMPLICATIONS OF RWANDA'S PARAGRAPH 6 AGREEMENT WITH CANADA FOR OTHER DEVELOPING COUNTRIES

Christina Cotter†

I. Introduction

On July 17, 2007, Rwanda became the first country to notify the World Trade Organization ("WTO") that it planned to import HIV drugs under Paragraph 6 of the Doha Declaration[1] on the Trade-Related Aspects of Intellectual Property Rights Agreement ("TRIPS Agreement").[2] On October 4, 2007, Canada notified the WTO that it had authorized the production of a generic version of patented anti-viral drugs for export to Rwanda.[3] Specifically, Canada gave Apotex, Inc., its largest pharmaceutical company, the authority to produce an anti-viral medication called Apo-TriAvir, a generic combination of three patented HIV drugs, without permission from the patent holders ("Paragraph 6 Agreement").[4] This groundbreaking agreement between Rwanda and Canada is the first of its kind and its ultimate success or failure will influence other developing nations that consider following suit.

This article will examine the legal ramifications surrounding Rwanda and Canada's Paragraph 6 Agreement, and most importantly, the implications the agreement has for other developing countries in need of life-saving drugs. Currently, Rwanda and Canada's agreement is not progressing as smoothly as was originally expected. Although the policy behind the agreement—the circumvention of patent rights in furtherance of human welfare—is an admirable one, the process has proven difficult to implement for three reasons.

First, some of the difficulty stems from the complexity of Canada's generic-drug legislation.[5] Legislation that is replete with red tape prevents developing countries and generic manufacturers from successful and timely completion of Paragraph 6 Agreements.[6] Potential beneficiary-nations of Canada's legislation,

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[1] World Trade Organization, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, Nov. 14, 2001, *available at* http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_trips_e.htm [hereinafter Doha Declaration].

[2] World Trade Organization, Council for Trade-Related Aspects of Intellectual Property Rights, Notification under Paragraph 2(a) of the Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, IP/N/9/RWA/1, Jul. 19 2007, *available at* http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/IP/N/9RWA1.doc.

[3] *Id.*

[4] Jillian C. Cohen-Kohler, *Canada's Implementation of the Paragraph 6 Decision: is it Sustainable Public Policy?* GLOBALIZATION AND HEALTH 2007, Dec. 6, 2007, *available at* http://www.globalizationandhealth.com/content/3/1/12.

[5] Cohen-Kohler, *supra* note 4.

[6] *Id.*

as well as generic manufacturers, have voiced criticisms surrounding the Canadian process.[7] Therefore, wealthy countries that wish to use their manufacturing capacities to provide generic drugs in the future should enact simple, straightforward legislation.

Second, on a global level, developing countries are discouraged from using the TRIPS Agreement to procure generic drugs from wealthy donor states such as the United States, because the donor states threaten to pull funding in order to protect pharmaceutical companies from generic competition.[8] Because of this pressure from wealthy states, Paragraph 6 of the Doha Declaration on TRIPS will likely go unused until the WTO creates a policy that truly supports human lives over big business. Therefore, the WTO should clarify and strengthen its policy toward human welfare in the context of TRIPS.

Finally, developing nations lack the infrastructure and distribution capabilities necessary to provide the infected with anti-viral medications. Currently, there is uncertainty as to how Rwanda will distribute the generic drugs it plans to import, leading to the possibility that upon receipt the drugs will sit in storage, or be diverted elsewhere illegally.[9] Without a distribution plan, no amount of generic drugs will be able to save infected citizens. Therefore, in the future, the WTO should demand that developing nations present plans for distribution of generic drugs before they are allowed to move forward under Paragraph 6.

The next section of this article briefly discusses Rwanda's AIDS epidemic.[10] Sections three and four discuss the TRIPS Agreement and the initial level of patent protection it provided pharmaceutical manufacturers.[11] Section five discusses the Doha Declaration and its implications for patent circumvention.[12] Section six discusses the issue of Paragraph 6 and how it enabled Rwanda to form an agreement with Canada.[13] Section seven discusses the logistics of Canada's plan for exporting generic drugs to Rwanda, as well as the criticisms those involved have of it.[14] Finally, Section eight discusses the implications of the plan between Canada and Rwanda for other countries, as well as suggestions for future success of similar agreements.[15]

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[7] *Id.*

[8] Brook K. Baker, *Arthritic Flexibilities: Analysis of WTO Action Regarding Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, BEPRESS LEGAL SERIES (Dec. 16, 2003), *available at* http://law.bepress.com/expresso/eps/108.

[9] Do Hyung Kim, *Research Guide on TRIPS and Compulsory Licensing: Access to Innovative Pharmaceuticals for Least Developed Countries*, GLOBALEX, Feb. 2004, *available at* http://www.nyulaw global.org/globalex/TRIPS_Compulsory_Licensing.htm.

[10] *See infra* §II.

[11] *See infra* §III, IV.

[12] *See infra* §V.

[13] *See infra* §VI.

[14] *See infra* §VII.

[15] *See infra* §VIII.

II. Brief History of Rwanda's AIDS Epidemic

Out of Rwanda's population of approximately 9.3 million people, an estimated 200,000 are infected with HIV or AIDS.[16] As of late 2007, only 44,395 of those infected were receiving anti-viral treatment.[17] Without anti-viral drugs, HIV progresses to AIDS much more rapidly.[18] The onset of AIDS often prevents the infected from working, exacerbating Rwanda's cycle of poverty.[19] In addition to the many Rwandans suffering from HIV and AIDS infection, there are estimated to be over 200,000 children who have been orphaned due to the AIDS epidemic.[20] Therefore, war-torn Rwanda is in need of access to inexpensive anti-viral drugs in order to prolong and enhance the lives of the sick and of their families.

A. Causes of Transmission

Most HIV infections in Rwanda occur through sexual intercourse, but unsafe blood transfusions or unsanitary drug injection practices also account for a small fraction of transmissions.[21] The cultural opinion common to some developing countries that men can have multiple wives creates an opportunity to spread the disease within families.[22] Additionally, the well-documented civil war and massacre of the Tutsi people in Rwanda significantly contributed to the AIDS epidemic, as many women were brutally raped by rebels and became infected.[23] Some of these infected women then transmitted the disease to their children or spouses.

B. Inadequate Medical Facilities

Rwanda's AIDS crisis is compounded due to the nation's inadequate medical resources. There is only one physician for every 60,000 people in Rwanda, and

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[16] HIV InSite, http://hivinsite.ucsf.edu/global?page=CR09-rw-00 (last visited May 15, 2008).

[17] United Nations General Assembly Special Section on HIV/AIDS: Rwanda, (Jan. 2006- Dec. 2007), UNAIDS, *available at* http://data.unaids.org/pub/Report/2008/rwanda_2008_country_progress_report_en.pdf.

[18] U.S. Dept. of Health and Human Services, *How HIV Causes AIDS, NIAID Fact Sheet*, (Nov. 2004), http://www.niaid.nih.gov/factsheets/howhiv.htm (last visited May 15, 2008).

[19] Ruth Kornfield et al., *Living with AIDS in Rwanda: A Study in Three Provinces*, John Hopkins University Center for Communication Programs, Feb. 2002, *available at* http://www.jhuccp.org/pubs/sp/22/22.pdf.

[20] HIV/AIDS, Tuberculosis, and Malaria Research and Programs in Sub-Saharan Africa, http://researchafrica.rti.org/index.cfm?fuseaction=home.country_view&country_id=15#country-profile (last visited May 15, 2008).

[21] UNAIDS, *supra* note 17.

[22] James C. McKinley, Jr., *Ravaged by War and Massacre, Rwanda Faces Scourge of AIDS*, N.Y. TIMES, May 28, 1998, *available at* http://query.nytimes.com/gst/fullpage.html?res=9E0DEFDE1338F93BA15756C0A96E958260.

[23] Lindsey Hilsum, *Don't Abandon Rwandan Women Again*, N.Y. TIMES, April 10, 2004, *available at* http://query.nytimes.com/gst/fullpage.html?res=9A05E0DD1338F933A25757C0A9629C8B63.

only thirty hospitals in the entire country.[24] In contrast, the United States has one doctor for every 400 people.[25] The lack of doctors and hospitals makes distribution and patient follow-up very difficult. Therefore, Rwanda needs an advanced infrastructure in place in order for the Paragraph 6 Agreement with Canada to be effective.

III. History of the TRIPS Agreement

The emergence of the technology and pharmaceutical sectors in the 1980's led to a shift in international trade policy and put the focus on intellectual property.[26] In 1994, at the behest of the pharmaceutical and technology sectors, intellectual property became a leading topic at the Uruguay Round of General Agreement of Trades and Tariffs ("GATT"), where the WTO was formed.[27] The WTO was created in Uruguay to enforce trade agreements among member states.[28] Additionally, the WTO adopted the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") to, "reduce distortions and impediments to international trade. . . promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade."[29] Although the TRIPS Agreement covers many types of intellectual property, this article is limited to the Agreement's effect on international patent law in regard to pharmaceuticals.

