NAFTA & (and) the Parent Systems of Its Members: Is There Potential for a Unification of the North American Patent Systems

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I. Introduction.

The theory behind the patent reaches as far back as the writings of Aristotle. Aristotle credited the idea of the patent to Hippodamus of Miletos, whose theory called for a system of rewards to those who discover things useful to society. Hippodamus's proposal, to honor the inventors of useful creations, is the essence of all patent systems. The opposing forces of individual interests and the good of society are at the core of, and have greatly influenced, the development of patent law throughout the world.

The first true patent system was created in Venice, Italy, during the fifteenth century. The Venetian Senate passed the 1474 Act that regularized the granting of patents. The 1474 Act stated that the device must be registered with the administrative agency. The device must be new and useful, reduced to perfection, and not previously made in the Commonwealth. The Act also provided a specific term of ten years for protection and set forth a procedure for determining infringement and remedy. This Venetian concept of the patent spread with the opening of trade in Europe. It is this original system of patent law that has become the foundation for all current patent systems throughout the world.

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1 ROBERT P. MERGES, PATENT LAW AND POLICY 1 (2nd ed. 1997).
2 See id.
3 See id. at 2.
4 See id. at 2.
5 See id. at 3. Historians recognize that the Renaissance produced an intellectual change in society creating a renewed emphasis on the individual. It was in this spirit of individuality that the environment produced a patent system, recognizing discrete inventions attributable to identifiable individuals. Id.
6 See id. at 4.
7 Id.
8 See id. at 5.
9 See MERGES, supra note 1.
With the beginning of the Industrial Revolution, the attention of the world began to focus on patents as never before. The Industrial Revolution was a period of rapid change in which the cottage technology of the past was supplanted by mass production and machines. New inventions brought the most important changes to society during the Revolution. At this time, patent systems changed to require that the applicant describe the invention clearly and completely. This specification requirement was important in its reflection of the changing perceptions about what an inventor contributed to society in exchange for the protection offered by the patent grant. Originally, the first patent systems benefited society by promoting the introduction of a new art or technology, but, by the eighteenth century, the societal benefit was seen as the technology behind the inventor's patent. This philosophy presented a major change in the role of patents by shifting the emphasis from the introduction of finished products to the introduction of useful information.

The patent was among the numerous legal concepts introduced to the American colonies by the English before the creation of an independent nation in 1776. For example, prior to the ratification of the U.S. Constitution, the colonies of Massachusetts and New Hampshire declared it the duty of their legislatures to encourage and reward the efforts of scientific progress. At the Constitutional Convention the drafters of the U.S. Constitution included within article I, section 8 a provision providing Congress with the authority to award exclusive rights for a limited term of years to authors and inventors for their writings and discoveries. In so doing, the fathers of the United States of America established a system of patent in the New World that would last with the life of the country. Congress passed the first U.S. patent statute in May 1790 and the first patent was issued soon thereafter. The theory and its importance behind the patent are best

10 See id. at 6.
11 Kevin Mhirotsu, The Industrial Revolution (visited March 16, 1998) <http://members.aol.com/mhirotsu/kevin/trip2.html>. Workers at this time became more productive with the increase in manufacturing. Id.
12 See id.
13 MERGES, supra note 1, at 6.
14 See id. at 7.
15 See id.
16 See id.
17 See id. at 8.
18 Edward C. Waltersheid, The Early Evolution of the United States Patent Law: Antecedents (5 Part I), 78 J. PAT. & TRADEMARK OFF. SOC’Y 615, 616 (1996). The colonial and state development of intellectual property and especially patent protection was of fundamental importance as precedent upon which the founders of the United States and the lawmakers of 1790 drew. See id. at 624. As with many other Constitutional provisions, the intellectual property clause was unanimously accepted as was the legislation that it authorized. Id.
19 MERGES, supra note 1, at 8.
20 See id. at 9.
21 See id. The original American inventive dispute, a type of pre-interference action, occurred over a conflict between two inventors who had made improvements to a boat in 1783. See Waltersheid, supra note 18, at 633.
expressed by the man responsible for the implementation of the first Patent Act of 1790 as Secretary of State, sometimes called the "father" of the patent in America. Thomas Jefferson stated:

Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property. If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breath, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from any body.23

This statement is a beautiful illustration of the theory of intellectual property and patent law dating back to the days of Aristotle and the Venetian Senate.24 As Jefferson observed, it is important for society to embrace the creator of new and useful things that may be utilized for society's own benefit.25 To encourage the release of these ideas for new and useful things, the inventor must be afforded the protection of his or her profitabili-
ty.26 Without this protection, there is no incentive to give these gifts to the world and, therefore, technological growth is stifled.27 It is the patent system in the United States and those throughout other nations of the world that encourage this deliverance of information to the global society.28 No other culture has so encouraged the "cultivation, production, diffusion, and legal control of new machines, tools, devises and processes as has Western culture since the eighteenth century."29

22 MERGES, supra note 1, at 9.
23 Id. at 483-84 n.1. Jefferson is known as father of America's patent system and even today is often quoted in all matters concerning patent law. Id. at 9.
24 See MERGES, supra note 1.
25 See id.
26 See id.
27 See id.
28 See id.
The purpose of this article is to discuss the patent systems used in the countries of North America. Though the nations of Mexico, Canada, and the United States have made strides toward toppling the barriers inhibiting free trade between their borders through implementation of the North American Free Trade Agreement (NAFTA), barriers in differences in the protection offered by each nation for intellectual property remain. The existence of three distinct patent systems in the NAFTA countries creates a situation whereby the inventor of a new product possessing marketable trade potential may not be afforded protection from infringement in the NAFTA countries. In this article, I will present an overview of the three distinct patent systems of the United States, Mexico, and Canada and demonstrate how they have been changed by NAFTA. An overview of the patent system of the European Community will be presented as an example of an attempt to unify the patent systems of its multiple nations in an effort to establish a free trade zone. This system will be compared to what already exists in North America and what might potentially be created upon attempts to unify this continent’s patent systems in a similar attempt at a truly free trade zone.


A. UNITED STATES.

The history of the American patent system predates the birth of the nation. The American colonists recognized the importance of sponsoring invention and enacted patent laws within the individual colonies. Massachusetts adopted the law of monopolies through the General Court in 1641. Soon after its enactment, this court granted the first patent in North America to Samuel Winslow for the method of manufacturing salt. After the Revolutionary War, proposals were made to the Constitutional Convention for the establishment of a protective system for inventors and authors. These proposals were incorporated in the U.S. Constitution in article I, section 8, clause 8. This clause gave Congress the power to promote the progress of science and useful arts through securing exclusive rights to inventors for their inventions and authors for their works. The creation of grants for patents established three important objectives: first, the inven-
tor was rewarded for his conception and perfection of his invention; next, there was a
stimulation of the inventor and others to further efforts toward inventive progress; and
finally, the securing of the public's access to important knowledge related to the nature of
inventions, as well as access to the use of the invention after the patent's expiration. The
founding fathers saw the significance and necessity of a strong patent system for the pro-
motion of useful arts and advancement of society.

Congress has the power to decide the policy that best satisfies the constitutional
objective of promoting the progress of the useful arts. In the second session of the First
Congress, Congress enacted the Patent Act of 1790, enabling the Patent Office to grant a
patent to any inventor complying with the terms of the Act—namely, that the person be
the first and true inventor or discoverer. At that time, the courts determined that this
requirement was satisfied by the first person to reduce the invention to practice. The
requirement was satisfied by a complete patent application and did not mandate that an
actual machine be created in every case.

In 1793, a new patent act was enacted that abolished the patent examination procedure
and established a prior inventorship defense to infringement. This defense allowed the
defendant in a patent infringement case to assert that the patented invention did not originate
with the patent holder but had been in use prior to the patent's issuance, or that the patent
holder had surreptitiously obtained the patent for another's invention. If the defendant
could prove this defense, the patent holder would lose the patent and there was no liability for
infringement. In 1836, another Patent Act altered this defense so as to provide a defense only
when the patent holder unjustly obtained the patent for the invention of another who was
using reasonable diligence in pursuing perfection of the same invention. U.S. case law estab-
lished the rule that the inventor does not have to bring his invention to the highest degree of
perfection to obtain a patent. The inventor only has to describe his invention with sufficient
clarity and precision to enable one skilled in the art to understand the invention, and describe
a practical way of putting it into operation. The courts considered a patent application a
constructive reduction to practice, legally sufficient to satisfy the related requirement. As of
1926, Congress recognized that the first person to file a patent application, satisfying the
requirements of section 112 of the Patent Act, was the first inventor and rightful patent holder
unless another party could prove they were in fact the first inventor.

39 See id.
40 See id.
41 See id.
42 See id. at 294.
43 See id.
44 See id. The Supreme Court held in Clark Thread Co. v. Willimantic Linen Co., 140 U.S. 481
   (1891), that the patent application satisfied the reduction to practice requirement. Id.
45 See id.
46 See id.
47 See id.
48 See id.
49 See id. at 295; see also Dolbear v. Am. Bell Tele. Co., 126 U.S. 481 (1891).
50 See Pritchard, supra note 32, at 295.
51 See id.
52 See id. 35 U.S.C. § 112 establishes the requirements of adequate disclosure in patent applica-
The determination of whether or not a person is the first inventor is made according to the statutory definition established when Congress rewrote the entire patent law in 1952.\textsuperscript{53} In this revision, Congress codified parts of the common law, refined the prior statutory law, and established totally novel laws.\textsuperscript{54} One important revision was found in section 102(g), which presented a definition for first inventor, and codified the theories under conception, reduction to practice, diligence, abandonment, suppression, and concealment.\textsuperscript{55} One result of this statute is that the interfering parties, the ones who file second patent applications, must establish the dates of conception and reduction to practice, the amount of diligence, and any abandonment, suppression, or concealment.\textsuperscript{56} The party second to file may be able to establish their priority by demonstrating the earliest invention date, or through establishing that the first inventor abandoned, suppressed or concealed the invention.\textsuperscript{57}

The first-to-invent system sets the American patent system apart from most of the rest of the world and has been a highly debated topic by scholars of intellectual property.\textsuperscript{58} Some scholars argue that this system is a roadblock to the future world harmonization of international patent law, especially considering the prominence of the United States in the field of intellectual property.\textsuperscript{59}

B. MEXICO.

Under Mexican law, a patent is a grant that gives an exclusive right for the exploitation of an invention.\textsuperscript{60} This right may be exercised either by the holder of the patent or by others with the authorization of the holder.\textsuperscript{61} Mexican law defines an invention as "any human creation which permits the transformation of matter or energy in nature for human use 'through the immediate satisfaction of a specific need.'"\textsuperscript{62} Mexico follows the first-to-file rule, by which the patent rights belong to the person whom first files for the patent, not to the first person to invent the thing, as in the United States.\textsuperscript{63}

The modern system of patent law began in Mexico in 1975 with the introduction of the Law on Inventions by Mexico's President Echeverria.\textsuperscript{64} The President and his Industry Secretary, Jose Sainz, promoted this law to aid the industrial development of Mexico. It was characterized as part of a "new international order" that would "eliminate the inventor's rights and the monopoly privilege of patents in favor of collective interest and the

\textsuperscript{53} Pritchard, supra note 32, at 297.
\textsuperscript{54} See id.
\textsuperscript{55} See id.; see also 35 U.S.C. § 102(g) (1984).
\textsuperscript{56} See Pritchard, supra note 32, at 298.
\textsuperscript{57} See id.
\textsuperscript{58} See id.
\textsuperscript{59} See id.
\textsuperscript{61} See id. at 77-78.
\textsuperscript{62} See id.
\textsuperscript{63} See id.
right of nations to economic independence.” The Law on Inventions was easily enacted with little debate in 1976. It seems that Mexico’s system of patent law vests a great deal more power in its government as compared to the system of the United States. This fact is a reflection of the Calvo doctrine, which incorporates nationalism into most of the Mexican laws, including those pertaining to intellectual property. The effect of the passing of the Law on Inventions was to “significantly diminish the rights of inventors.” The law reduced the term for patent protection to ten years, from the previous fifteen-year allowance. The effect of this change was to drastically reduce the value of Mexican patents. The Law on Inventions also increased the obligations upon patent holders, especially as pertaining to patent exploitation. These obligations regarding exploitation allowed the Mexican Government to exploit privately held patents or to require the licensing of the patented invention to a third party if the patent holder did not exploit the patent himself. Mexico required exploitation to begin within three years from the patent’s issuance date and this exploitation had to be demonstrated or proven by the patent holder. The importation of the patented product did not satisfy this exploitation requirement, leaving the obligation unfulfilled for many foreign patent holders. If the patent was not exploited within three years (or if certain other requirements were not satisfied) then third parties could apply to Mexico’s Bureau of Inventions and Trademarks.

65 See id. Jose Sainz observed that ninety-two percent of all Mexican patents were held by foreign inventors and only eight percent by Mexican citizens. Id. He maintained that the current patent system was favoring foreign nations over Mexico’s own interests. Id.

66 See id.

67 See id. at 284.

68 See id. The Calvo doctrine was developed by Carlos Calvo, an Argentinean jurist. See Borchard, The Diplomatic Protection of Citizens Abroad 795-809 (1915). This doctrine is essentially nationalist and isolationist in nature and has effected most aspects of the Mexican government. Id. This doctrine was incorporated into the Mexican Constitution and has remained an extremely influential part of Mexico’s foreign policy. Id. The NAFTA treaty has begun to erode the Calvo doctrine’s influence upon Mexico.

69 See Kransdorf, supra note 64, at 286. The Law also made four types of products and processes totally non-patentable including metal alloys, pharmaceuticals, chemicals, and biological inventions. Id. Other types of products were denied protection and offered only a non-exclusive certificate of invention, a concept from the Soviet Union that does not confer any exclusive rights or monopoly on the use of the invention, but only confers the right to receive royalties from any other party who uses it. Id. This theme is reminiscent of Thomas Jefferson's words on patent law. See Merges, supra note 1.

70 See id. at 287. It has been suggested that this term of ten years was enacted to correspond with the maximum permitted length of a technology transfer agreement, and to reflect the rapidity with which modern technology was changing. Id.

71 See id. This created problems for foreign licensors, especially those from the United States. Id.

72 See id. Exploitation is the active use of patents, which includes the production of the invention, the licensing of the invention, or other significant uses of the invention. Id.

73 See id. Most countries other than the United States have similar requirements that patents be used or exploited; however, the requirements of the Mexican Law on Inventions are unusually stringent. Id.

74 See id.

75 See id.
for a compulsory license allowing them to exploit the patent. At that time, the patent owner was afforded an opportunity to post a bond to secure his own performance to ultimately satisfy the exploitation requirement. The effect of these exploitation provisions was the licensing of patents in a fashion, and for a price, that was contrary to the desires of the actual patent holder. Additionally, if the patent holder was to cease the exploitation of the patent for any reason or failed to exploit it in sufficient volume, then he was in a position to lose his exclusive right to the invention. The Ministry of Patrimony and Industrial Development could grant a public benefit license if it determined that the public health, national defense, or other public policy concern so warranted. Notice and an opportunity for a hearing were provided, but these were merely conciliatory to the patent holder whose rights were being revoked. If the patent was not exploited within the three-year requirement and no compulsory license was applied for, the patent was deemed to expire and the invention was thrust into the public domain. No justifications for non-exploitation were accepted. The overall effect of such strict patent laws was that inventors were afforded only narrow and limited rights in their own inventions. The Mexican stance in the 1970s was visibly nationalistic and anti-patent.

In 1987, Mexico revised its patent laws. In October of 1986, Mexican authorities submitted a bill to the Senate to amend the 1976 Law on Inventions, which was subsequently passed by the Mexican Legislature. There were significant changes to Mexico's intellectual property laws incorporated into this amendment. These laws, however, did not break new ground or change the spirit of the 1976 Law. The passing of the 1987 amendment was an effort to bring the Mexican patent system more in line with the International Convention for the Protection of Industrial Property, commonly referred to as the Paris Convention. As a result, the term for patent protection (and for certificates of invention) increased from ten to

76 See id.
77 See id. If the patent holder does not post the allowed bond, a hearing was held by the Bureau of Inventions and Trademarks for determination of whether the third party's compulsory license should be granted. Id. If it was so determined, then the National Registry for the Transfer of Technology was consulted to set the terms of the licensing. Id. The patent owner or the third party licensee could petition for the modification of the set terms. Id. at 288. If the compulsory license was granted, the patent holder was required to furnish the technical information needed to enable the licensee to exploit the patent. Id.
78 See id. Even cessation of exploitation for unprofitability could trigger the loss of rights in the patent. Id.
79 See id.
80 See id.
81 See id.
82 See id.
83 See id.
84 See Kransdorf, supra note 64.
85 See id. at 290.
86 See id.
87 See id.
88 See id.
89 See id. The Paris Convention is a union of almost ninety nations, including Mexico, that have agreed to provisions for the protection of international patents. Id.
fourteen years. Other changes included extending the time when a patent was held to lapse. It was provided that no patent would be declared to have lapsed before at least two years from the grant of the first compulsory license, but patents were still subject to compulsory licensing after three years of non-exploitation by the inventor. However, the requirement that compulsory licensors provide to licensees the technical information necessary to the exploitation of the patent was abolished. Another change presented by this amendment was that the Mexican Patent Office began accepting Spanish translations of patent novelty examinations completed in countries belonging to the Patent Cooperation Treaty or the European Patent Office, including the United States, which is a party to the former. Though many of the revisions to the Law on Inventions constituted needed improvements to the Mexican patent system, for the most part the changes were not radical.

Until 1986, Mexico had postponed its membership to the General Agreement on Tariffs and Trade (GATT), and was the only major trading country not then a member. Since its joining, Mexico was bound to abide by that organization's decisions. This was the beginning of the modernization of Mexico's patent system, which improved very slowly until NAFTA. The prospect of NAFTA was the catalyst for major change to this system in an effort to unify the North American continent in free trade. "Mexico is [still] a developing country, with limited resources and a need for modernization and new technology." Mexico's patent laws maximized the utility of technology transfers while limiting the cost to Mexico, and in so doing, they created barriers to international trade, foreign investment and technology importation. Reforms to the Mexican patent system, as influenced by the United States and NAFTA, will eventually increase the transfer of technology and foreign investment in Mexico, thereby enriching the economies of all nations involved.