IV. The TRIPS Agreement's Objectives

The TRIPS Agreement attempts to strike a balance between two competing objectives—economic welfare and social welfare. Pharmaceutical companies and the developed countries where they are based would like patents to be strictly enforced in order for drug inventors to be the sole benefactors of their creations.[30] This argument is based on the fact that it is much more expensive to be the developer of a drug than it is to later acquire the knowledge and create a generic drug.[31] If generics are allowed without limitation, the incentive for pharmaceutical companies to create new drugs will diminish.[32] In contrast, developing countries and researchers would like to gain knowledge of patented drugs and

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[24] HIV/AIDS, Tuberculosis, and Malaria Research and Programs in Sub-Saharan Africa, *supra* note 20.

[25] Sandya Nair, *Doctor Shortage Facing U.S.*, THE JOHN HOPKINS NEWSLETTER, Feb. 27, 2004.

[26] *See generally*, Phillip McCalman, The Doha Agenda and Intellectual Property Rights (Oct. 2002) (unpublished manuscript, *available at* www.adb.org/Economics/pdf/doha/McCalman.pdf) (discussing changes in intellectual property rights and trade).

[27] *Id.* at 1.

[28] Cohen-Kohler, *supra* note 4.

[29] Agreement on Trade-Related Aspects of Intellectual Property Rights, preamble, 1994, 33 I.L.M. 81 [hereinafter TRIPS].

[30] McCalman, *supra* note 26, at 1.

[31] *Id.*

[32] *Id.*

create less expensive versions of them, which could then be distributed to the infected for less money and allow developing countries to deal with health crises more affordably.[33]

Both sets of interests have positive and negative consequences for public health. If inventors are financially rewarded for their initiatives, they will spend more money on researching and creating new products that can save lives.[34] However, if pharmaceuticals are too expensive, many developing countries will not be able to afford them.[35] This is why allowing researchers to develop less expensive models is so important for the survival of populations in developing countries. In order to strike a balance, the TRIPS Agreement aims to "contribute to the promotion of technological innovation" as well as aid "the transfer and dissemination of technology."[36] However, it has proven difficult to satisfy both the pharmaceutical companies and the developing countries in desperate need of affordable drugs.

A. Patent Protection Under TRIPS

Articles 7 and 8 of Part One of the TRIPS agreement are of particular importance to intellectual property rights, and thus patented medications.[37] Article 7 provides that intellectual property should be protected "in a manner conducive to social and economic welfare. . ."[38] and Article 8 provides that abuse of intellectual property rights should be avoided when it results in restraining the international transfer of information.[39] Some international scholars have noted that these articles, at least as interpreted before the Doha Declaration, favor the promotion of innovation and the interests of pharmaceutical companies instead of promoting access to drugs for developing countries.[40]

In regard to patents, the TRIPS Agreement provides that member states must give protection to "any inventions. . . in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application."[41] Additionally, member states must allow an inventor a patent for at least twenty years.[42] A patent prevents third parties from "making, using, offering for sale, selling or importing" the product in the territory of the patent's grant.[43]

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[33] *See* TRIPS and Public Health: *Canada is First to Notify Compulsory License to Export Generic Drug, World Trade Organization,* Oct. 4, 2007, *available at* http://www.wto.org/english/news_e/news07_e/trips_health_notif_oct07_e.htm.

[34] *Id.*

[35] *Id.*

[36] TRIPS, *supra* note 29, art. 7.

[37] *Id.* arts. 7, 8.

[38] *Id.* art. 7

[39] *Id.* art. 8.

[40] *See* Kim, *supra* note 9.

[41] TRIPS, *supra* note 29, art. 27.1.

[42] *Id.* art. 33.

[43] *Id.* art. 65.4.

Therefore, WTO members are obligated to provide patent protection to pharmaceutical inventors under TRIPS Agreement Article 27.[44]

There are exceptions to this mandate of patent protection under the TRIPS Agreement. Although member states are specifically prohibited from discriminating against a certain field of technology when awarding patents,[45] there is an exception that allows researchers to use inventions protected by patents for the advancement of science and technology. Specifically, Article 8(2) states that, "[a]ppropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."[46] This general provision opened the door to circumvention of patent rights.

B. Compulsory Licensing under the TRIPS Agreement

Article 31 of the TRIPS Agreement takes the general policy behind Article 8(2) and specifically applies it to situations where patent circumvention is needed to combat a national emergency. Under Article 31, member-state governments have permission to grant licenses to generic manufacturers for the reproduction of patented products without the right holder's permission under limited conditions.[47] This process is called "compulsory licensing." One of the conditions where patent circumvention is allowed is a national emergency, such as an epidemic.[48] Although generally the WTO aims to protect the interests of the patent holder, in national emergencies there is no need for a member nation to attempt to retain a voluntary license before the compulsory one can be granted.[49] Therefore, with the permission of the WTO, Article 31 allows developing nations to grant compulsory licenses to generic manufacturers without the permission of the patent owners.

Despite Article 31's underlying policy of social welfare, developing countries that wished to move under the original meaning of Article 31 faced many hurdles. For example, developing nations still needed permission from the WTO before they could declare an emergency situation that warrants compulsory licensing.[50] Additionally, a compulsory license could only be used to serve the producer's domestic market.[51] This limitation was a barrier to poor countries like Rwanda because most nations experiencing health epidemics do not have the

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[44] *Id.* art. 27.1.

[45] *Id.*

[46] TRIPS, *supra* note 29, art. 8.

[47] *Id.* art. 31(b).

[48] *Id.*

[49] *Id.*

[50] *Id.* 31(a).

[51] *Id.* 31(f).

capabilities to manufacture generic drugs domestically.[52] The WTO first addressed Article 31's shortcomings in Paragraph 6 of the Doha Declaration.[53]

V. The DOHA Declaration

In 2001, the Doha Declaration on TRIPS and Public Health further clarified nations' rights regarding the circumvention of pharmaceutical patents. Specifically, the WTO emphasized at Doha that TRIPS should be interpreted in a way that supports world public health.[54] In order to support world health, the WTO named access to pharmaceuticals in developing countries a priority.[55]

The WTO recognized that patents generally allow inventors to monopolize markets and charge higher prices because consumers lack access to competitive alternatives for the duration of the patent.[56] Although financial incentives to pharmaceutical inventors are important because they encourage research and development, high prices lead to limited access for developing countries that cannot afford to pay.[57] In response to this situation, the Doha Declaration extended exemptions on pharmaceutical patents until 2016 for developing countries.[58] This means that developing countries can manufacture and distribute generic versions of drugs without the permission of the patent holder for the next eight years.[59] The declaration also gives member states the power to decide what constitutes a national emergency without the WTO's input, by stating, "each member has the right to determine what constitutes a national emergency. . . it being understood that public health crises, including those relating to HIV/AIDS. . . can represent a national emergency. . ."[60] This provision paved the way for Rwanda to declare its own national emergency in 2007.[61]

VI. The Paragraph 6 Issue

Although Doha was a large step in the right direction in assisting developing countries in the fight against HIV/AIDS and other epidemics, the issue of domestic production – the so-called "Paragraph 6" issue – was still unresolved after Doha.[62] Paragraph 6 of the declaration states:

> We recognize that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in mak-

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52 McCalman, *supra* note 26, at 6.

53 *Id.* at 8.

54 Doha Declaration, *supra* note 1.

55 *Id.* at §17.

56 Cohen-Kohler, *supra* note 4.

57 *Id.*

58 *Id.*

59 Doha Declaration, *supra* note 1, at § 5.

60 *Id.* at § 5(b).

61 Cohen-Kohler, *supra* note 4.

62 TRIPS and Public Health, *supra* note 33.

> ing effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and report to the General Council before the end of 2002.[63]

Because Article 31(f) of TRIPS declares that compulsory licensed products should be made "predominantly for the supply of the domestic market,"[64] countries like Rwanda that cannot produce generic drugs domestically were unable to obtain them from other countries without violating the TRIPS Agreement. African-state WTO members were particularly interested in resolving this issue, and on August 20, 2003, a solution was created.[65] Specifically, the WTO decided to simplify the process of importing generic drugs made under compulsory licensing for countries that cannot produce those drugs domestically by creating three waivers.[66]

A. Waivers to Article 31

First, and most importantly, exporting countries' duties under Article 31(f) were waived, meaning developing countries can now import generic products made in wealthier countries, which have the appropriate manufacturing capacity.[67] This was important for Canada because it did not wish to be in violation of its WTO obligations should it export generic drugs to a country in need.

Second, exporting countries only, and not the developing importing countries, are responsible for remuneration to the patent holder.[68] This removes an additional burden for countries like Rwanda when receiving assistance. Third, exporting constraints were removed for developing countries, making it possible for them to work jointly with others.[69] This means groups of developing countries with smaller populations can jointly declare an emergency.[70] By working together, developing countries can each address their domestic health emergencies through the grant of one compulsory license to one generic producer, instead of many.[71]

B. Concerns with Paragraph 6's Policy

Although the August 2003 decision is a positive step for developing countries that cannot produce generic drugs domestically, developed countries and pharmaceutical companies still have many concerns. For example, many fear that the

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63 Doha Declaration, *supra* note 1, at § 6.

64 TRIPS, *supra* note 29, art. 31(f).

65 TRIPS and Public Health, *supra* note 33.

66 *Id.*

67 Holger P. Hestermeyer, *Canadian-made Drugs for Rwanda: The First Application of the WTO Waiver on Patents and Medicines*, ASIL Insight International Economic Law Edition, Dec. 10, 2007, available at http://www.asil.org/insights/2007/12/insights071210.html.