See id. at 291. The fourteen-year protection period was still shorter than the pre-1976 Mexican law and the then-existing United States law. Id. There were also revisions in what matter was patentable. Alloys, pharmaceuticals, and pesticides became patentable, while chemical products and biotechnological products remained unpatentable. Id. These unpatentable products were to become patentable ten years after the bill became law. Id. Certificates of invention were abolished except for those for biotechnological processes to make products for human consumption. Id.

See id. at 290.

See id. at 291.

See id.

See id. The United States was one of the 35 initial parties to the Patent Cooperation Treaty, initiated on June 19, 1970, which allows for the filing of a single international patent application. Id. (citing Creel & Wintringham, Patent Systems and Their Role in the Technological Advance of Developing Nations, RUTGERS COMPUTER & TECH. L.J. 267-68 (1984)).

See id. at 294.

See id. Several justifications for this reluctance to join GATT that have been suggested include Mexico's fear of export or similar restrictions, belief that oil wealth would obviate the necessity of membership, and a seemingly irrational suspicion about the eagerness of the United States to have them join. Id.

See id.

See id.

See id.

See id. at 295.

See id. at 291.

See Krandsdorf, supra note 64.
C. CANADA.

The intellectual property laws in Canada are similar to those of the United States.\textsuperscript{103} But the history of Canada's development of its system deserves some attention, along with the U.S.-Canada relationship regarding intellectual property prior to NAFTA.\textsuperscript{104}

In 1985, Canada established a first-to-invent patent law system.\textsuperscript{105} In October of 1989, this system was changed by the Patent Act to a first-to-file system that resembled those of Europe and Japan.\textsuperscript{106} A significant feature of this Act can be seen in the implementation of its hybrid absolute novelty requirement.\textsuperscript{107} This hybrid requirement mandates that the claimed invention be novel in view of any disclosure, except one by the inventor, that is available to the public at the date of filing or the priority date of the application.\textsuperscript{108} If the inventor had disclosed the invention, a patent application must be filed in Canada within a year of that first disclosure.\textsuperscript{109} Another feature of this Act was that Canadian patent applications became open for public inspection eighteen months after the filing or priority date.\textsuperscript{110}

Another important aspect of Canada's patent system, when viewed historically since NAFTA, was its treatment of pharmaceutical patents.\textsuperscript{111} In 1969, Canada began requiring the compulsory licensing of patented pharmaceutical products by foreign drug manufacturers and offered no term of guaranteed exclusivity in its national market.\textsuperscript{112} Drug manufacturers could produce generic drugs in Canada that were recently patented in any other country (including the United States) by simply notifying the patent holder and paying a fixed royalty fee of four percent.\textsuperscript{113}

Though it did not include any separate chapters on intellectual property, the U.S.-Canada Free Trade Agreement of January 1988 (CFTA), the pre-NAFTA agreement between these two countries, addressed issues such as the compulsory licensing practice.\textsuperscript{114} During the CFTA negotiations, the countries agreed to ten-year terms of exclusivity for pharmaceutical products patented outside Canada, and a seventeen-year term for those completely developed within Canada.\textsuperscript{115} In 1993, Canada eliminated the compulsory licensing provisions of its Patent Act through implementing the Patent Act Amendment Act of 1992.\textsuperscript{116} Under this Act, no new compulsory licenses were to be issued, and those issued after December 20, 1991 were deemed to expire.\textsuperscript{117}

\textsuperscript{104} See id.
\textsuperscript{106} See id.
\textsuperscript{107} See id.
\textsuperscript{108} See id.
\textsuperscript{109} See id.
\textsuperscript{110} See id.
\textsuperscript{111} See Del Valle, supra note 103.
\textsuperscript{112} See id.
\textsuperscript{113} See id.
\textsuperscript{114} See id.
\textsuperscript{115} See id.
\textsuperscript{116} See Mendes da Costa, supra note 105, at 75.
\textsuperscript{117} See id.
Though the CFTA solved some discrepancies between the Canadian and American patent laws, it created others.\footnote{118} Canada exempted cultural industries from the provisions of the CFTA, including those that deal with intellectual property.\footnote{119} This exemption reserved the right to protect its industries through any action in the national interest; Canada could deny national treatment or minimal patent protection to certain industries of the United States or Mexico.\footnote{120} NAFTA dealt with this issue, but did little to remedy the problem.\footnote{121}

Canada permitted compulsory licensing if a patent was being abused through non-exploitation or product importation.\footnote{122} The determination of whether to grant a compulsory license was made by the Commissioner of Patents, who was given broad discretion in giving these grants.\footnote{123} Canada dealt with this issue prior to NAFTA negotiations in order to comply with the ultimate provisions of the Agreement.\footnote{124}


NAFTA has been the most substantial step to date toward an integrated economic North American, and Western Hemispheric, free trade zone.\footnote{125} The purpose of NAFTA is to break down barriers obstructing the free flow of commerce between the United States and its neighbors on the continent, Canada and Mexico.\footnote{126} “Nowhere is international cooperation in the progressive development and codification and international economic law more evident than in the sphere of intellectual property rights.”\footnote{127} NAFTA is the first international trade agreement to include a comprehensive scheme covering the protection of intellectual property rights.\footnote{128} In fact, NAFTA includes as one of its six objectives to “provide adequate and effective protection and enforcement of intellectual property

\begin{itemize}
\item \footnote{118} See Del Valle, supra note 103.
\item \footnote{119} See id. at 9.
\item \footnote{120} See id.
\item \footnote{121} See id.
\item \footnote{122} See Mendes da Costa, supra note 105, at 76.
\item \footnote{123} See id.
\item \footnote{124} See id.
\item \footnote{125} See James A. R. Nafziger, NAFTA's Regime for Intellectual Property: In the Mainstream of Public International Law, 19 HOUS. J. INT'L L. 807, 808 (1997).
\item \footnote{126} Id. Article 1701, paragraph 1, is an example of the ambitious scope of the NAFTA: “Each Party shall provide in its territory to the nationals of another Party adequate and effective protection and enforcement of intellectual property rights, while ensuring that measures to enforce intellectual property rights do not themselves become barriers to legitimate trade.” Allan Wright, The North American Free Trade Agreement & Process Patent Protection, 27 INTELL. PROP. L. REV. 47, 72 (1995).
\item \footnote{127} See Nafziger, supra note 125, at 808.
\item \footnote{128} See id.
\end{itemize}
NAFTA requires that each member make patents available for any inventions, whether products or processes, provided that the inventions are novel, result from an inventive step, and may be applied to industrial purpose. These requirements of inventive step and industrial application are synonymous with the U.S. requirements of non-obviousness and usefulness. The similarities between member countries' laws regarding the requirements for patentability allowed for reduced debate on this issue during negotiations, but articles 1709(2) and 1709(3), which set forth certain exclusions from patentability, still remain controversial. These provisions reflect the differences in patentable subject matter among NAFTA members, as well as an attempt to accommodate for these differences.
The articles discussed above provide for exclusions from patentability for certain inventions to protect public order and morality. For exclusion there must be some finding that the particular product or process would endanger the life or health of the public or seriously prejudice the environment.

Article 1709(5) of NAFTA basically restates the essential rights of a patent holder already in place in the member nations. This article provides that a patent holder may prevent unauthorized parties from making, using, or selling the subject matter of a product patent, and prevent unauthorized parties from using the process in using, selling, or importing a product derived from a patented process. The laws of the United States, Mexico, and Canada are very similar, and this section of NAFTA was not hotly debated; however, this might not be the case for nations acceding to the treaty in the future. This article also requires that NAFTA members permit patent holders to fully transfer, assign, and license their patents.

Article 1709(7) provides for nondiscrimination policies for patents. The provisions of this article require that patents be available and rights enjoyable without discrimination as to the field of technology, the territory of the party where the invention was made, or whether the products are imported or locally produced. The requirement relating to field of technology means that member countries cannot single out particular technologies for discriminatory treatment. Prior to NAFTA, Canada's laws discriminated against certain technologies, specifically in the form of permitting compulsory licenses for particular products such as pharmaceuticals. During NAFTA negotiations, the United States vigorously argued that various compulsory-licensing provisions (especially under these Canadian laws) singled out the pharmaceutical industry for discrimination. The United States prevailed on this issue, causing Canada to abolish the associated laws. The next issue involving discrimination relates to the territory where the invention is made. NAFTA also prohibits member nations from discriminating on the

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138 NAFTA, supra note 129, art. 1709(2)-(3).
139 Id. Article 1709(2) was designed to protect human, animal or plant life or health or to protect the environment. Neff & Smallson, supra note 131, at 71. The United States disagrees with the ability of a member nation to apply this exclusion in light of its predisposition to issue patents if the requirements of novelty, non-obviousness, and usefulness are met. Id. Mexico, on the other hand, has moral and religious concerns regarding the patentability of living things, and under its laws, genetic material is not patentable. Id. Article 1709(3) of NAFTA permits each nation to exclude at its option surgical methods, plants and animals other than microorganisms, and biological processes for the production of such plants and animals. Id. at 71-72.
140 See id. at 75.
141 See id.
142 See id.
143 See id.
144 NAFTA, supra note 129, art. 1709(7).
145 See id.
146 See id.
147 Neff & Smallson, supra note 131, at 76.
148 See id. The U.S. pharmaceutical industry put pressure upon the government during these negotiations. Id.
149 See id.
150 See id.
basis of where the patent was made. Member countries must consider inventive activity internationally, not just domestically. This provision was directed at the United States' discriminatory practices as, prior to NAFTA, the American system required that only inventive activity within the United States could be considered during a patent application. Due to article 1709(7)(b), the United States, and the other member countries, may no longer discriminate against foreign patent holders through laws that result in the consideration of only domestic inventive activity. Lastly, NAFTA prohibits the discrimination of imported products and aims to end the enforcement of domestic law of its members that so discriminate. Article 1709(7) is designed to curtail the domestic laws of the member nations that discriminate against another member's products. Canada, for example, was forced to recognize importation as satisfying its local working requirement, which previously had forced patent holders to exploit (work) their patents in that particular country, with failure to do so resulting in forced licensing. The United States had no such laws prior to NAFTA, whereas Mexico does permit the granting of compulsory licenses for failure to exploit unless the patent holder has been importing the patented product or the products made with a patented process. Mexico's laws relating to this issue, however, are consistent with article 1709(7).

In article 1709(8), NAFTA provides for the revocation of a patent if such grounds exist that would justify the refusal to grant the patent or the grant of a compulsory license has not remedied the lack of the patent's exploitation. Part (a) of this article simply affirms the patent revocation doctrines recognized in all three of the member countries. Part (b), however, is not as universal in nature as compared with the laws of the member nations. In Canada, if a compulsory license is granted because the patent holder refuses to exploit the patent and it is still not exploited within two years, the patent may be revoked. The United States has no law creating such an obligation. Thus, article 1709(8) accommodates these differences.

151 See id. Geographical Indicators: NAFTA's protection of geographical indicators will prevent the dissemination of misleading designations or representations to the public about products. ANTHONY D'AMATO & DORIS ESTELLE LONG, INTERNATIONAL INTELLECTUAL PROPERTY ANTHOLOGY 246 (1996). Such products must contain accurate and not misleading indicators of national origin. Id.

152 NEFF & SMALLSON, supra note 131, at 76.

153 See id. at 77.

154 See id.

155 See id.

156 See id.

157 See id.

158 See id.

159 See id.

160 NAFTA, supra note 129, art. 1709(8).

161 NEFF & SMALLSON, supra note 131, at 78. The Paris Convention does allow the compulsory licensing of patents if a patent holder uses the patented invention for his exclusive use. See D'AMATO & LONG, supra note 151, at 247. The rights to a patent can be forfeited under the Paris Convention if the patent holder's exclusive use is not corrected in the mandatory issuance of a compulsory license. Id.

162 NEFF & SMALLSON, supra note 131, at 78.

163 See id.

164 See id.
The issue of compulsory licensing is dealt with in article 1709(10). This article sets forth narrow conditions for the permitted use of a patent without the authorization of the patent holder, allowing both the government and parties given governmental authorization to use such patents in this way. Each use of the patent must be considered individually so there is no blanket authorization, and the proposed licensee must have previously attempted to gain authorization from the patent holder on reasonable commercial terms. Any compulsory license issued is limited in scope and duration as the purpose for authorization allows, and this use is nonexclusive and nonassignable and intended primarily for the supply of the party's domestic market and upon payment to the patent holder of reasonable compensation. When the circumstances that mandated the compulsory license no longer exist and are not likely to return, the compulsory license is terminated. The granting of such use of a patent without the patent holder's authorization will affect the United States in situations where licenses are given for governmental use, as example, where statutory provisions automatically license the U.S. Government to use inventions in industries such as aerospace and defense.

The duration of patents was another important issue and was addressed by NAFTA in article 1709(12). This article recognized the differences among the member countries' patent laws and allowed some flexibility. Article 1709(12) provides that each nation make patent terms for either a period of twenty years from the filing date of the patent or for seventeen years from its date of issue, giving the domestic governments the choice between the two. The current Mexican and Canadian laws influence the twenty-year option, where the seventeen-year option reflects the American law. Article 1709(12) also provides for an extension of the patent term to compensate for any delay occurring during the regulatory approval process.

165 NAFTA, supra note 129, art. 1709(10).
166 NEFF & SMALLSON, supra note 131, at 78.
167 See id. at 79.
168 See id.
169 See id.
170 See id. at 80.
171 NAFTA, supra note 129, art. 1709(12). Again, patents may be revoked if (1) grounds exist that would have justified a refusal to grant the patent initially, or (2) the grant of a compulsory license cannot remedy the absence of patent exploitation or "working." See D'AMATO & LONG, supra note 151, at 244.
172 NEFF & SMALLSON, supra note 131, at 81.
173 NAFTA, supra note 129, art. 1709(12).
174 NEFF & SMALLSON, supra note 131, at 81.
175 See id.
IV. NAFTA's Effect on National Laws.

In an effort to conform to NAFTA's minimum standards for patent protection, the three member nations were forced to adapt their domestic laws. Changes were necessary to the patent laws of Canada, Mexico, and the United States.

A. CANADA.

The most drastic changes were required of the Canadian patent system. Canada took steps to conform its laws through the Patent Act Amendment Act of 1992, and the North American Free Trade Agreement Implementation Act of 1993; additional steps to amend the Patent Act were taken through the Intellectual Property Law Improvement Act of 1993.

Article 1709(7) provided for nondiscrimination as to field of technology for patents and required many changes to Canada's compulsory licensing doctrine for the pharmaceutical industry. Canada previously required the patent holders of such products to grant licenses to third parties upon the payment of a royalty. The Patent Act Amendment Act of 1992 eliminated Canada's compulsory licensing of pharmaceuticals and extended to such products the full twenty-year patent term for protection. This amendment to the Canadian Patent Act applied retroactively as of December 1991.

Article 1709(7) required changes to remedy Canada's other discriminatory practices including those relating to imported patented products or products of patented processes. Before NAFTA, Canadian law granted patent licenses to applicants if the patent was not exploited within three years from the date of issue. In these situations, applicants could apply for compulsory licenses for the use of a patent. During NAFTA negotiations, the United States argued that such requirements were discriminatory because of their lack of recognition of exploitation within the other two member nations. Section 196 of the NAFTA Implementation Act negated the availability of such compulsory licenses for lack of Canadian exploitation. NAFTA does allow for the compulsory licensing (or governmental use) of patents under limited circumstances. Twelve requirements for compulsory licensing exist. Four important requirements relating to the Canadian situation are: (1) the proposed licensee must have made an effort to obtain authorization from the patent holder on reasonable terms, and these efforts must have
been unsuccessful within reasonable time requirements; (2) the scope and duration of the use (of the license) must be limited to a specific purpose for which it is authorized; (3) the use must be nonexclusive; and, (4) the authorization of the use is terminated when the circumstances necessitating it cease and are unlikely to reoccur. Because of these NAFTA provisions several of Canada's compulsory licensing sections of the Patent Act have been repealed. Repealed provisions of the Act dealt with the right of the Commissioner of Patents to grant exclusive compulsory licenses, consideration of previous work done by any previous licensees with a view to testing the commercial value of the invention in Canada, and the guidelines used by the Commissioner in settling the terms of an exclusive license.

Canada had to amend its patent laws to deal with the requirements of NAFTA Article 1709(11), which provided that the burden of proof in process patent infringement cases must be on the defendants. Section 193 of the NAFTA Implementation Act established the burden of proof requirements in such infringement cases to comply with NAFTA.

So, with the implementation of NAFTA, slight changes had to be introduced into the Canadian patent system. These changes were comparatively minor when compared to the Canadian revisions that had already taken place. In light of the rapid changes to Canadian patent law, it is impossible to predict with certainty how stable the system will be in the future. Most likely the international view of intellectual property protection displayed in the provisions of NAFTA will hold Canada's system on course with the other member countries and serve to retain the changes conforming to the treaty.

B. MEXICO.

Over the last twenty years, Mexico has initiated the move from a protectionist economy to a global economy. This economy is supported by the nation's two main draws of foreign currency: the maquiladora industry and tourism. The passage of NAFTA

190 See id. at 76-77.
191 See id. at 77.
192 See id.
193 See Neff & Smallson, supra note 131, at 82.
194 See id.
195 See Mendes da Costa, supra note 105, at 83.
196 See id.
197 See id.
198 See id.
200 The Maquiladora Program, also known as the In-Bond Program, was established by the Mexican government in 1965. Pentex International, Ltd., Maquiladora Program (visited Mar. 16, 1998) <http://www.PentexInt'l.com/maquiladora>. The purpose of this program was to help reduce the unemployment problem along the U.S.-Mexico border. Id. The program allows foreign companies to establish assembly or manufacturing plants in Mexico while utilizing U.S. components in the industrial process. Id. Hundreds of large American corporations and small firms have established over 1900 plants in Mexico. Id. A company may be incorporated with 100% foreign capital if it is participating in the Maquiladora Program. Id. Items assembled and manufactured under the In-Bond Program are not to be sold or disposed of in Mexico except under certain circumstances. Id.
201 See id.
moved Mexico further away from its former nationalistic and protectionist policies. NAFTA's effects have been both direct, as in the case of intellectual property protection afforded to foreign investors, and indirect, through setting the stage for development of business, political, and economic relationships with the United States in pursuit of a unified North American marketplace. These effects really began with Mexico's efforts to join the global economy in the 1980s, when inflation dropped to single digits from 160 percent. Its Gross Domestic Product also grew between 1989 and 1992, and direct investment in Mexico increased by almost 600 percent to reach $24.6 billion before 1992, and $75 billion in 1992 (three times the 1986 level). It was under this theory of economic expansion and international trade that Mexico began to change its patent system to conform to its trading partners and ultimately prepare itself for the intellectual property provisions of the NAFTA.