68 *Id.*

69 *Id.*

70 McCalman, *supra* note 26, at 8.

71 *Id.*

generic drugs could be diverted to other markets instead of reaching the intended recipients.[72] Additionally, pharmaceutical companies have expressed concern over perceived patent violations.[73] Specifically, these criticisms have come to light surrounding Canada's plan for the exportation of Apo-TriAvir.[74]

VII. Canadian Export Plan

In 2004, after the implementation of Paragraph 6 of the Doha Declaration on TRIPS, Canada amended its patent law with the hope of being the first country to manufacture generic drugs for export to a developing nation.[75] The amendment process resulted in a law called Canada's Access to Medicines Regime ("CAMR"), which allows the production and export of generic drugs to developing countries without the permission of the patent holder in connection with the TRIPS Agreement.[76] In July 2007, Rwanda was the first country to notify the WTO that it intended to move under Paragraph 6 and import drugs from Canada.[77] In September 2007, Canada's patent commissioner gave Apotex, Inc. a compulsory license to produce and export a triple fixed-dose, anti-viral AIDS drug to Rwanda.[78]

With the compulsory license in place, Rwanda stands to receive a huge discount on generic anti-viral drugs. Specifically, Apotex plans to export 260,000 packages of single-dose Apo-TriAvir,[79] each costing around $.40 per pill, as opposed to the $20 per pill that consumers in developed countries must pay for the name-brand version.[80] Despite the many prerequisites, if successful, the manufacture and export of Apo-TriAvir will result in 21,000 HIV patients in Rwanda being treated for one year.[81] This is 50% more than the current group of 44,000 people receiving anti-viral drugs.

A. Obtaining a Compulsory License under CAMR

CAMR has its own application process that is more demanding than the WTO process outlined in Article 31 of the TRIPS Agreement. This has led to much criticism from developing countries and generic manufacturers alike. Due to CAMR's complicated nature, it took nearly four years for Rwanda to implement

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72 TRIPS and Public Health, *supra* note 33.

73 Cohen-Kohler, *supra* note 4.

74 Hestermeyer, *supra* note 67.

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.*

79 *Canada Issues Compulsory License for HIV/AIDS Drug Export to Rwanda, in First Test of WTO Procedure*, 11 BRIDGES WEEKLY TRACE NEWS DIGEST 32, (Sept. 26, 2007), *available at* http://www.ictsd.org/weekly/07-09-26/story2.htm.

80 *Id.*

81 *Id.*

the regime.[82] Additionally, despite Apotex's philanthropic intentions, it faced many legal challenges from the patent holders,[83] which further inhibited the process.

Unlike the process under TRIPS alone, CAMR requires the generic producer to attempt to get a *voluntary* license from the patent holder before Canada can issue a compulsory license.[84] The three pharmaceutical companies that hold patents for the anti-viral drug that Apotex wished to produce—GlaxoSmithKline, Shire, and Boehringer Ingelheim—were unwilling to give Apotex a voluntary license.[85] In accordance with CAMR, Apotex attempted to negotiate with these pharmaceutical companies for over a year without success.[86] Only when Rwanda notified the WTO of its intention to declare a national emergency in July 2007 did Canada finally grant a compulsory license to Apotex despite the resistance of the patent owners.[87]

Additionally, before the life-extending drugs could be shipped, CAMR required Apotex to create a website providing information about the generic drug - specifically surrounding its packaging - in order to prevent illegal diversion to other markets besides Rwanda.[88] This website was completed in early 2008, and therefore Apotex has fulfilled its duties under CAMR.

B. Schedule for Exportation

At the time of this article's completion, the schedule for delivery of Apo-TriAvir remains unknown. Recently, Rwanda failed to provide tender to Apotex as was previously planned.[89] According to Apotex's Director of Public and Governmental Affairs, Elie Betito, Apo-TriAvir cannot be shipped until Rwanda completes the tender process.[90] Experts speculates that Rwanda's failure to complete this process is the result of pressure not to follow through.[91] Therefore, the timing of exportation is uncertain, and Rwandans continue to suffer in the absence of generic drugs.

C. Criticism of CAMR

Many criticisms have arisen surrounding CAMR since its creation over three years ago. These criticisms include the concern that the law's requirements are

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[82] *Id.*

[83] Hestermeyer, *supra* note 67.

[84] *Id.*

[85] *Canada Issues Compulsory License for HIV/AIDS Drug Export to Rwanda*, *supra* note 79.

[86] *Id.*

[87] Cohen-Kohler, *supra* note 4.

[88] *Id.*

[89] Hestermeyer, *supra* note 67.

[90] Email from Elie Betito, Director of Public and Governmental Affairs, Apotex, Inc., to Christina Cotter (Feb. 25, 2008) (on file with author).

[91] Baker, *supra* note 8.

too complex and prevent successful implementation.[92] The length of time between CAMR's creation and its actual application lends credence to this opinion.

1. Criticism from Developing Countries

Developing WTO member-states have found CAMR to be overly complex, as well as unresponsive to the needs of its beneficiaries. One developing country representative has said of the legislation, "the needs of developing countries must be taken into consideration any time international programs have been set up . . . if you are trying to increase access to medicines and then you set up a new criteria and processes, that in themselves becomes the barriers, and then we have not done much."[93] In fact, it took three years for Rwanda to implement Canada's plan, and it has been the only developing country to do so.[94] Richard Elliott, the Executive Director of the Canadian HIV/AIDS Legal Network, has noted that the lack of importers is a wake-up call to Canada to simplify the process of obtaining generic drugs.[95]

Additionally, many developing countries are unable to begin the process of obtaining drugs through CAMR because they fear that wealthier states will stop donating money should they seek to circumvent pharmaceutical patents. As one health activist noted, "[a] country that wants to do this has to stick its neck out and make an order and say to the world . . . we intend to use the WTO system, specifically Canada's. . . and there will be an immediate backlash . . ."[96] Backlash comes from developed states that use their strong influence over poorer states to further the agendas of pharmaceutical companies. For example, the United States may offer millions of dollars to a developing country for medicine, on the condition that it buys patented products only.[97] Another health activist has said, "[i]f I'm sitting here, and I'm in Malawi, and I've got $200 million annually from the US for drugs as long as I buy patent drugs, do you think I'm going to thumb my nose at that? It's part of the bigger architecture."[98] Therefore, developing countries appear to be unwilling to take action under Paragraph 6 for fear that it will lead to decreased donations.

2. Criticism from the Generic Drug Industry

The generic drug industry desires additional incentives for participating in CAMR. For example, currently CAMR's "Good Faith Clause" requires that the average price of the generic drug be less that twenty five percent of the cost of

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92 Hestermeyer, *supra* note 67.

93 Cohen-Kohler, *supra* note 4.

94 *Id.*

95 *Rwanda First to Use Canada's Access to Medicines Regime to Buy Affordable AIDS Drug*, LEGAL NETWORK NEWS, Issue 28, Oct. 2007, at 1, *available at* http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1234.

96 Cohen-Kohler, *supra* note 4.

97 *Id.*

98 *Id.*

the patented version.[99] Companies believe that this rule subjects them to substantial liability while providing little financial benefit.[100] One industry insider has said, "[i]nternational companies who operate in Canada . . . say why should I go to Canada and lose money because the Canadian government has an objective?"[101] The general consensus from generic manufacturers is that Canada's procedures do not facilitate the producers who are trying to save lives.[102]

VIII. Implications for Other Nations

It is uncertain whether Rwanda will complete the process of generic drug importation at this time. Unfortunately, if the Rwanda plan ultimately fails, it will set a poor precedent for other nations contemplating action under Paragraph 6. However, other countries can learn from the challenges faced under Rwanda and Canada's agreement.

First, developed countries that wish to export generic drugs should enact simple legislation that facilitates the production of those drugs. CAMR's complexity posed many problems for Apotex and for Rwanda, and therefore should serve as a cautionary example for future exporters. Specifically, future legislation should be similar to Article 31 of TRIPS, which does not require the generic producer to attempt to receive a voluntary license prior to a compulsory license being granted. Had Canada's process been more similar to Article 31, Apotex would not have spent over a year's time attempting to receive a voluntary license in vain.

Additionally, the WTO should take steps to prevent pharmaceutical companies and the developed states where they are based from inhibiting the success of Paragraph 6 agreements. The Doha Declaration's policy of world health will never become reality if developing countries are pressured against following through with their plans to import generic drugs. Unfortunately, Rwanda seems to be experiencing just this type of pressure. Although Apo-TriAvir is ready for shipment, Rwanda has not taken the final step to complete the deal, and experts speculate that this is because of pressure from developed nations against the export of generic drugs.[103] Therefore, the WTO should develop policies that prohibit this type of pressure since thousands of lives are at risk every day. Specifically, the WTO should clarify its position on human welfare under Paragraph 6.