To prepare for NAFTA, Mexico had to make extensive changes to its patent laws. In June of 1991, Mexico passed the Law for the Promotion and Protection of Industrial Property (IPL) to comply with NAFTA's patent provisions. In December of 1993, Mexico enacted a new Foreign Investment Law, which met its obligations under NAFTA and finalized the national reformation that had started in 1989. This law introduced regulations to open and liberalize what had previously been an economy virtually closed to foreign investment due to the extremely restrictive Foreign Investment Law of 1973. This opened Mexico's economy to foreigners by allowing foreign investors to at last own more than forty-nine percent of entities in most areas of the economy.

Mexico worked closely with the United States to make the improvements enacted through the IPL, which was a preview to NAFTA negotiations. The alterations to the Mexican patent system brought it into closer conformity to the United States system.

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202 See Marrero & Renert, supra note 199, at 78.
203 See id. Mexico hopes that through NAFTA it might achieve a regulatory framework under which foreign and Mexican investors can be reassured of the permanence of its domestic economic reforms. See Gonzalez, supra note 130, at 316. Through the guaranteeing of access to the United States market, Mexico hopes that it will follow the Canadian example and secure the continued entry for its $29 billion of American directed exports, which represent at least 70 percent of Mexico's total trade. Id.
204 Marrero & Renert, supra note 199, at 78.
205 See id.
206 See Marrero & Renert, supra note 199.
207 NEFF & SMALLSON, supra note 131, at 82.
208 See id. Besides the 1991 Industrial Property Law, the Mexican government's enormous movement away from socialization and toward privatization is exemplified by Mexico's reform of its agricultural property rights. Gonzalez, supra note 130, at 317. Article 27 of the Mexican Constitution compelled the government to give land to anyone requesting it. Id. This system has been restructured since 1991 by eliminating article 27. Id. Well-defined private ownership rights have been implemented so that land can be rented or sold. Id. at 318.
209 See Marrero & Renert, supra note 199, at 79.
210 See id.
211 See id.
212 See NEFF & SMALLSON, supra note 131, at 82.
213 See generally Marrero & Renert, supra note 199.
Patent terms were extended from fourteen years to twenty years from the date of filing and the lives of pharmaceutical patents can be extended for an additional three years. Patent holders who obtained their patents under Mexico's former laws retained their protection for the remainder of their fourteen-year term but were subject to the provisions of the new laws. Products that are patentable under the new law must be novel, which is defined as the result of inventive activity and susceptible to industrial application (similar to U.S. law). Under this new system, patents may be issued for all processes and products, including alloys, beverages, biotechnologies, chemicals, foods, pharmaceuticals, and plant varieties (though there are many restrictions and exceptions under NAFTA for all sorts of biological patents). Expressly omitted from patent protection are biological processes for reproducing or obtaining plant varieties, animals or their varieties, plant and animal species or breeds, natural biological material, or human genetic material. Under the new law an inventor is provided protection from the date of filing, so as to prevent the possibility of one's license being stolen between the time of submission and date of issuance of the patent (a typical first-to-file system). Where the patent originates in another country, the first filing date in any member country may be recognized as the priority date, so long as the patent application is filed in Mexico in accordance with terms of an international treaty, and filed within one year from the original filing date (this complies with the nondiscrimination mandates of NAFTA). The IPL also incorporated protection of utility models, having only a ten-year term of protection and less stringent regulatory standards (such as mere domestic Mexican novelty). An area of importance that was left unreformed by the ILP was patent protection for plants.

Mexico was unwilling, not surprisingly, in light of its historic nationalistic and isolationist paradigm, to make any further significant changes to its patent laws or its intellectual property system in general because it believed that it had already conformed its laws with the requirements of NAFTA. Mexico agreed in the negotiations to comply with the provisions of the 1978 or 1991 International Convention for the Protection of New Varieties of Plants (UPOV) within two years from NAFTA's signature. As of 1994, Mexico had not made any express changes in its laws to comply with the UPOV. While

214 See id. at 84.
215 See id.
216 See id. at 85.
217 See id. The 1991 Industrial Property Law eliminated much of the inconsistencies between the Mexican and the U.S. pharmaceuticals prices that were the result of the wholesale patent pirating of American drugs. Gonzalez, supra note 130, at 319. That intellectual property law broadened the patent protection by extending its duration from fourteen to twenty years and by limiting the use of compulsory licenses. Id. The full cost of research and development was not forced into the Mexican pricing system because the Mexican government intentionally kept the coverage of parallel importing ambiguous. Id.
218 See Marrero & Renert, supra note 199, at 85.
219 See id.
220 See id.
221 See id.
222 See NEFF & SMALLSON, supra note 131, at 83.
223 See id.
224 See id.
225 See id.
the IPL increased the protection for patent holders to a level that was generally equal to that found in most industrialized nations—there were many flaws and loopholes within Mexico's patent system—these problems are substantially resolved by NAFTA.226

Though Mexico's changes to its patent system provide increased protection "on paper, it is the application and enforcement of these laws [that] will increase a foreign investor's confidence in Mexico."227 Patent infringement should now be addressed through civil, criminal, and administrative actions.228 Included in criminal patent offenses are infringement of patents, utility models, and industrial design matters.229 Unfortunately, there is a real possibility that Mexico will not enforce these laws and policies as stringently as they are written.230 There has been some evidence of enforcement, however, in Mexico's efforts to increase foreign investor confidence through a series of high-profile raids and criminal prosecutions.231 The Mexican government in 1993 established an Intellectual Property Commission comprised of officials from the treasury, interior, education, and commerce departments, to ensure compliance with, and enforcement of its intellectual property laws.232

Perhaps the most significant characteristic of the reforms implemented by Mexico to conform its patent system to the provisions of NAFTA is not what has been written, but what still lies ahead.233 Mexico, Canada, and the United States will inevitably begin to share a common vision of the continent's economic market and for the potential to create opportunities for one another as their political, business, and social relationships develop.234 With these developments will come changes in the systems for protecting the rights of political neighbors and trade partners and changes in national roles in the global community.235

C. United States.

Fewer changes were required to U.S. patent laws to conform to NAFTA's requirements as compared to the other members; however, these changes were extremely controversial.236 The most major change was to the U.S. provisions embodied in 35 U.S.C. § 104 requiring that inventive activity occurring only within the United States would be considered for purposes of patent application proceeding or during litigation.237 During NAFTA negotiations, Mexico and Canada argued that the effects of this practice were discriminatory to inventive activity occurring in Mexico and Canada.238 Mexico and Canada

226 See Marrero & Renert, supra note 199, at 88.
227 See id.
228 See id.
229 See id.
230 See id. at 89.
231 See id.
232 See id.
233 See id. at 94.
234 See id.
235 See id.
236 See Neff & Smallson, supra note 131, at 83.
237 See id.
238 See id.
also argued that more rights were given to plaintiffs during infringement proceedings if the patents were developed in the United States than if they were developed abroad.\textsuperscript{239} The result was an amendment to 35 U.S.C. § 104 to recognize inventive activity outside the U.S. borders.\textsuperscript{240} The amendment states:

In proceedings in the Patent and Trademark Office, in the courts, and before any other competent authority, an applicant for a patent, or a patentee, may not establish a date of invention by reference to knowledge or use thereof, or other activity with respect thereto, in a foreign country other than a NAFTA country or a WTO member country, except as provided in Sections 119 and 365 of this title.\textsuperscript{241}

Proving the date of first invention usually requires an extensive discovery process and doing so in nations such as Canada and Mexico would be very difficult given the differences in their judicial systems and discovery procedures (as the United States argued during negotiations).\textsuperscript{242} U.S. negotiators (as well as some industry associations) wanted assurances from Mexico and Canada that they would implement legislation recognizing that evidence relevant to the origin and time of invention would be subject to U.S. discovery procedures to the same extent as if such acts had occurred in the United States.\textsuperscript{243}

The negotiations prior to formalizing NAFTA demonstrated great effort on the parts of the United States, Mexico, and Canada to bring the agreement in as close conformity to that nation's own intellectual property laws.\textsuperscript{244} The final result is a mixture of each nation's system of patent law, with the United States system proving to be the most influential.\textsuperscript{245} This is an essential step toward the formation of a single patent system within the present NAFTA member nations and those who may join in the future.\textsuperscript{246}