Finally, developing countries acting under Paragraph 6 in the future should consider distribution methods from the onset and have an infrastructure in place upon the generic drugs' arrival. It is still unclear how Rwanda will efficiently distribute generic medication when and if it is received. As already indicated, the medical facilities in Rwanda and other developing countries are lacking and the

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99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

103 Baker, *supra* note 8.

TRIPS Agreement does not provide guidance for the distribution of generic drugs. Despite distribution uncertainty, the fight against malaria and other epidemics is instructive. Currently, Rwanda's National Malaria Control Program, an initiative funded by multiple nongovernmental organizations ("NGOs"), provides Malaria drugs at $.10 a dose and is monitored by the government.[104] More importantly, NGOs and their local partners oversee the distribution of these malaria drugs at the local level.[105] If Rwanda could get similar help on the local level for the distribution of Apo-TriAvir, the program could be successful. In the future, the WTO should provide that production of generic drugs is allowed only in conjunction with the developing state's efforts to create distribution methods. Therefore, when future developing countries decide to move forward under Paragraph 6, they should already be working with donors or NGOs to create these distribution chains.

IV. Conclusion

Although the future of the agreement between Rwanda and Canada is uncertain, it should serve as a case study for other countries wishing to receive or manufacture generic drugs under Paragraph 6. If lessons can be learned from the slow and arduous process of the Rwanda/Canada agreement, perhaps the next Paragraph 6 agreement will be a success.

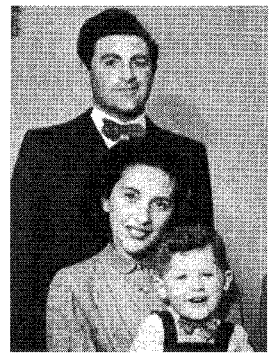
[104] Julia Ross, *Treating Child Malaria in Rwandan Communities*, eJOURNAL USA: ECONOMIC PERSPECTIVES, Aug. 2005, at 25, *available at* http://usinfo.state.gov/journals/ites/0805/ijee/ijee0805.pdf

[105] *Id.*

WHAT'S A SURVIVOR TO DO? AN INQUIRY INTO VARIOUS OPTIONS AND OUTCOMES FOR INDIVIDUALS SEEKING RECOVERY OF NAZI-LOOTED ART

Sarah K. Mann†

"Labour to keep alive in your breast that little spark of celestial fire called conscience."[1]



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Introduction

As the granddaughter of Holocaust survivors, I have always been inquisitive about World War II, the tumultuous time during which my grandparents came of age. On one side of the world, my father's parents suffered tremendously at the hands of the Nazis. On the other side of the world, my mother's parents fought valiantly for my father's parents' freedom from the Nazis. Neither side knew that one day they would be connected by more than a shared struggle against Nazi oppression, that they would be connected by love, and the familial bonds which grow from that love.

My patriarchal grandmother was taken to Auschwitz along with her family in 1939. After years of being shuffled between numerous concentration camps, my grandmother eventually was taken to Bergen-Belsen, a Nazi concentration camp located in Lower Saxony, southwest of the town of Bergen near Celle. When the Allied Forces arrived in 1945, only my grandmother and her older sister had survived to see the camp's liberation.

Soon after the liberation, my grandmother met my grandfather, a young man, who until recently had been utilized by the Germans as a laborer in a concentra-

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[1] George Washington, *Rules of Civility and Decent Behaviour in Company and Conversation* (Ferry Farm, 1744), *available at* http://gwpapers.virginia.edu/documents/civility/transcript.html.

[2] The Mann family circa 1952.

tion camp. The two quickly fell in love and became inseparable, marrying in Stockholm, Sweden in 1947. My father was born three years later. In 1953, my grandparents were sponsored by relatives already in America, and my small family made their way to America. They passed through Ellis Island when they arrived in the United States, where our complicated original family surname of "Mankowicz" was shortened to the more easily-pronounced "Mann." The Mann family soon settled into their new American lives on Chicago's South Side, learning the English language by reading newspapers, and eventually opening a small, successful grocery store.

My matriarchal grandparents were raised in the Green Bay, Wisconsin area, and after completing high school in 1942, my grandfather joined the United States Army. During World War II, my grandfather advanced in the ranks of the military, becoming an officer and served his country in France and Germany. My grandmother supported him and the war effort from home in the United States, and they were married almost immediately when he returned in 1946. My mother and her younger brother followed in quick succession, and eventually the Schrickel (my mother's maiden name) family also found themselves in the Chicago area.

During their reign of terror, the Nazis did not simply destroy the lives, families, and communities of those groups they deemed inferior, but they also attempted to destroy the cultural contributions that these people had made to the world. One way in which this policy was carried out was through the systematic plundering of art. This article examines the issues a private party wishing to reclaim a piece of art stolen by the Nazis during World War II faces in both international and domestic legal arenas. It will include a brief history of the Nazi regime, as well as a discussion of cultural property in general. It will continue by assessing common problems facing an individual claimant in a potential legal dispute involving Nazi-stolen art, focusing on the relevant aspects of international and U.S. law. This article will then focus on four specific case studies involving four works of art plundered by the Nazis during World War II (considered the most famous pieces by the author), the different approaches used by the claimants in each, and the results of these efforts. This paper will then conclude with a general statement of the shape this area of law is likely to take in the future, how the ideas of equity and conscience are intertwined with the facts of each case, and the judiciary's activist role in adjudicating cases of this nature.

Where Art and Fascism Intersect: A Brief History of the Nazi Regime's Cultural Pillaging

I can never pretend to understand the atrocities my family, and countless others like them, experienced under the Nazi regime in the years before and during World War II. Beyond the well documented human tragedy, there exist lesser-known areas of collateral damage from the War which still affects us today. What can best be described as the Nazi art campaign, a systematic effort to plunder art from across Europe, is one such lingering wound of the Nazi era. The amount of art plundered by the Nazis before and during the War is almost

unimaginable. From 1938-1945, the Nazis, under the direction of Adolf Hitler, seized thousands of pieces of art worth billions in today's dollars.[3] Historians, while not able to pinpoint an exact number, have estimated that around 240,000 pieces of art were looted, and their combined worth valued somewhere in the neighborhood of $20.5 billion.[4] The United States government has estimated that one-fifth of all Western art then in existence was seized, or obtained via coerced sales by German forces and other Nazi agents before and during World War II.[5]

The Nazis accumulated their treasure trove of stolen art in two ways: first, by confiscating pieces from individuals, mostly Jews being shipped to concentration camps in Germany and other occupied countries throughout Europe; or second, by coercing the sale of pieces of art and paying bargain-basement prices for them.[6] This scheme was not accidental; Hitler had sanctioned the official Nazi policy that mandated the taking of all works of art during the War in an effort to bring to fruition his dream of making Germany the cultural center of Europe.[7] The decision as to which pieces were to be taken and how they were to be stored and preserved were made with military precision.[8] German forces included members that were highly trained art specialists, and it was their duty to oversee Hitler's growing collection.[9] In an ironic twist of fate, it was these specialists who were responsible for the preservation of the collection and they likely rescued many famous pieces from complete destruction.[10] Similarly, the Nazis kept meticulous records, and inventoried nearly every piece.[11] These records would come to the aid of some Holocaust victims wishing to locate their valuables years, or even decades, later.[12]

Hitler envisioned a national museum filled with valuable art that demonstrated the Third Reich's cultivation and supremacy, and in his view only German or Germanic art was worthy of such stature.[13] However, Hitler understood that art

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[3] Sue Choi, *The Legal Landscape of the International Art Market After Republic of Austria v. Altmann*, 26 Nw. J. Int'l L. & Bus. 167, 167 (2005) (citing Emily E. Maples, Comment, *Holocaust Art: It Isn't Always "Finders Keepers, Losers Weepers": A Look At Art Stolen During the Third Reich*, 9 Tulsa J. Comp. Int'l L. 355, 356 (2001)).

[4] *Id.* at 167.

[5] Howard N. Spiegler, *Recovering Nazi-Looted Art: Report From the Front Lines*, 16 Conn. J. Int'l L. 297, 298 (2001).

[6] David Wissbroecker, *Six Klimts, A Picasso, & A Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 DePaul-LCA J. Art & Ent. L. & Pol'y 39, 40 (2004).

[7] Spiegler, *supra* note 5, at 298.

[8] Choi, *supra* note 3, at 167 (citing Stephan J. Schlegelmilch, Note, *Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and A Statutory Application of the Discovery Rule*, 50 Case W. Res. L. Rev. 87, 92 (1999); Lynn H. Nicholas, *World War II and the Displacement of Art and Cultural Property*, *in* The Spoils of War: World War II and Its Aftermath: The Loss, Reappearance, and Recovery of Cultural Property 39 (Elizabeth Simpson ed., 1997)).

[9] Choi, *supra* note 3, at 167.

[10] *Id.*

[11] Hector Feliciano, Owen Pell, & Nick Goodman, *The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art*, 20 Whittier L. Rev. 67, 68 (1998).