Current intellectual property policy in the United States has been characterized as composed of three basic principles: (1) the need for a defined system for minimum patent protection; (2) a recognition that patent rights are only as good as their enforcement mechanisms; and (3) a willingness to set aside antagonistic issues to facilitate multinational agreement-making.\textsuperscript{247} These principles operate through a parallel policy of multinational action and organizations such as NAFTA and GATT.\textsuperscript{248} Only through international agreements like NAFTA and GATT can there be effective transcendence of the problems of extraterritorial enforcement of patent rights.\textsuperscript{249} Justification for the

\textsuperscript{239} See id.
\textsuperscript{240} See id.
\textsuperscript{242} See NEFF & SMALLSON, supra note 131, at 84.
\textsuperscript{243} See id.
\textsuperscript{244} See generally NEFF & SMALLSON, supra note 131.
\textsuperscript{245} See id.
\textsuperscript{246} See id.
\textsuperscript{248} See id.
\textsuperscript{249} See id.
international protection of intellectual property has been argued on three principles: (1) intellectual property protection stimulates technological innovation, (2) technological innovation contributes beneficially to economic growth, and (3) development through economic growth is desirable throughout the continent.250

V. The European Union’s Patent System.

In the post-World War II era, six countries established the European Community.251 The subsequent European Union has demonstrated that economic freedoms and prospects for peace are enhanced by the integration of national trade markets.252 The European harmonization process was fueled by the 1992 objective of a Europe without economic frontiers.253 This objective produced a community that regulated the parallel importation within its national territories that formed the regional trading bloc.254 Today, the European Union includes fifteen nations and establishes a common market providing free trade between borders.255

As early as 1961, the lack of a common patent system in the European Community created many problems.256 In 1977, the European Patent Office (EPO) was opened and solved many of the problems caused by the disharmonized patent systems.257 The European Patent Convention (EPC) prescribed the patent system under which the EPO operates.258 This patent system is the most prominent multinational harmonization approach in the world.259 The EPC established a multinational patent system under which a single patent application filed in the EPO provides a series of national patents within the parties participating in the Convention.260 The EPO coexists with the national

250 See id. at 584.
251 Thompson, supra note 30, at 506. This European Community is probably the most widely recognized international free trade bloc. Id. The European Community’s objective was to establish a foundation for a broad and independent community among peoples historically divided by bloody conflicts, by establishing an economic community. Id. Like NAFTA, the European Community establishes a general common market among its parties. Id. at 507.
252 See Gonzalez, supra note 130, at 321.
253 See id. at 325.
254 See id.
255 See Thompson, supra note 30, at 507. The Union now includes Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Portugal, Spain, Sweden, and the United Kingdom.
256 See id. at 509. The most important problems caused by this lack of a common patent system have been summarized as (1) inhibition of the free flow of goods in the whole common market; (2) lack of uniformity in the conditions of competition within the common market; and (3) lack of uniformity of the conditions of economic activity throughout the common market. Id.
257 See id.
258 See id.
260 See Thompson, supra note 30, at 509. Unfortunately, not all of the countries participating in the European community are included in the EPC. See id. at 509-10.
patent systems of each country party to the Convention. Essentially, the EPC enables an applicant to file a single patent application with the EPO, and, upon the EPO's acceptance of the application, the patent will mature into multiple individual national patents in the countries that the applicant has designated. The European patent is a group of national patent applications processed together and eventually given individual legal effect within discrete national boundaries. Local inventors and others within a limited geographical market can continue to use the less expensive national system to obtain single country patent protection. When used in combination with national applications, the Paris Convention and the PCT, the EPC allows for a large amount of flexibility in obtaining a patent in Europe.

A very important aspect of the European Patent Office is how it dictates the resolution of disputes. National courts, applying their own laws, adjudicate disputes concerning patent infringements. The EPC harmonized these laws to a great degree, though in the early years jurists tended to resolve infringement matters using their traditional national approaches. Multiple litigation over the same patent and technology often led to different outcomes in different countries, fostering many comparative studies. Increased experience with the EPC will increase the European courts' acceptance of new approaches and allow the shedding of their old ones, enabling these discrepancies to become less common.

The European Union is pursuing a multinational patent system that would provide for uniform protection and enforceability throughout the entire community. The European Patent for the Common Market (the Convention or CPC) discussed this pro-

261 See id. at 510.
262 See Thomas, supra note 259, at 294.
263 See id.
264 See Thompson, supra note 30, at 510.
265 See Thomas, supra note 259, at 294. The Paris Convention is the foundational patent harmonization treaty and remains the most significant influence on modern patent practice. Id. at 289. The Paris Convention was formed in 1884. Id. The three basic principals of the Convention are: (1) the patents of any nation shall enjoy the same protection for its patent in foreign territories as they do at home; (2) the filing date of a patent shall be given, internationally, the date obtained in its original national filing; and (3) patents shall have independent terms in each nation. Id. The PCT stands for the Patent Cooperation Treaty. Id. at 292. This treaty is open to any nation that is a party to the Paris Convention and provides for the filing of one patent application that can be enforced in many countries. Id. A party utilizing the PCT follows a two step procedure: (1) the applicant files an international application in one of the designates national patent offices, which has the effect of a national application in all of the countries that the applicant designates; and (2) after the international search authority conducts an examination and submits a report, the national stage begins where the applicant submits the application to national offices for individual national patent issuance (after further independent national examination). Id.
266 See id. at 295.
267 See id. at 294.
268 See id.
269 See id. at 295.
270 See id.
271 See Thompson, supra note 30, at 511.
This would provide for a true European patent where one office would issue a single patent that could be enforced in every country party to the CPC. This European Union (formerly Community) has been working on the CPC since 1958 and has still not ratified a final version. CPC advocates believe that such a unified patent system as proposed by the Convention would achieve the original European Community objective of promoting free international trade and competition within its territory. Infringement litigation would proceed through a national trial, but at the appellate level questions would be decided by a Common Appeals Court. This multinational court would relieve some of the problems associated with duplicative multinational patent enforcement litigation, but concerns over possible forum shopping at the trial court level would still persist. Today, European patent enforcement is a difficult task, consisting of complex multinational litigation that consumes resources and time.


Europe’s integration in the 1992 Single Market Program provides an obvious basis for comparison with NAFTA. The eventual attainment of multilateral free trade after the initial emergence of regional trading blocs could lead to a process of macro-harmonization of both the European Union (EU) and the NAFTA nations’ approaches to trade. NAFTA parties have a long-term interest in understanding the historical institutional process the EU has undergone in order to prepare for future harmonization.

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272 See id. This was the second such patent convention and is commonly referred to as the Community Patent Convention or the CPC. Id. The first version of the CPC was signed in 1975 in Luxembourg by the nine European Community countries then participating. Id. (citing Christian Hilti, The Future European Community Patent System and its Effects on Non-EEC-Member States, 18 AIPLA Q.J. 289, 294 (1990)). By 1985 only seven of the original nine countries party to the conference had ratified the CPC; the Convention could not be enforced until all nine of the nations ratified. Id. Some nations had constitutional problems with ratification. Id. In 1989 an updated version of the Convention was signed by the present twelve nations of the European Community, but this version, too, has yet to become ratified by all these nations. Id.

273 See Thomas, supra note 259, at 298.
274 See Thompson, supra note 30, at 511.
275 See id. at 512.
276 See Thomas, supra note 259, at 298.
277 See id. Despite three conferences attempting to enact the treaty, many European nationalists still have not ratified due to three significant factors. Id. First, because the European Patent Convention is basically very successful, few see reason to change from this proven establishment. Id. Second, the increasing size of the European Union suggests that applicants wish to obtain protection in discrete nations rather than within the entire Union. Id. at 299. Third, there are concerns about national sovereignty, which have led to much caution regarding the possibility of international courts adjudicating domestic rights. Id.

278 See id.
279 See Gonzalez, supra note 130, at 320.
280 See id.
281 See id.
Also, during NAFTA negotiations, President Salinas of Mexico looked very carefully at the European model. From the very beginning of the free-trade process, Mexico has looked to European reforms as examples of institutional progress without disintegration of political systems. Lastly, the combined gross domestic product of NAFTA parties is over $6.7 trillion, which nearly matches that of the entire European Union. The European Patent Convention is the most prominent example of regional patent system harmonization to date. This system is the best example of how NAFTA may be a building block toward North American patent system harmonization.

"The ... passage of the NAFTA presents a perfect opportunity to take a serious look into the possibility of forming a North American Patent Office (NAPO)." The member countries have already agreed to eliminate substantially all the barriers to trade between their borders. But one of the largest barriers to free trade that still remains are the three domestic patent systems of the members and the requirement that a product be subject to three separate patent regimes to be protected throughout NAFTA territory. This imposes a significant non-tariff cost that prevents actual free trade. A single patent system that could cover the entire continent (the entire NAFTA territory) would be a logical step toward achieving real free trade.

The foundation for the NAPO has already been laid by the intellectual property provisions of NAFTA and the harmonization of the members' domestic systems prior to the enactment of the agreement. The EPO could be used as a prime example (as a blueprint) for a multinational patent system for NAFTA members to use in implementing a NAPO.

The EU and NAFTA were both formed with the primary goal of fostering free trade and global competitiveness among their member nations. Though the EU did not initially recognize the importance of a unified patent system, there was concentration on simplifying the domestic systems of its member countries (symbolizing the EU's recognition of its importance today). NAFTA's comprehensive treatment of intellectual property rights shows a similar awareness of the importance of the protection of those rights within North America.