[12] *Id.*

[13] Wissbroecker, *supra* note 6, at 40.

that did not live up to this standard could still be worthwhile to his cause; as a result he also seized so-called "degenerate art."[14] Degenerate art included works that depicted Jewish subjects or pieces that were in some way critical of the Nazi ideology.[15] Works by modern masters like Van Gogh and Picasso were also included in this classification due to their revolutionary depictions of the human figure.[16] Likewise, abstract and modern works, by artists like Matisse or displaying Dadaism or Cubism, were considered "degenerate" in nature.[17] Hitler did not destroy the degenerate art; instead the Nazis used it like currency, using these pieces to make trades for worthwhile Germanic art.[18] Interestingly, this was not the only use Hitler found for these subjectively worthless pieces. In 1937, before the works were sold to dealers or collectors, they were displayed at a museum in Munich at an exhibit called "Entartete Kunst," or "Degenerate Art."[19]

Following the end of the War, Allied forces attempted to catalog and preserve the plundered art being found in vaults and hiding places all over Europe, a nearly impossible undertaking.[20] In the decades following the War many of these pieces began resurfacing in various galleries, museums, and private collections around the world, despite their often disjointed or unknown provenance.[21] In the end, Hitler's displacement of many of Europe's art treasures resonated long after the fall of the Nazi regime. Today, more than sixty years later, many descendants of Holocaust victims are still attempting to relocate and reclaim their family's stolen valuables with varying degrees of success.

Cultural Property Ideas

Property rights have been called the "cornerstone of civilized societal values."[22] The concept that one is entitled to exclusive control of his property, free from the intrusion of others, is arguably one of the most basic liberties assigned in the United States Constitution, and is affirmed in nearly every legal system worldwide.[23] Relevant to cultural property claims involving stolen art in the United States is the fundamental and accepted rule that it is impossible to obtain good title to stolen property, even if the property was purchased in good faith.[24]

Under this rule, it is entirely possible that persons or museums may genuinely believe they have obtained good title to works of art, when in fact they have no actual ownership rights to the works. The person or entity that believes it owns

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[14] *Id.*

[15] *Id.*

[16] Choi, *supra* note 3, at 168 (citing Schlegelmilch, *supra* note 3, at 93-94).

[17] Choi, *supra* note 3, at 168.

[18] Wissbroecker, *supra* note 6, at 41.

[19] *Id.*

[20] Choi, *supra* note 3, at 169.

[21] *Id.*

[22] Shirley Foster, *Prudent Provenance – Looking Your Gift Horse in the Mouth*, 8 UCLA ENT. L. REV. 143, 147 (2001).

[23] *Id.* at 148.

[24] Spiegler, *supra* note 5, at 299.

the piece may sell it or loan it to another person or entity in either a domestic or international transaction, further complicating the true owner's undertaking of retrieving the piece. It is also possible that a potential claimant may face the daunting task of bringing suit against a foreign government in the process of attempting to reclaim a work of art, or that the attempt may require intervention on the part of the claimant's government.

Returning a piece of art stolen by the Nazis during the Holocaust to the heirs of its original owner "serves the greater good in a . . . prolific sense," because the act of returning the piece supports the values that underscore society.[25] At the end of the War in 1945, many European countries enacted laws in an effort to return Nazi-plundered artworks to their original owners.[26] Despite these seemingly good intentions, most of these laws failed to bring about their intended result, with only half of the artwork stolen by the Third Reich having been returned to their true owners.[27]

Both domestic and international attempts to return to their rightful owners cultural properties stolen during World War II followed over the next six decades, via international treaties and domestic legislation.[28] Many difficulties still exist for a potential claimant seeking the return of stolen art, including choice of law questions, the issue of sovereign immunity, and statutes of limitations.[29] In any case, an individual attempting to recover art through a domestic or foreign legal dispute resolution process likely faces a long path, fraught with complications.

Case Studies: How Equity and Conscience Interplay to Provide Relief for Private Parties Seeking to Reclaim Nazi-Looted Art

Cases involving cultural property stolen by the Nazis over sixty years ago in numerous countries around the world involves complex and tedious aspects of domestic and international law. Interestingly, cases of this nature are never exactly the same, and often feature varied approaches and strategies. It is possible to group the most common problems faced by potential claimants in cultural property cases into three general categories: 1) locating the piece of art in question; 2) establishing an individual's ownership or title to the piece such that he can proceed in an action to reclaim it; and 3) dealing with the applicable statute of limitations and its implications.[30]

The case studies included in this article are not meant to be exhaustive, but are rather meant to be a brief inquiry into some of the more complex cases involving Nazi-looted art. At the center of many of these disputes are arguably some of the most famous works of art ever created. Like the pieces themselves, the circum-

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[25] Foster, *supra* note 22, at 147.

[26] Choi, *supra* note 3, at 170.

[27] *Id.*

[28] Arjun Gupta, *A Portrait of Justice Deferred: Retroactive Application of the FSIA and Its Implications for Holocaust Era Art Restitution: Republic of Austria v. Altmann, 124 S. CT. 2240 (2004)*, 30 U. DAYTON L. REV. 373, 396 (2005).

[29] Choi, *supra* note 3, at 170.

[30] Spiegler, *supra* note 5, at 299.

stances of each case are unique, but each case has a common theme: the application of principles of equity and conscience to right past wrongs.

Klimt's "Portrait of Adele" and Altmann's Lengthy Legal Battle: Judicial Activism Provides Equity to Holocaust Art Heirs

A wealthy Austrian family, owners of an expensive art collection, is forced to flee their native country on the eve of the Nazi annexation of Austria in 1938.[31] Mounted on the walls of their home are six paintings by a prestigious artist, paintings that will be confiscated by the Nazis soon after the annexation.[32] The surviving heirs of the family attempt to recover the paintings after the War, but to no avail.[33] Sixty years later, in 1998, an Austrian journalist discovers evidence linking the paintings to their rightful owners, a discovery that eventually leads the family's descendants to be reunited with their treasured family heirlooms.[34] At first glance this story seems like a Hollywood screenplay, but in actuality, this is the story of Maria Altmann. The harrowing details of the effort to recover the Altmanns' family art come from the pages of the United States Supreme Court opinion, *Altmann v. Republic of Austria*.[35]

Maria Altmann was born in Austria in 1916, the niece of wealthy Jewish sugar magnate Ferdinand Bloch-Bauer and his wife Adele Block-Bauer.[36] Prior to the Nazi annexation of Austria, known as *"Anschluss"*, Ferdinand and Adele maintained a principal residence in Vienna.[37] The Bloch-Bauers were patrons of the arts, and near the turn of the century Adele had posed for two paintings by the now-famous Art Nouveau artist Gustav Klimt.[38] In addition to these two portraits, the Bloch-Bauers owned four other paintings by the artist, which they kept at their home in Vienna. Today these six paintings are valued at over $150 million.[39]

In 1907, Adele sat for the first portrait; a beautiful and intricate piece that included an image of Adele's narrow face and long neck superimposed over a complex mosaic of shapes and colors.[40] Additionally, Klimt was able to capture Adele's dress in a way few other artists have, weaving together the imaginary elaborate gold threads. Klimt's portrait manages to capture Adele's powerful intellect, while allowing the colors contained on the canvas to tell her story. At the time she sat for the portrait Adele was unaware that this acquisition would eventually become one of Klimt's most famous pieces, and the subject of a long-

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31 *Altmann v. Republic of Austria*, 541 U.S. 677, 681 (2004) [hereinafter *Altmann*].

32 *Id.* at 681.

33 *Id.* at 683.

34 *Id.* at 681.

35 *Id.* at 677-83.

36 *Id.* at 681.

37 *Id.*

38 *Id.*

39 Gupta, *supra* note 28, at 375.

40 Alison Frankel, *The Case of the Stolen Klimts*, LAW.COM, Nov. 1, 2006, http://www.law.com/jsp/law.

standing and fervent legal dispute that would include numerous individuals and the national governments of two countries.[41]

Ferdinand had supported national efforts opposing Germany's seizure of Austria prior to annexation.[42] When the *Anschluss* took place in 1938, he and his family were forced to flee, and he ultimately settled in Zurich.[43] During the *Anschluss*, Ferdinand claimed that the Nazis "Aryanized" his sugar company, took possession of his home, and seized all of his belongings, including the artwork he and his wife had collected.[44] Although Ferdinand held title to all the Klimt paintings, when Adele died in 1925 her will requested that the works be donated to the Austrian National Gallery.[45] At the time Ferdinand indicated that he intended to fulfill his wife's request; however he was not legally obligated to comply with her final wishes.[46]

A Nazi lawyer, Dr. Erich Fuhrer, who had assisted in the liquidation of the Bloch-Bauer estate during the *Anschluss*, kept some of the confiscated works of art for himself, including the Klimt paintings.[47] Dr. Fuhrer eventually sold or donated all but one of the Klimts to the Austrian National Gallery, claiming that he was attempting to fulfill the terms of Adele Bloch-Bauer's will.[48] Meanwhile, Bloch-Bauer's niece Maria Altmann had also fled Austria during the *Anschluss*, eventually settling in California in 1942 and obtaining United States citizenship in 1945.[49] Ferdinand died in Zurich in 1945, bequeathing the titles to the Klimt paintings to his heirs, who included Altmann.[50]

In 1946 World War II was over, and the Austrian government enacted a law that declared all transactions motivated by Nazi ideology null and void.[51] However, this law did not readily provide a legal remedy by which Altmann or other Bloch-Bauer heirs could reclaim the Klimts. This was due to a provision in the law which stated that exportation of works of art deemed culturally significant would require the permission of the Austrian Federal Monument Agency, and the Klimt paintings fell into this category.[52] Over the next few years a series of negotiations between the family and the City of Vienna, the Austrian Federal Monument Agency, and the Austrian National Government took place.[53] The

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41 *Id.*

42 *Altmann*, 541 U.S. at 682.