EU and NAFTA members are similar in many ways: both have comparable gross domestic products and populations, both are comprised of member nations with dis-

282 See id. at 321.
283 See id.
284 See Thompson, supra note 30, at 502-03.
285 See Thomas, supra note 259, at 294.
286 See generally Thomas, supra note 259.
287 See Thompson, supra note 30, at 521.
288 See id. at 522.
289 See id.
290 See id.
291 See id.
292 See id.
293 See id.
294 See id. at 522-23.
295 See id. at 523.
296 See id.
parate levels of income, and both have multiple national languages.297 Even with these similarities, NAFTA countries have not substantially followed the development of the EPO or seriously contemplated the formation of a NAPO.298

Based on the European example, a NAPO is economically feasible.299 The cost of a typical patent application in each of the NAFTA member countries is the same (about $4,500), comparable to the cost of an application at the EPO (with a five-country designation).300 As NAFTA begins to admit additional members, the cost of prosecuting patent applications within each country (in order to cover the entire free trade zone) will soon outpace the cost under a single multinational patent system.301 The benefits of the efficiency of such a multinational system, modeled after the European system, would be significant because the filing of a single application and a single examination would be the only requirement for total coverage within NAFTA territory.302

Although it is a more important market for foreign patentees than the other NAFTA members, the United States should not be deterred; uniform coverage could better protect U.S. investors.303 The extensive use of patent protection in Mexico and Canada under the NAPO would promote trade in all three members through the elimination of this last great trade barrier.304 U.S. manufacturers could more easily market more products to Mexico and Canada if a multinational patent that was as easily obtained as an American one protected them.305 The United States could use the momentum from NAFTA to move toward a single patent system, thereby continuing the economic integration of NAFTA members.306

297 See id. The goals of NAFTA and the European Community remain startlingly similar. See Gonzalez, supra note 130, at 329. NAFTA's objective of formally establishing a free trade area by eliminating barriers to trade through the progressive elimination of all tariffs on goods and by eliminating prohibitions and restrictions applied to goods at national borders is much like the impetus behind the formation of the EC. Id. Such impetus in North America to complete free movement of goods within the regional trading bloc should elicit institutional responses that will alter the individual state intellectual property systems that govern parallel importation, reflecting a multinational idea of intellectual property protection based upon the European model. Id.

298 See Thompson, supra note 30, at 523.
299 See id.
300 See id. at 523-24.
301 See id. at 524.
302 See id.
303 See id.
304 See id.
305 See id.
306 See id. at 525.
The remaining differences between NAFTA countries' patent laws would be a significant obstacle to the formation of a NAPO, but not an insurmountable one. The World Intellectual Property Organizations (WIPO) Treaty could provide a list of the revisions needed to harmonize the various patent systems in an acceptable way. A NAPO should operate under its own multinational patent laws as the EPO currently operates under the European Patent Convention and ultimately under the Community Patent Convention. It can be assumed that the United States, Canada, and Mexico would continue to maintain their individual domestic patent systems, so their laws should be aligned with the NAPO patent laws to avoid the evils of forum shopping and competition within NAFTA territory. To accomplish this regional harmonization, NAFTA members would have to make changes to their patent systems that would go far beyond the dictates of NAFTA's intellectual property provisions, and possibly changes that would go to the very character of their individual systems.

The first-to-file ideology for settling issues over title to rights when more than one inventor independently makes the same invention is adopted by the WIPO Treaty and, as discussed above, is the system already in place in both Canada and Mexico as well as most of the rest of the world. The United States would have to adopt such a system to comply with the WIPO Treaty; this is considered a very drastic change by many American scholars and small inventors. If the NAPO were established, the discrepancy between the first-to-invent American system and the first-to-file systems of the other members would allow for the possibility of the granting of patents to two different inventors for the same invention, resulting in conflicting patent rights, which is anathema to the idea of a unified system.

The WIPO Treaty provides for a twenty-year patent term beginning from the date of filing. The United States has increased its patent terms from an exclusive seventeen

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307 See id. The World Intellectual Property Organization (WIPO) is a specialized agency of the United Nations exclusively dealing with the subject of international intellectual property issues. D'AMATO & LONG, supra note 151, at 192. The WIPO headquarters is located in Geneva, Switzerland. Id. The WIPO's General Assembly is a representative body comprised of delegates from each of the 116 nations that form its membership. Id. The General Assembly appoints a Director General who is in charge of the International Bureau (Secretariat). Id. The current Director General is Bogsch. Id. The primary objectives of the WIPO are to promote the protection of intellectual property throughout the world and to administer the international intellectual property unions such as the Berne Convention (for copyrights) and the Paris Convention. Id. There are four major multinational unions that are governed by the WIPO; they are the Paris Convention, the Berne Convention, the Madrid Agreement and the Rome Convention. Id. These conventions cover all aspects of intellectual property including patents, copyrights, trademarks, industrial design, trade secrets, and neighboring rights. See D'AMATO & LONG, supra note 151.

308 Thompson, supra note 30, at 526.

309 See id.

310 See id.

311 See id.

312 See id.

313 See id.

314 See id.

315 See id. at 527.
years to twenty years in order to comply with this provision; Canada and Mexico had twenty-year terms already.\textsuperscript{316} Had such a discrepancy remained it surely would have lead to forum shopping based on whether an inventor wanted to shift forward his patent term beyond twenty years from the date of filing by using the American date of issue.\textsuperscript{317} A twenty-year patent term beginning from the filing date promotes the policies of U.S. patent law through encouraging early public disclosure and transfer of the patented technology to the public.\textsuperscript{318}

The WIPO Treaty is similar to the current laws of Mexico and Canada in that it provides for publication of patent applications eighteen months from the earliest date of filing.\textsuperscript{319} This would be another necessary change to the American patent system because such publication would ensure early access to technical information and eliminate the ability of applicants to keep their applications secret for many years prior to public disclosure of the invention.\textsuperscript{320}

Another conflict between the WIPO pattern for the NAPO is the provision in the treaty allowing prior user rights similar to those in place in Canada and Mexico.\textsuperscript{321} This would present another opportunity for potential forum shopping.\textsuperscript{322} Prior user rights involve the limited defense for any party who independently developed or used the subsequently patented invention—in good faith—before the patent holder's filing date.\textsuperscript{323}

While there are theories about the regional harmonization of NAFTA members' patent systems and the development of a North American Patent Office, there is a failure to provide complete solutions to the many problems presented with this matter.\textsuperscript{324} Some domestic laws of NAFTA members are consistent with the provisions of the WIPO but are still very different from the laws of other members.\textsuperscript{325} Many of the domestic laws are already in sync with the WIPO Treaty provisions since the enactment of NAFTA.\textsuperscript{326}

\textsuperscript{316} See \textit{id.} The Uruguay Round of the GATT negotiations in 1993 instigated significant change to the United States' patent laws upon the initiation of implementation legislation; the Uruguay Round Agreements Act. Karen Tripp & Linda Stokley, \textit{Changes in U.S. Patent Law Effected by the Uruguay Round Agreements Act—The GATT Implementation Legislation}, 28 INTELL. PROP. L. REV. 315, 316 (1996). The most significant change enacted through this Act was that the U.S. patent term was extended to twenty years beginning from the filing date of the patent. \textit{Id.} at 316.

\textsuperscript{317} See \textit{Thompson, supra} note 30, at 527.

\textsuperscript{318} See \textit{id.}

\textsuperscript{319} See \textit{id.} at 528.

\textsuperscript{320} See \textit{id.}

\textsuperscript{321} See \textit{id.}

\textsuperscript{322} See \textit{id.}

\textsuperscript{323} See Kyla Harriel, \textit{Prior User Rights in a First-to-Invent Patent System: Why Not?}, 36 \textit{IDEA: J.L. & TECH.} 543, 546 (1996). Prior user rights are not a reward for invention as a patent is, there is no limited monopoly granted, just a defense against a charge of infringement. \textit{Id.} Should the United states adopt prior user rights legislation it would be another step toward global and continental harmonization as these rights have been adopted by virtually every other developed country. \textit{Id.} at 566.

\textsuperscript{324} See \textit{Thompson, supra} note 30, at 528.