43 *Id.*

44 Gupta, *supra* note 28, at 375.

45 *Altmann*, 541 U.S. at 681.

46 *Id.* at 682.

47 Gupta, *supra* note 28, at 376.

48 *Id.*

49 *Altmann*, 541 U.S. at 681.

50 Gupta, *supra* note 28, at 376.

51 *Altmann*, 541 U.S. at 682.

52 *Id.* at 683.

53 Gupta, *supra* note 28, at 376.

negotiations continued for the next fifty years, but never resulted in the return of the Klimts to members of the Bloch-Bauer family.[54]

During the negotiations in 1948, a Viennese lawyer retained by the family wrote to the National Gallery in an attempt to have three of the Klimts sold by Dr. Fuhrer returned to the family.[55] The Gallery's response asserted that Adele Bloch-Bauer had bequeathed the paintings to the Gallery, and that the Gallery had simply allowed Ferdinand to possess the works during his lifetime.[56] Later in 1948, the family's lawyer went outside the scope of his authority and attempted to represent the family without permission in a series of transactions.[57] These transactions eventually led to the lawyer signing a document on behalf of the family conceding that Ferdinand had wished to follow his wife's request to donate the Klimts to the Gallery.[58]

Then in 1998, a journalist investigating the Gallery's files made an important discovery: documents which revealed that at all times Gallery officials knew that neither Adele nor Ferdinand Bloch-Bauer had actually donated the Klimts to the Gallery.[59] The journalist published a series of astonishing articles following his discovery.[60] One article described how the Gallery had represented that Klimt's first portrait of Adele was donated in 1936, when in fact the portrait had been donated in 1941.[61] Shockingly, the journalist had uncovered a letter written by Dr. Fuhrer in which he donated the portrait, and included the words "Heil Hitler" at the close of the correspondence.[62]

Despite the journalist's discovery, the family was confronted with numerous obstacles in securing the return of the now-famous Klimt paintings. Regardless of the uncovering of Dr. Fuhrer's letter, the National Gallery persisted in denying the return of the six Klimt paintings to Altmann.[63] At this point Altmann decided she would file suit in Austria to recover the six paintings.[64] She faced considerable hurdles in dealing with a foreign legal system.[65] In Austria, the court costs are assigned to the claimant filing suit, and are proportional to the monetary value of the recovery sought in the potential case; for Altmann's case this would have translated into millions of dollars.[66] She then sought and was granted a

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[54] *Id.*

[55] *Altmann*, 541 U.S. at 683.

[56] *Id.*

[57] *Id.* at 683-84.

[58] *Id.* at 683.

[59] *Id.* at 684.

[60] *Id.*

[61] *Id.*

[62] Andrew J. Extract, *Establishing Jurisdiction Over Foreign Sovereign Powers: The Foreign Sovereign Immunity Act, The 'Act of State' Doctrine and the Impact of Republic of Austria v. Altmann*, 4 J. INT'L BUS. & L. 103, 107 (2005).

[63] *Id.* at 108.

[64] *Id.*

[65] *Id.*

[66] *Id.*

waiver from the Austrian courts.[67] Even with this waiver, Altmann would have been required to pay approximately $350,000.[68] Altmann decided to voluntarily dismiss her suit in the Austrian courts, and proceeded to file an action against the Republic of Austria in the United States District Court for the Central District of California.[69]

Altmann claimed that the Nazis expropriated the six Klimt paintings from her family in violation of international law, and that the Republic of Austria fell under the court's jurisdiction due to an exemption from foreign sovereign immunity provided in the Foreign Sovereign Immunities Act (FSIA).[70] FSIA is an established principle of international law, and operated for over 200 years as a grant of absolute protection to foreign sovereigns and their agents from the jurisdictional range of the U.S. courts.[71] In 1952, the U.S. adopted a more restrictive theory of sovereign immunity in regards to a number of nations and sovereign participation in commercial activities forms. However, judicial application of this post-1952 restrictive theory is muddled and confounded by contradictions.[72]

In 1976, FSIA was ultimately amended to reflect the shift away from the grant of absolute immunity to foreign governments and towards a more moderate and regulated system of immunity and exemptions from immunity.[73] In addition to establishing exclusive statutory authority in determining the application of foreign sovereign immunity, the 1976 amendment to the FSIA also provides three exceptions to the general rule of immunity: 1) waiver of immunity by a foreign state; 2) actions arising out of a foreign sovereign's commercial activity; and 3) expropriation of property in violation of international law.[74] If any of these exceptions are met, a U.S. Federal District Court may obtain proper subject matter jurisdiction over a foreign sovereign, as was eventually the case for Altmann in attempting to reclaim the six Klimt paintings.[75]

Despite the seemingly supportive exception to the 1976 FSIA, Altmann's case was far from over. After filing her claim in federal court, the Republic of Austria claimed that they were immune from U.S. jurisdiction on two bases: 1) they claimed that because most of the alleged wrongdoing took place in 1948, they would have benefited from absolute immunity in the U.S.; and 2) they were presently entitled to this immunity for their past acts.[76] The District Court sided with Altmann, holding that the 1976 FSIA applied retroactively, and further that the expropriation exception applied to Altmann's claim.[77] Austria appealed the deci-

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[67] *Id.*

[68] *Id.*

[69] *Altmann*, 541 U.S. at 685.

[70] *Id.* at 680-81.

[71] Gupta, *supra* note 28, at 377.

[72] *Id.* at 379-80.

[73] *Id.* at 377.

[74] *Id.* at 381.

[75] *Id.*

[76] *Altmann*, 541 U.S. at 686.

[77] *Id.*

sion, and the Ninth Circuit Court of Appeals affirmed and remanded the District Court's decision.[78] A petition for rehearing was subsequently filed and denied by the Court of Appeals, and eventually certiorari to the United States Supreme Court was granted.[79] On June 7, 2004, the Supreme Court finally provided relief for Altmann by holding in a six to three decision that, "FSIA applies to conduct occurring prior to its enactment (1976), and prior to the United States' adoption of the restrictive theory of sovereign immunity (1952)."[80] At long last, Altmann was able to regain what rightfully belonged to her family, undergoing decades of turbulent legal disputes, numerous trips across the Atlantic Ocean, and an appearance before the Supreme Court.[81] In 2006, Altmann sold Klimt's first portrait of her aunt Adele Bloch-Bauer to cosmetics heir Ronald Lauder for $135 million.[82]

Although Altmann's case is obviously important to her and the memory of her ancestors, it is significant in a larger sense in that it clarified an important piece of legislation applicable to every player on an international stage. In the wake of the Supreme Court's decision it is possible that other families who lost valuables at the hands of the Third Reich may be able to revive legal claims that seemed to have disappeared along with their family heirlooms.

Schiele's "Portrait of Wally" and Picasso's "Femme en Blanc": Result-Oriented Government Intervention Provides Justice

It is 1938, and Egon Schiele's "Portrait of Wally" (Wally) hangs in the apartment of Lea Bondi, a Jewish art dealer, in Vienna, Austria.[83] In that same year Germany would annex Austria, and put into effect "Aryanization" laws that would effectively mandate the transfer of property belonging to Jewish citizens to Aryan people.[84] Under this policy, Aryans could coerce Jews into the sale of their possessions for artificially low prices, and the Jewish victims could do nothing to halt the sales.[85] A German named Friedrich Welz, a self-proclaimed Aryan, would come to personally benefit from the country's new policies, as he would eventually procure the "purchase" of many pieces of fine art under the process of Aryanization.[86]

In 1938, Bondi and her husband were preparing to flee the country when Welz came to her apartment to discuss the transfer of her gallery to his growing collection.[87] During discussions he noticed Wally hanging on her wall, and demanded

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78 Gupta, *supra* note 28, at 376.

79 *Id.* at 376-77.

80 Gupta, *supra* note 28, at 377.

81 *Id.*

82 Frankel, *supra* note 40.

83 Spiegler, *supra* note 5, at 306.

84 Susan E. Brabenec, *The Art of Determining "Stolen Property": United States v. Portrait of Wally, A Painting By Egon Schiele, 105 F. Supp. 2D 288 (S.D.N.Y. 2000)*, 69 U.CIN. L. REV. 1369, 1386 (2001).

85 *Id.*

86 *Id.*

87 Spiegler, *supra* note 5, at 306.

that she give him the painting, a piece from her private collection.[88] Welz likely noticed the painting because he was already familiar with Schiele's work; he had recently secured the transfer of the collection of another Viennese art patron, Dr. Heinrich Rieger, which contained a number of Schiele's pieces.[89] Bondi subsequently surrendered the Schiele painting to Welz for no compensation, frightened of the consequences that might ensue should she refuse his demand.[90] Bondi soon fled the country for England, and eventually Welz transferred the painting to his gallery in Salzburg.[91]

At the conclusion of World War II, the Allied forces occupying Austria attempted to organize the pieces of art and other cultural artifacts that had been confiscated by the Nazis and their cohorts in order to eventually return these pieces to their original owners.[92] Around this time, Welz was arrested for suspicion of war crimes, and the large art collection he had amassed was turned over to the U.S. forces for sorting.[93] Wally was mistakenly mixed in with the collection that had belonged to Rieger, which Rieger had bequeathed to his son and his granddaughter upon his death.[94]

In 1948, Rieger's heirs were given ownership of his collection, and agreed to sell part of the collection, including Wally, to the Austrian National Gallery in Vienna.[95] In the meantime, the U.S. forces responsible for mistakenly including Wally in Rieger's collection, alerted the Austrian authorities of the error.[96] Regardless of this recognition, the Gallery insisted on taking the piece for itself, and Wally became part of its collection.[97] In the years that followed, Bondi learned of the location of her prized Wally from Dr. Rudolf Leopold, a Schiele collector who had come to her in London in an attempt to locate more of the artist's pieces.[98] Bondi asked Leopold if he would help her secure Wally's return from the Gallery, and went to the Gallery herself in 1953 to make her claim.[99]

Although Leopold represented that he would help Bondi recover Wally from the Gallery,[100] in 1954 he acquired Wally for himself in a transaction involving a different Schiele from his private collection in exchange for Wally.[101] Bondi

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88 Brabenec, *supra* note 84, at 1386.

89 Spiegler, *supra* note 5, at 306 (Rieger was subsequently transferred to a concentration camp and died shortly after his arrival).

90 Brabenec, *supra* note 84, at 1386.

91 *Id.*

92 Spiegler, *supra* note 5, at 306.

93 Brabenec, *supra* note 84, at 1387.

94 *Id.* (However it seems that the U.S. forces may have suspected this mistake at the time of its making).

95 Spiegler, *supra* note 5, at 306.

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.* at 307.

100 Wissbroecker, *supra* note 6, at 45.

101 Spiegler, *supra* note 5, at 307.

learned of Leopold's acquisition in 1957, when she saw an exhibition catalogue in which Leopold had listed himself as Wally's owner.[102] Bondi went to the exhibition and confronted Leopold, but to no avail.[103] Soon after, she hired Austrian lawyers to convince Leopold to return Wally to its rightful owner; however she never filed suit against Leopold.[104] Bondi's failure to bring any legal action against Leopold or any other individual or entity in an Austrian court was primarily due to her distrust of the Austrian government.[105] Historical records of post-War recovery efforts by Jews in Austria support Bondi's belief that any legal attempt by a Jew in Austrian courts would be futile.[106] Bondi even suspected that her own lawyers had attempted to delay taking appropriate action, and that all persons involved in the potential action were siding with Leopold.[107]

Bondi died in 1969 without ever recovering Wally.[108] However, the fight for her beloved painting did not die with her.[109] In 1994 Leopold sold Wally, and the entirety of his art collection, to the newly formed Leopold Museum in Austria, at which he had been named "Director for Life."[110] Then in 1997, the Leopold Museum loaned its collection of Schieles, including Wally, to the Museum of Modern Art (MoMA) in New York.[111] When Bondi's heirs learned of the location of Wally they insisted that MoMA hold the painting while the heirs' ownership claim to the painting was resolved.[112] The museum refused, citing its contractual obligations with the Leopold Museum for the safe and timely return of Wally at the end of the agreed-upon exhibition period.[113]

In 1998, the New York District Attorney's office learned of the controversy surrounding Wally, and issued a subpoena for the painting.[114] The subpoena was related to an investigation the District Attorney's office had commenced to assess whether Wally was stolen property brought into New York in violation of the common law doctrine of stolen property.[115] Lengthy litigation concerning the validity of the subpoena under New York's anti-seizure laws followed, with a decision finally being elicited from the New York Court of Appeals.[116] The de-

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102 Wissbroecker, *supra* note 6, at 45.

103 *Id.*

104 Spiegler, *supra* note 5, at 307.

105 *Id.*

106 *Id.*

107 *Id.*

108 Wissbroecker, *supra* note 6, at 45.

109 *Id.*

110 Spiegler, *supra* note 5, at 307.

111 *Id.*

112 *Id.*

113 *Id.*

114 Wissbroecker, *supra* note 6, at 47.

115 Spiegler, *supra* note 5, at 307.

116 *Id.*

cision held that the subpoena was to be quashed, and that Wally could be returned to the Leopold Museum in Austria.[117]

It seemed as if Wally would slip through the fingers of Bondi's heirs, but then within hours of the court's decision the United States Customs Service ("Customs") and the National Stolen Property Act ("NSPA") saved the day. Customs was able to obtain a seizure warrant for Wally on the grounds that it constituted "stolen property knowingly imported into the United States in violation of the NSPA."[118] Immediately afterwards the U.S. government filed a civil forfeiture action in federal court to have Wally permanently removed from the Leopold Museum, and Bondi's heirs, as well as the Leopold Museum and others, claimed ownership of the painting in that action.[119]

This case is currently ongoing in the Southern District of New York, and has survived numerous jurisdictional, summary judgment, and dismissal motions by the parties. Wally is currently in New York, in the custody of MoMA, and it will stay there until a final decision is rendered as to whether Wally was in fact stolen from Bondi some sixty years ago and whether her heirs are entitled to ownership of the painting.[120] Until then, questions and criticisms remain regarding the actions of the parties involved, including the U.S. government's decision to intervene and MoMA's seemingly uncooperative stance in assisting claimants in the recovery of Holocaust assets.[121] Similarly, questions remain as to how the Austrian government's recent opposition to Holocaust recovery efforts can be reconciled with the affirmative steps it has taken in the past to secure the return of Nazi-looted artworks to their rightful owners.[122]

Interestingly, the NSPA and government interaction played a part in the resolution of another high-profile Holocaust art reclamation case, and led to a much different result.[123] Carlota Landsberg owned Picasso's "Femme en Blanc" prior to World War II, and entrusted it to a reputable art dealer in Paris, Justin Thannhauser.[124] The Nazis invaded France in 1940 and subsequently the painting seemed to have vanished at the hands of the Nazis.[125] By 1975, the painting had resurfaced and was purchased by Marilyn Alsdorf, an art collector in Chicago, Illinois.[126] In 2002, Alsdorf sent the piece to David Tunkl, an art dealer based out of Los Angeles, California, who eventually sent the painting to Switzerland

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117 *Id.*

118 *Id.* at 308.

119 *Id.*

120 Wissbroecker, *supra* note 6, at 49.

121 *Id.* at 52.

122 *Id.*

123 Graham Green, *Evaluating the Application of the National Stolen Property Act to Art Trafficking Cases,* 44 HARV. J. ON LEGIS. 251, 262 (2007).

124 *United States of America v. One Oil Painting Entitled "Femme en Blanc" By Pablo Picasso,* 362 F. Supp. 2d 1175, 1178 (2005) [hereinafter *Picasso*].

125 *Id.*

126 Donald S. Burris & E. Randol Schoenberg, *Reflections of Litigating Holocaust Stolen Art Cases,* 38 VAND. J. TRANSNAT'L L. 1041, 1047 (2005).

to be viewed by a potential buyer.[127] The prospective purchaser contacted the Art Loss Register ("ALR") in London, which informed him that the Nazis had confiscated the piece during World War II.[128] The potential buyer then informed Alsdorf of the ALR's findings.[129] Meanwhile, the ALR located Tom Bennigson, Landsberg's sole heir, and informed him of the status and location of the painting.[130] Over the course of these discussions the painting was returned to Tunkl in Los Angeles.[131]

Alsdorf, fully aware of the painting's legacy, instructed Tunkl to have the piece transported back from Los Angeles to Chicago.[132] Bennigson quickly retained counsel, and was informed by Alsdorf's attorney that the painting was to be sent to Alsdorf in Chicago immediately.[133] Bennigson immediately filed a complaint in California Superior Court to seek a temporary restraining order; however, hours before the hearing was to take place the painting was put on a plane and shipped back to Chicago.[134]

In a strange turn of events, the District Judge presiding over the case in California found that the court lacked personal jurisdiction over Alsdorf, despite the fact that she had seemingly submitted to jurisdiction in California by instructing that the painting be sold by a California art dealer.[135] In 2004, the California Court of Appeals affirmed, and Bennigson petitioned the California Supreme Court for review, a petition that was eventually unanimously granted.[136] However, before the California Supreme Court had occasion to review the case, the U.S. Attorney's Office intervened and charged Alsdorf under the NSPA.[137] The charge was premised upon the theory that she had knowingly transported art stolen by the Nazis between states, and thus was liable for civil forfeiture of the piece.[138] Not surprisingly, the parties began arduous settlement negotiations soon after.[139] The painting was valued at between eight million dollars and ten million dollars, and Alsdorf, citing her age and a desire to resolve her affairs, eventually agreed to pay Bennigson $6.5 million for the painting.[140] In the end, Bennigson was able to recover sixty-five percent to eighty percent of the paint-

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127 *Picasso*, 362 F. Supp.2d at 1179.

128 *Id.*

129 *Id.*

130 *Id.*

131 Burris, *supra* note 126, at 1047.

132 *Picasso*, 362 F. Supp.2d at 1179.

133 Burris, *supra* note 126, at 1047.

134 *Id.*

135 *Id.* at 1048.