\textsuperscript{325} See \textit{id.}

\textsuperscript{326} See \textit{id.} at 529.
Clearly there would have to be many changes for total alignment of the three systems to allow for unification, but these changes would be consistent with the goal of promoting the progress of science of the useful arts as set forth by the American ideology.\textsuperscript{327} This goal would be furthered by the promotion of international cooperation and uniformity in the protection of inventions among the patent systems of the globe.\textsuperscript{328} As the leading industrial nation in North America, the United States will most likely lead the way for any harmonization efforts on the continent.\textsuperscript{329} During the 1980s and early 1990s, the United States made some attempts to harmonize its patent laws with the rest of the world; these attempts have to date been unfruitful.\textsuperscript{330} 

The United States participated in discussions for patent harmonization at the World Intellectual Property Organization in 1985, which was created by the United Nations for the purpose of worldwide promotion of patents and other intellectual property rights.\textsuperscript{331} There was potential for global harmonization with the drafting of a treaty of basic proposals and the meeting of a diplomatic conference in 1991.\textsuperscript{332} The final session of this conference was to meet in 1993, but the Clinton administration postponed it indefinitely, justifying the delay due to the need to reorganize the Patent and Trademark Office and select a new commissioner, and the need to formulate a clear position on patent harmonization.\textsuperscript{333} The WIPO's basic proposal would effect many changes to the U.S. patent system including changes to the seemingly sacred first-to-invent priority system, prior user rights, and the publication of applications.\textsuperscript{334} At that time the United States seemed to be on the path toward meaningful patent harmonization; if the contracting nations had adopted these proposals then, complete harmonization would not have been long in coming.\textsuperscript{335} This possibility of harmonization ended in 1994 when the United States Department of Commerce issued a press release announcing that the United States would maintain its system of first-to-invent and that it had no plans to resume patent harmonization negotiations at that time.\textsuperscript{336} This announcement left room for continued future harmonization negotiations through WIPO or bilateral agreements, but severely hampered any possible resolution by the appropriate parties, including the American Bar Association Subcommittee designated to discuss such matters.\textsuperscript{337} This subcommittee had been discussing the United States' efforts at harmonization through regional agreements such as NAFTA and GATT, and the possible concessions the United States should make to accommodate the global intellectual property system.\textsuperscript{338} 

\textsuperscript{327} See id.  
\textsuperscript{328} See id.  
\textsuperscript{329} See Pritchard, supra note 32.  
\textsuperscript{330} See id.  
\textsuperscript{331} See Pritchard, supra note 32, at 299.  
\textsuperscript{332} See id.  
\textsuperscript{333} See id.  
\textsuperscript{334} See id. at 301.  
\textsuperscript{335} See id. at 302.  
\textsuperscript{336} See id.  
\textsuperscript{338} See id. For harmonization to occur the United States would have to make four basic changes to its patent system. D'AMATO & LONG, supra note 151, at 342. In 1987, Donald J. Quigg, the Deputy Commissioner of Patents and Trademarks for the United States, announced that the
VII. CONCLUSION.

NAFTA provisions on intellectual property rights are a shining example of cooperation among scholars, government officials, and legal practitioners within the Western Hemisphere. This international protection of intellectual property rights is a crucial element in the larger system of NAFTA cooperation and an example of the capacity of the discrete regional authorities to create a regime of international economic law.340

Intellectual property rights are now, more than ever, a truly significant element in the international multigovernmental legal process.341

One thing remains certain: significant hurdles in actual implementation of the intellectual property provisions of NAFTA lie ahead. Only time will tell if NAFTA's enforcement measures can give real effect to the new doctrine of intellectual property rights on this multinational scale. The standards are clear, if the real intention behind them is not. These standards are now within the mainstream of international law.

A patent system in today's global, or at the very least continental, economy must do more than provide patent protection within discrete national borders. For Canada, Mexico, and the United States, NAFTA has been a substantial step toward this important goal of internationalization. To take this goal to its fullest extent, America and the other NAFTA members must pursue a multinational patent system.

Such a unified North American patent system incorporating Canada, Mexico, and the United States would be justified in view of the procedural advantages to be gained, though reduction in costs of obtaining the protection of a patent in these countries would not be great. When additional nations are invited to join NAFTA, the need for a more unified system covering the entire NAFTA territory will be more evident. Like

United States was contemplating making a change from a first-to-invent system to a first-to-file system in exchange for assurances from the other developed nations of the world that improvements would be made including an international twelve-month grace period; meaningful and fair protection based on patent claims including equivalents; a prohibition of pregrant oppositions; and the ability to file applications initially in English and rely on the original version if errors are found in translations. Id. The next significant change needed in the United States is the adoption of prior user rights. Id. Third, the United States would have to begin early disclosure of patent information; the U.S. argues for an extension from the general 18-month requirement to a 24-month period. Id. at 342-43. Lastly, the United States would have to amend its specifications as to the term of a patent's protection from 17 years from issue to 20 years from filing date; this goes along with the requirements of a first-to-file system. See id. at 343.

339 See Nafziger, supra note 125, at 826.
340 See id.
341 See id.
342 See Nafziger, supra note 125, at 828.
343 See id.
344 See id.
345 See id.
346 Thompson, supra note 30, at 501.
347 See id.
348 See id.
349 See id.
350 See id.
the EU, that expanded from six countries to twelve to today's fourteen, NAFTA will likely expand to reach other countries in the Americas as the benefits of free trade gain acceptance around the world.\textsuperscript{351} The similarities between NAFTA and the EU, in terms of size, trade volume, and population, make the two trading blocs easy to compare, and demonstrate the comparable value of a North American patent office to that of the Union.\textsuperscript{352}

The issues involving intellectual property rights and further attempts at harmonization have been on the table of the Clinton administration.\textsuperscript{353} For more than a decade, the strengthening of intellectual property protection on a global scale has remained a primary objective of America's international trade policy.\textsuperscript{354} The Clinton administration has been committed to strong action under the laws available to ensure that some of the most precious resources America has to offer, namely the results of innovation and creativity, are adequately protected abroad.\textsuperscript{355} It has been the declaration of the Clinton administration that over the next years the U.S. PTO will follow the lead of President Clinton in dealing with issues involving multinational treaties and domestic intellectual property policy.\textsuperscript{356}

The example of NAFTA emphasizes the growing interdependence of nations and the impact of transnational accords on the formation and development of governmental policies.\textsuperscript{357} Efforts by the United States, Mexico, and Canada to meet the challenges of vigilant protection and reform demanded by NAFTA have not been easy.\textsuperscript{358} Though cultural, technological, and political differences make the adoption of a uniform framework for the protection of intellectual property more difficult and seemingly out of reach, progress has been made.\textsuperscript{359} Only through continued commitment by all three member nations to a true free trade territory, to the sharing of technologies and development of international markets, and to enforcement of national and international covenants, may hemispheric intellectual property protection be fully harmonized and unified.\textsuperscript{360}

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\textsuperscript{351} See id.
\textsuperscript{352} See id.
\textsuperscript{354} See id.
\textsuperscript{355} See id. The former Commerce Secretary Ron Brown and the U.S. Trade Representative Mickey Kantor have both been committed to these actions. Id. Raising the standards of protection for intellectual property rights in the North American continent and throughout the world will help ensure that American exports can effectively compete with products of others. Id. at 403. Further harmonization will create a level playing field and allow U.S. producers of goods and services to compete using the United States' competitiveness, innovation, and creativity. Id.
\textsuperscript{356} See id. at 410. Bruce Lehman is the Assistant Secretary of Commerce and Commissioner of Patents and Trademarks. Id. This article was adapted from a speech presented to the International Patent Club, sponsored by the New York Intellectual Property Law Association and the New Jersey Intellectual Property Law Association, on October 4, 1993. Id.
\textsuperscript{357} See Zagaris & Aguilar, supra note 60, at 123.
\textsuperscript{358} See id.
\textsuperscript{359} See id.
\textsuperscript{360} See id.
International Trade in Financial Services: The NAFTA Provisions

by K.N. Schefer

The author works as a research fellow for World Trade Organization law at the Institute of European and International Economic Law at the University of Bern, Switzerland, where she also received her doctorate of law in 1998. She studied law at Georgetown University Law Center in Washington, D.C. and completed her undergraduate degrees in Political Science and Public Policy Studies at the University of Chicago.

This book examines the new and rapidly developing area of law relating to trade in financial services, with a particular focus on the rules contained in Chapter 14 of the North American Free Trade Agreement (NAFTA). After a detailed analysis of the relevant provisions and their effect on financial institutions in Canada, Mexico, and the United States, the author examines the impact of the NAFTA rules on the legal position of banks operating in countries outside NAFTA, particularly in the context of the WTO financial services provisions. The book concludes with a chapter on the effects of a potential NAFTA expansion.

The book aims to contribute to the development of a new legal and regulatory framework distinct from those of trade and financial services law, and offers a valuable insight into how trade in financial services within a regional trade agreement develops its own legal dynamic. Although the financial services provisions are seen as the cornerstone of NAFTA, until now there has been very little in-depth analysis of these provisions, or of the effects on those not party to NAFTA, in the literature in general. This book's unique approach will make it of considerable interest to practitioners and researchers in international banking, trade and economic law.

Contents:
International Bank Insolvencies

A Central Bank Perspective

edited by Mario Giovanoli, General Counsel, Bank for International Settlements, Basle, Switzerland;
Gregor Heinrich, Bank for International Settlements, Basle, Switzerland

Mario Giovanoli is General Counsel for the Bank for International Settlements and
Professor of Law at the University of Lausanne.
Gregor Heinrich was formerly Head of Legal Research and International Co-
operation and is currently Head of Secretariat of the Committee of Payment and
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The globalisation of the world economy poses significant challenges for policy
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It is against this background that the Bank for International Settlements organised
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other institutions responsible for banking supervision and the co-ordination
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discuss the instruments employed for crisis prevention and resolution and issues
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twelve expert papers discuss issues ranging from specific national experiences to
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The book further includes in annex the text of the UNCITRAL Model Law on
Cross-Border Insolvency and the EC Finality Directive.

This work constitutes an essential addition to every banking and insolvency law
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regulators and policy makers.

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Southern Methodist University School of Law  
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