136 *Id.*

137 Green, *supra* note 124, at 262.

138 *Id.*

139 Burris, *supra* note 126, at 1049.

140 Kiesha Minyard, *Adding Tools to the Arsenal: Options for Restitution from the Intermediary Seller and Recovery for Good-Faith Possessors of Nazi-Looted Art*, 43 TEX. INT'L L.J. 115, 132 (2007).

ing's value,[141] and government intervention in the form of the NSPA was able to quickly accomplish what would have likely taken years to adjudicate in the courts.

The Seattle Art Museum and Matisse's "L'Odalisque": Relying on the Kindness of Strangers to "Do the Right Thing"[142]

In 1997, the Seattle Art Museum ("SAM") made a shocking discovery: they had been displaying Nazi war booty for years in the form of a Matisse painting entitled "L'Odalisque."[143] As SAM came to discover, Paul Rosenberg, a French art collector whose collection had fallen prey to the Nazis during World War II, had originally owned L'Odalisque.[144]

As mentioned in a previous section of this article, the Nazis kept meticulous records of the art they stole, photographing, describing, and inventorying their newly-acquired collection.[145] As luck or irony would have it, these records have become instrumental pieces of evidence for individuals seeking to recover Nazi-looted possessions.[146] Additionally, these records have facilitated researchers' efforts to compile and publish books and reports in recent years, like Hector Feliciano's *The Lost Museum*.[147] It was in this book that the Rosenberg heirs first learned that their family had owned the Matisse painting L'Odalisque, and that it had been subsequently lost to Nazi confiscation.[148]

After making their discovery, the Rosenberg heirs determined the whereabouts of L'Odalisque and immediately filed suit against SAM in the U.S. District Court in Washington.[149] SAM then began the lengthy task of researching the provenance of the painting, and within months was able to confirm that the piece had indeed belonged to Rosenberg prior to the beginning of World War II.[150] SAM agreed to return the painting, citing its moral obligation to do so, and a desire to "do the right thing."[151] However, as SAM would come to learn, no good deed goes unpunished, as the museum would eventually come to owe hundreds of thousands of dollars in legal fees.[152]

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[141] *Id.*

[142] Daniel Range, *Deaccessioning and its Costs in the Holocaust Art Context: The United States and Great Britain*, 39 TEX. INT'L L.J. 655, 655 (2004) (quoting the Seattle Art Museum, responding to why it returned a piece of stolen Holocaust art in its possession without legal intervention).

[143] Foster, *supra* note 22, at 144.

[144] *Id.* at 152.

[145] Feliciano, Pell & Goodman, *supra* note 11, at 168.

[146] *Id.*

[147] Spiegler, *supra* note 5, at 300.

[148] *Id.*

[149] Foster, *supra* note 22, at 152.

[150] Range, *supra* note 142, at 655.

[151] *Id.*

[152] *Id.*; SAM would eventually bring suit against Knoedler & Co., the gallery L'Odalisque had been purchased from in 1954, and recover all of the legal fees they incurred in defending themselves against the claim brought against them by the Rosenberg heirs to reclaim the title to L'Odalisque.

SAM had come to possess L'Odalisque when the Bloedel family donated it to the museum in 1991.[153] The Bloedels had purchased the piece in 1954 from the reputable New York art gallery, Knoedler & Co., and believed they held the rightful title to it.[154] After SAM agreed to return the painting to Rosenberg's heirs, the museum filed suit in U.S. District Court against Knoedler for fraud, breach of implied warranty, and negligent misrepresentation.[155] SAM argued that it was entitled to bring suit against Knoedler because the Bloedels' legal rights regarding L'Odalisque had been transferred to SAM upon the donation of the painting.[156] Although the District Court for the Western District of Washington originally disagreed with SAM's claim and held that the museum did not have standing to bring suit against Knoedler, it eventually vacated the earlier ruling and reinstated SAM's case.[157] In its opinion the Court stated: "as a matter of equity, SAM should be permitted its day in court so that the case may be disposed of in its merits."[158] However, the merits of the case would never be judged; in October 2000 SAM and Knoedler settled out of court, agreeing that Knoedler would reimburse SAM for the legal fees and costs it had incurred in the pending case.[159] The agreement further stated that Knoedler would transfer to SAM one or more pieces of art from the Knoedler collection, to be selected by SAM, in order to reimburse SAM for the loss of L'Odalisque.[160]

While the end of this story is noteworthy, the combination of the absence of a final ruling by the Court and the seemingly remarkable gesture of SAM's generous return of L'Odalisque to the Rosenberg heirs leaves some important unanswered questions. Most notably, the question remains whether a statute of limitations would have prevented the Rosenberg heirs from succeeding in their claim to L'Odalisque had SAM not agreed to return the painting without legal intervention.

While each state in the United States dictates its own statute of limitations periods for recovering stolen property, there is a general consensus that under the discovery rule a "plaintiff's case does not accrue, and thus the statute of limitations does not commence, until the plaintiff, using due diligence, knows or should know of the identity of the possessor [of the stolen property]."[161] After the war, Paul Rosenberg had attempted to find the four hundred pieces that had comprised his collection before Nazi confiscation, traveling to numerous countries, hiring various attorneys and filing claims with international authorities.[162]

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153 Foster, *supra* note 22, at 152.

154 *Id.* at 143.

155 *Id.* at 152.

156 *Id.*

157 *Rosenberg v. Seattle Art Museum*, 124 F. Supp.2d 1207, 1211 (W.D. Wash. 2000).

158 *Id.* at 1210.

159 Foster, *supra* note 22, at 153.

160 *Id.*

161 *Id.* at 155 (quoting Symeon Symeonides, *On the Side of the Angels: Choice of Law and Stolen Cultural Property*, PRIVATE L. IN THE INT'L ARENA 750 (2000)).

162 *Id.* at 154-55.

How did Rosenberg's activities affect the time of accrual of the cause of action? It is reasonable to assume that, while none of his efforts resulted in identifying the whereabouts of L'Odalisque, if the Rosenberg heirs had been required to argue their case in court, Paul Rosenberg's actions in attempting to recover his collection would have been found to be as diligent as could be expected under the circumstances.[163] As such, his actions would probably have been held sufficient to toll the statute of limitations, and the Rosenberg heirs' legal claim to L'Odalisque would likely have succeeded. Their story may provide Holocaust heirs with some hope that an old claim may not necessarily be a fruitless claim.

Conclusion and Proposed Solutions

As the old saying goes, rules are made to be broken — and if they cannot be broken, sometimes they can be bent. Such is the present state of the law surrounding an individual's claims to art confiscated during the Holocaust, which is highly influenced by an overwhelming urge to right past wrongs by returning stolen property to its rightful owner. Interestingly, the demands of conscience and concepts of equity are largely at play in claims of this nature, in that "public policy allows discretionary application of equitable defenses when the 'wrong result' might occur. For instance, the doctrine of estoppel is flexible in application, turning largely on the circumstances involved in the total situation, turning perhaps on the relative innocence or culpability of the plaintiff and the defendant, for the law may aid one who is comparatively the more innocent."[164]

Perhaps certain issues are so socially important as to go beyond strict application of the rules; how else can one resolve the mainly plaintiff-oriented holdings in cases of this nature? Courts implicitly recognize the necessity of making a social statement in regard to those victimized during the Holocaust by crafting their holdings to achieve desirable social policy results. This judicial activism can be observed in the Supreme Court's holding that retroactively applied the Foreign Sovereign Immunity Act to Holocaust era art claims in *Republic of Austria v. Maria V. Altmann,* 541 U.S. 677 (2004). Similarly, humane government action has played an important role in cases of this nature, sometimes supplying justice when all judicial avenues had been exhausted. While the battle over Egon Schiele's "Portrait of Wally" rages on in the Southern District of New York, government intervention in the form of a civil forfeiture action under the National Stolen Property Act seems to have played a large part in Alsdorf's decision to settle her case in *United States of America v. One Oil Painting Entitled "Femme en Blanc" By Pablo Picasso,* 362 F. Supp.2d 1175, 1178 (2005). Lastly, and perhaps most remarkably, it seems impossible to deny this phenomenon when one looks to the circumstances surrounding Matisse's "L'Odalisque." Not only did the Seattle Art Museum return the painting to the heirs of its pre-Holocaust owner without legal compulsion; in addition, the gallery it sued to recover its losses chose to settle with minimal complications.

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[163] *Id.* at 155.

[164] Foster, *supra* note 22, at 157 (quoting from *O'Keefe v. Snyder,* 416 A.2d 862, 869 (1980)).

It seems undeniable that the principles of equity, the demands of conscience, and a desire to serve the greater good, are important factors in Holocaust-era legal disputes. If property ownership rights are indeed the cornerstone of civilized societal values,[165] then "in returning a stolen painting to a family that lost it as helpless victims of wartime looting, [the person returning the painting] respects property ownership rights and supports the values that underscore civility, thus benefiting society overall."[166] Holocaust survivors and heirs wishing to assert legal claims to stolen family heirlooms can take heart in recent developments in this area of the law, for it seems judges, state and national governments, and individuals and entities alike all want the same result: to do the right thing for Holocaust survivors and their heirs.

[165] Foster, *supra* note 22, at 147.

[166] *Id.* at 148 (quoting HECTOR FELICIANO, THE LOST MUSEUM 189 (1st ed. 1997)).